

Global Leniency Manual

First Edition

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Japan

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1. Background questions

1.1 Is there relevant legislation that authorises the Leniency Policy? If not, what is the status of the policy?

The leniency policy is contained in the Japanese Anti Monopoly Act ("AMA") at paragraphs 7 to 13, Articles 7-2. It is applied in terms of the Rules on Reporting and Submission of Materials regarding Immunity from or Reduction of Surcharges ("Leniency Guidelines"). The leniency policy became effective on 4 January 2006, following an amendment to the AMA.

1.2 Which institution/s primarily administer the Leniency Policy

The Fair Trade Commission of Japan (JFTC) is responsible for enforcing the AMA and administering the leniency policy.

1.3 Please provide an overview of the basic principles of the Leniency Policy

Under the leniency policy, a maximum of three companies in any one case may declare their illegal actions, including their participation in a cartel to the JFTC. Following their compliance with certain other conditions, these companies may receive immunity or a reduction in the applicable administrative surcharges which may apply to the participants due to their illegal behaviour.

2. Timing

2.1 Does the "first-in" principle apply? (i.e. is there any benefit to being the first to co-operate?)

The first qualifying applicant, who comes forward before the start of the JFTC's investigation, will be entitled to total immunity from administrative surcharges. In principle, the leniency policy in Japan only purports to offer leniency with respect to administrative surcharges and, strictly speaking, does not offer express immunity from criminal prosecution. However, the JFTC has stated that it would not request the indictment of the first leniency applicant, including its officers and employees, provided that they fully cooperate with the company in regard to its internal investigation and subsequently with the JFTC and would 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 Prosecutor will give due consideration to the policy of the JFTC.

2.2 What are the consequences of not being the "first-in"? Can a company still get leniency?

The second qualifying applicant who comes forward before the start of the JFTC's investigation will only be entitled to a fixed 50% reduction. The policy also offers a guaranteed 30% reduction in surcharges to a third qualifying applicant who comes forward before the start of the JFTC's investigation.

2.3 Are applicants who come forward after the authority has started its investigation still eligible for leniency? If so, on what basis?

Applications for leniency after the start of JFTC's investigation can be still filed, however, such applicants are only entitled to a 30% reduction in surcharges, provided that the total number of applicants, irrespective of whether they applied before or after the start of JFTC's investigation, is three or less and certain other conditions are met.

3. Scope of application of the policy

3.1 Does the policy cover vertical as well as horizontal anti-competitive conduct?

The policy only covers horizontal anti-competitive conduct.

3.2 Does it cover the criminal law and the civil law consequences of competition law violations?

The policy only offers immunity from or a reduction in the applicable administrative surcharges which may apply to the participants due to their illegal behaviour. Criminal and civil law consequences are not covered by the policy.

3.3 Who is eligible for full leniency?

Full immunity from surcharges is available to the first applicant, provided that all of the conditions, set out in 3.4 below are met.

3.4 What are the essential criteria for the availability of full leniency?

The criteria for full leniency are as follows:

- 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.

3.5 How many applicants have achieved full leniency to date?

According to the JFTC, as at 31 March 2007, 105 applications for leniency had been filed under the programme. As at 12 July 2007, the identities of successful leniency applicants in ten cartel cases have been publicly disclosed. As at 10 January 2008, five companies have received full immunity from fines.

3.6 How many applicants have lost immunity and on what basis?

There is no publicly available information in this regard.

4. Procedure and practical steps

4.1 Is it possible to obtain informal guidance on a confidential basis prior to submitting a formal application?

It is possible to obtain informal guidance through telephonic communication with the JFTC.

4.2 Will the agency advise whether leniency is still available?

Although it is not binding, the JFTC will give such advice on a confidential basis.

4.3 Does a marker system exist to secure an initial level of leniency until all conditions can be met? If so, what are the conditions and the procedure for obtaining a marker?

