

2010 ICN Cartel Workshop
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THE DECISION TO REQUEST LENIENCY/IMMUNITY

JAPAN

A. Evaluation of the Leniency/Immunity Alternative

- What is the company's potential exposure to sanctions from enforcement authorities in each jurisdiction, one-by-one and cumulatively?

- Which jurisdictions are likely to take action?

The Fair Trade Commission of Japan (JFTC) is responsible for enforcing the Anti-monopoly Act and is likely to take action in international cartel cases which involve Japan.

- Maximum penalties?
 - Company (criminal, civil, and administrative fine; restitution; suspension or debarment; probation, court monitoring)?

In Japan the applicable penalties are an administrative surcharge and in addition sometimes (statistically once a year or once every 2 years) a criminal fine. Basically, the amount of administrative surcharge against the company is 10% of the sales amount of the relevant products for the period of infringement (3 years at the maximum). The surcharge rate is increased by 50% if the company plays a leading role in the case. Maximum criminal fine is 500,000,000 JPY.

- Executives (prison sentences, fines, probation, travel limitations, governance restrictions)?

If the criminal procedures are accepted by the public prosecutor, the maximum prison term is 5 years and the maximum personal criminal fine is 5,000,000 JPY.

- Likely penalties (based on precedent and trends)?
 - Company (same as above)?

As the JFTC has no discretion in deciding the amount of the administrative surcharge, the likely penalty depends entirely on the relevant sales amounts in Japan of each company targeted by the JFTC.

- Executives (same as above)?

Although the criminal cases do not arise often, the average length of punishment is of about 1 year in Japan. Further, the criminal prison term sentences against individual wrongdoers have always been suspended. However, the amendment to the Anti-monopoly Act in 2009 extended the maximum prison term from 3 years to 5 years which could result in significant changes in enforcement policy, because under the Penal

Code of Japan, prison term sentences cannot be suspended for prison term sentences of longer than 3 years.

■ Are the sanctions enforceable against company and/or executives?

● Judgments against company?

Administrative surcharges are enforceable against the target company. In addition, the company and/or executives shall pay damage compensation in the civil litigation if the judicial court awards it.

● Prison sentences and fines on individuals?

If the judicial court imposes prison sentences and fines, this will be enforceable against the company and/or executives.

● Extradition of individuals?

Extradition of individuals is possible in Japan, however, the Japanese government has a discretion to apply it and up to today there are no cases of the application thereof in relation to a cartel case.

■ Identification and evaluation of opportunities to avoid or mitigate sanctions, jurisdiction by jurisdiction?

● Leniency/Immunity policy in jurisdiction?

Under the leniency programme, a maximum of five companies (or groups of companies) may declare their participation in a cartel to the JFTC. Following their compliance with certain other conditions, these companies (or groups of companies) may receive immunity or a reduction in the applicable administrative surcharges which may apply to the participants due to their illegal behaviour.

To be precise, before the start of a JFTC investigation, the first applicant is granted full immunity, the second 50 per cent and the third 30 per cent, and the fourth and fifth applicants are also granted a 30 per cent reduction. (After the start of the JFTC's investigation, an applicant who is: (i) within the fifth position including itself and any other applicants (either before or after the start of the JFTC's investigation); and (ii) within the third position including itself and any other applicants after the start of the JFTC's investigation, will be granted a 30 per cent fine reduction.) The JFTC has no discretion to change the amount of administrative surcharge, and also has no discretion to offer any kind of leniency to parties that cooperate after the first five slots have been taken whether or not they make a useful contribution.

In principle, the leniency programme in Japan only purports to offer leniency with respect to administrative surcharges however, regarding criminal procedures, the JFTC has stated that it will not request the indictment of the first leniency applicant before the start of the JFTC's investigation (including its officers and employees, provided that they fully

cooperate with the applicant in regard to its internal investigation and subsequently cooperate with the JFTC) and will consider subsequent applicants on a case-by-case basis. In this regard, the Japanese Ministry of Justice has also issued a statement stating that the public prosecutors' office will 'pay due respect' to the policy of the JFTC.

- Markers available?

See the beginning of B.

- Requirements?

See the beginning of B.

■ Analysis of civil litigation exposure and likely litigation/settlement costs?

- In which jurisdictions are private damage actions likely to succeed?

In Japan private damage actions have been increasing in recent years. Private damage actions such as claims for damages are likely to succeed in the relevant district court and settlement talks are also held within the litigation proceeding. In many bid rigging cases, the companies involved in the infringement lost the case or accepted the settlement. Further, it would be difficult for the leniency applicants to deny the fact of the infringement, rather they tend to deny the extent of the amount of damages.

- Timetable? When are actions likely to be filed? Settled or litigated?

In some cases, the civil litigation procedure ends in settlement within 6 months or so, however, generally, it takes around 2 or 3 years until the decision at the court, and it will take longer if any party appeals to the higher court.

- What are the likely litigation/settlement costs?

Most of the litigation/settlement costs is the legal fee. Costs for the court, including costs for witness, is quite nominal. Business disruption costs within the company would be large.

- Are there potential cost savings in civil litigation for leniency/immunity recipients?

No. Even the first applicant for leniency has no possibility to save costs in civil litigation.

- Will applying for leniency/immunity increase the exposure in civil damage actions?

Yes (in the sense that such an application could trigger the start of the JFTC's investigation, which could result in the JFTC's decision to impose an administrative surcharge and possibly a civil claim from the victims.)

- Consequences of private discovery on leniency/immunity submissions to enforcement authorities (and vice versa)?

The JFTC has a general policy not to disclose leniency application forms or other evidence provided by applicants in the course of leniency application to other defendants or interested parties, or even to the Japanese courts. However, if an applicant retains documents related to the application, such documents may be subject to discovery.

B. Incentives/Disincentives to Pursue the Leniency/Immunity Alternative

- Timing issues – How soon does company have to act to:

- Obtain marker?

Submission of Form 1 (before the start of the JFTC's investigation) or Form 3 (after the start of the JFTC's investigation). Such forms should be sent to the JFTC using a specified facsimile number.

- Perfect marker and obtain conditional leniency/immunity

The ranking of each applicant will be determined by the JFTC based on the timing of the submission of Form 1 or Form 3. On average before the JFTC's investigation, the JFTC requests the submission of Form 2 within 2 to 3 weeks from the submission of Form 1. The submission of Form 1 functions as a quasi 'marker'. Roughly speaking, the submission of Form 1 (or Form 3) for the purpose of securing the rank requires the products or services involved to be listed in addition to a brief description of the relevant violation, and the period of violation. There is no need at the time of filing Form 1 (or Form 3) for any evidence to be attached to such forms. However, the documentary and other evidence must be produced within 2 to 3 weeks (or within 20 business days for the procedure after the start of the JFTC's investigation).

- Requirements for marker and conditional leniency/immunity?
 - What are the requirements?

Before the start of the JFTC's investigation

- *the applicant has 'independently' submitted reports (Forms 1 and 2) as well as documentary and other evidence of the anti-competitive conduct to the JFTC;*
- *the reports and documents are submitted before the start of the JFTC's investigation;*
- *the applicant stops the conduct before the start of the JFTC's investigation;*
- *the applicant provides additional information as requested by the JFTC;*
- *the reports and evidence provided by the applicant are not false; and*
- *the applicant has not previously coerced another party to participate in the illegal conduct or prevented it from ceasing such conduct.*

(After the start of the JFTC's investigation

- *the applicant has 'independently' submitted reports (Form 3) as well as documentary and other evidence of the anti-competitive conduct to the JFTC;*
- *the reports and documents are submitted within 20 business days after the start of the JFTC's investigation;*
- *the applicant stops the conduct before the submission of Form 3;*
- *the applicant provides additional information as requested by the JFTC;*
- *the reports and evidence provided by the applicant are not false; and*

the applicant has not previously coerced another party to participate in the illegal conduct or prevented it from ceasing such conduct.)

- Relative certainty/uncertainty of satisfying said requirements?

In general the JFTC will grant a marker if the above conditions are satisfied by the applicant. In one case the JFTC decided that one of the violating companies was not qualified because of false reporting by the applicant (the case of manufacturers of shutters published on June 9, 2010 by the JFTC) This is the first case that the JFTC applied conditions for disqualification against an applicant.

- What admissions are required by the company?

Only the information requested (that is the facts) in the Forms must be provided. (Accordingly, the probability of the violation may be accepted.)

- What admissions are required by individuals?

The JFTC will usually interview individuals and request information from them before granting immunity or leniency.

- What use can enforcement authority make of information submitted and admissions if company ultimately does not qualify for conditional leniency/immunity?

If the company does not ultimately qualify for conditional leniency or immunity, the JFTC does not in practice use information provided by applicants in the course of leniency application such as leniency application forms or other evidence for the purpose of imposing administrative surcharges or for any other purpose .

- To which jurisdictions does the company report and in what order?