Under the policy, a U.S. type marker system does not exist, such that an applicant wishing to secure a leniency position must submit a written application to the JFTC. If an applicant submits Form 1 to the JFTC, the order of the leniency position may provisionally be secured until Form 2, together with evidentiary materials, are lodged by the designated deadline. Form 1 should be sent to the JFTC using a specified facsimile number. Roughly speaking, Form 1 requires the products or services involved to be listed, in addition to a brief description of the relevant violation, and the period of the violation. There is no need for any evidence to be attached to the Form 1.

4.4 Can a marker be withdrawn and if so, on what basis?

If an applicant fails to submit Form 2 and evidentiary materials by the designated deadline or otherwise falls under any of the conditions described in 6.3 below, the provisional leniency position will be lost.

4.5 How the application should be made:

4.5.1 Provide the name of the authority and the address for lodging the application.

Senior Officer for Immunity from or Reduction of Surcharges
The Japanese Fair Trade Commission,
〒100-8987 1-1-1 Kasumigaseki, Chiyoda-ku,
Tokyo
Japan

4.5.2 Who should make the application - the company; its legal adviser or the individual concerned?

Either the company or its legal adviser should make the application.

4.5.3 In the case of corporate groups or undertakings must the application be submitted by the relevant legal entity only or by the group?

The individual legal entity needs to submit the application, although in terms of immunity and reductions entities within a group may possibly be treated as one.

4.5.4 Is there a specific form to be used?

Yes, specific forms, namely Forms 1 and 2 or Form 3 must be used.

4.6 What is the overall procedure and timetable?

The practical steps which must be taken to apply for leniency will depend on whether the application is made before or after the JFTC commences its investigation (i.e., the JFTC's dawn raid or criminal inspection). However, regardless of the time at which the application is made, the following principles are applicable to an application for leniency:

- reports (Form 1, 2 or 3) must be written in Japanese. Evidence written in a foreign language must be translated into Japanese;
- applications cannot be made by a group company on behalf of its subsidiaries or related companies. This means that each company applying for immunity or leniency must apply individually; and
- applications can be prepared and submitted by an attorney.

Applications made before the start of JFTC's investigation

An application for leniency which is made before the start of the JFTC's investigation can result in full immunity (first applicant only) or a reduction in surcharges (50% for second applicant and 30% for third applicant).

Practically, the following summarises the typical steps for making an application prior to the JFTC's commencement of an investigation:

Step 1: Internal investigation and informal consultation/guidance

After detecting a cartel or activities which may be illegal, the company should conduct an internal investigation to determine whether it should file an application. The company may hold a prior consultation with the Senior Officer for the Leniency Programme to seek informal guidance. This consultation and guidance can be on an anonymous basis.

Step 2: Submission of Form 1

A Form 1 should be sent to the JFTC using the specified facsimile number. Roughly speaking, Form 1 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 for any evidence to be attached to Form 1.

Step 3: Submission of Form 2 and the JFTC's notice of acceptance

The applicant must submit Form 2 to the JFTC within the period specified by the JFTC, which is normally two weeks. Form 2 requires more detailed information than Form 1, including specific details of the conduct, the applicant's executives or employees involved, co-violators, etc. Evidence, including witness statements signed by relevant employees, must be attached to Form 2 in compliance with the required evidentiary standards. A few weeks or months after receiving the Form 2, the JFTC will issue a notice of acceptance of the Form 2. The notice of acceptance of the Form 2 acts as a confirmation by the JFTC that the application has been accepted and is complete.

Step 4: Investigation of the co-violators and applicant(s) by the JFTC

Typically, the JFTC investigates the co-violators as well as applicant(s) about six months after the submission of a Form 2.

Step 5: Continued cooperation with additional requests by JFTC

The applicant must continue to cooperate with the JFTC in response to requests for additional information. In our experience, the JFTC makes repeated requests for substantial amounts of reports and evidence.