In general, it is common to decide whether to apply for leniency in Japan from the view point of the sales amount of relevant products in Japan, because the amount of administrative surcharge is calculated based on the sales amount of relevant products in Japan without any discretion. Regarding the order, in this case, however, as the U.S. authority has a power to enforce prison sentences and the European Commission is likely to impose a very large fine, in practice, a priority is likely to be given to applications in the U.S. and the Europe although it is recommended to apply in Japan at the same time as in the US and EU.

- Are there “must report” jurisdictions in this matter?
 - Does the company know at this stage?
 - When will the company know?
- Are there “should report” jurisdictions in this matter? How many?
 - How many?

-When will the company know?

- What are potential consequences of not reporting in other jurisdictions?
 - What if another company reports in a jurisdiction in which you have decided not to report?
 - What are the chances another jurisdiction will start an investigation?
- If the company reports in several jurisdictions, is there a cascade effect with regard to reporting in more and more jurisdictions?
- What are potential consequences of the order of reporting?

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- What are costs of self-reporting and cooperation in each jurisdiction? What is the cummulative burden of self-reporting and cooperating in multiple jurisdictions?
- What are likely requirements of full, complete, continuing cooperation in each jurisdiction?

For applications made before the start of the JFTC's investigation:

Other than submission of reports (Forms 1 and 2) as well as documentary and other evidence of the anti-competitive conduct to the JFTC, in practice, it is likely that employees witness interviews by enforcement authority and RFIs and follow-up RFIs from enforcement authority are requested.

- Document production
- Document translation (very expensive)
- Internal company interviews
- Company and witness proffers
- Company statement
- Employee witness statement
- Employee witness interviews and re-interviews by enforcement authority
- RFIs and follow-up RFIs from enforcement authority

- Money costs?
 - Hard costs for above cooperation

Most of the hard costs is legal fee for the internal investigation, which depends on the number of attorneys involved and also the period of cooperation.

- Business disruption costs?

Business disruption costs for the cooperation, including the preparation for interviews and the collection of documents, is large. Such a disruption continues at least 1 or 2 months and in some cases 6 months or so.

- Yes, time of senior executives, sales and marketing departments, and finance department to answer initial and follow-up questions from each jurisdiction?
 - Yes, time of legal department consumed in facilitating and coordinating responses to requests for information and interviews from each jurisdiction?
 - Yes, time of witnesses in preparing/reviewing written statements and preparing for and being interviewed in multiple jurisdictions?
- Additional issues in each jurisdiction if company is considering an international strategy of self-reporting and cooperation:
 - Will company be required to continue participation and engage in covert cooperation to advance the government investigations?

Yes.

- Will the enforcement authority proscribe the company's internal investigation?

No.

- Will the leniency/immunity application procedure result in disclosure of the applicant's identity or the information it provides?

The JFTC will not disclose the identity of the leniency applicants and the information provided by them unless the applicant requests that a public announcement be made.

- Will the subsequent search warrants, subpoenas, inspections, raids carried out by enforcement authorities result in disclosure of the applicant's identity or the information it provides?

No.

- Will the enforcement authority's investigation or proceedings result in disclosure of the company submissions and/or its employee's statements?

The JFTC does not in practice disclose leniency application forms or other evidence provided by applicants in the course of the leniency application to other defendants or interested parties, or even to the Japanese courts.

- What is disclosed?
 - Application documents?
 - Company statement?
 - Company response to RFIs?
 - Employee witness statements (written)?
 - Employee witness interviews (transcripts or summaries)?
- Disclosed to whom?
- At what stage?
- How long after the initiation of the investigation?
- Restrictions on use of disclosed material in other proceedings? Enforceability of protections?
- Does the applicant have any input into the above?
- NET, NET: What is likelihood that company submissions and/or employee witness statements in support of the leniency/immunity application and cooperation obligation will be used against the company and/or the individuals:
 - in criminal proceedings in the *same* jurisdiction? (in regimes where the competition agency and criminal enforcement authority are separate)

No.

- in enforcement proceedings - criminal, civil, or administrative - in *other* jurisdictions?

No, unless the applicant allows disclosure to other jurisdictions.

- in civil proceedings in the *same or other* jurisdictions?

No. The JFTC does not in practice disclose leniency application forms or other evidence provided by applicants in the course of leniency application to other defendants or interested parties, or even to the Japanese courts. In addition, the Leniency Guidelines specifically provide for oral statements from the applicant's employees and executives instead of written evidence required under Form 2 or 3, in order to reduce the risk of discovery in foreign courts.