Step 6: Grant of immunity/ reduction of surcharge

The JFTC grants immunity or a reduction of surcharges to applicants about 6 to 12 months after the start of the JFTC's investigation. Upon finding an infringement, the JFTC issues a cease and desist order and a surcharge payment order against each of the entities that are the subject of its investigation. Successful immunity applicants receive a notice of immunity from surcharges instead of a surcharge payment order.

Applications made after the start of JFTC's investigation

Even after the start of the JFTC's investigation, applications for leniency can still be filed to seek a 30% reduction in surcharges, as long as the total number of applicants (including the applicant itself and all the prior applicants, irrespective of whether they filed an application before or after the start of JFTC's investigation) is three or less.

4.7 At which point in the process is the applicant given certainty that it is eligible for leniency or immunity?

Where leniency applications are submitted both before and after the commencement of the JFTC's investigation, the JFTC issues a notice of acceptance of Form 2 or 3 to leniency applicants promptly after receipt of the reports and evidence (Article 7-2, paragraph 10 of the AMA). This notice should be issued in a few weeks or a few months. While this notice of acceptance does not legally guarantee the grant of immunity or leniency, practically speaking this would mean that leniency is granted. As such, an applicant may learn (with some possible exceptions) that eligibility for leniency is granted when the JFTC notifies an applicant that either the Form 2 or 3 has been accepted.

4.8 Is leniency granted by way of agreement with the applicant or by a formal decision of the authority?

Leniency is granted by a decision of the JFTC. A successful immunity applicant will receive a notice of immunity from surcharges from the JFTC when the JFTC issues surcharge payment orders against all other violators in the same case (Article 7-2, paragraph 13 of the AMA). Other successful leniency applicants, which can receive a 50 or 30% reduction, will be able to confirm the grant of leniency and the result of their leniency application once they receive a surcharge payment order from the JFTC.

4.9 Is it possible to appeal a decision which denies leniency to an applicant?

The JFTC's decision could be reviewed through a hearing proceeding if the applicant is not satisfied with a decision denying leniency. When a surcharge payment order is issued, the applicant may apply for commencement of a hearing at the JFTC, at which the applicant may argue that a decision which denies leniency should be reversed.

5. Conditions for leniency

5.1 What general conditions must the company fulfil for leniency to be granted?

The following general conditions must be met:

- the applicant has 'independently' submitted reports as well as documentary and other evidence of the anti-competitive conduct to the JFTC;
- 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.

5.2 Is there a requirement of "full co-operation" ? If so, how is this interpreted?

According to the comment produced by the JFTC, an applicant needs to cooperate with the investigation to the extent that the JFTC deems necessary and reasonable.

5.3 Is leniency or immunity available to a company that has coerced other parties? If so, on what basis?

No. A company which has previously coerced another party to participate in the illegal conduct or prevented it from ceasing such conduct cannot qualify for leniency.

5.4 Does the system encourage the disclosure of information in respect of other violations? (i.e. is "leniency or amnesty plus" available?)

No, 'immunity plus' and 'amnesty plus' options are not available under the AMA.

6. Scope of the protection granted

6.1 What is the scope of the protection after full leniency has been granted?

In principle, the leniency programme in Japan only offers leniency with respect to administrative surcharges. The program does not offer protection against civil litigation or the suspension of nomination by public open bidding procedure.

6.2 What are the consequences, if any, for employees of the company that is granted immunity and/or leniency?

No protection will be given to employees of the company.

6.3 Under what circumstances, if any, could leniency be revoked?

If any of following are found after acceptance of the application and before the JFTC issues a surcharge payment order, leniency will not be granted:

- the report or materials submitted by the relevant undertaking contained false information;
- when the JFTC requests additional reports or material, the relevant undertaking fails to submit the requested reports or materials or submits false reports or materials; or
- in a case pertaining to the violation committed by the relevant undertaking, the undertaking coerced another undertaking to commit the violation or blocked another undertaking from discontinuing the violation.

It is not clear under what circumstances a leniency decision may be revoked by the JFTC after a notice of immunity or surcharge payment order has been issued.

7. Confidentiality and disclosure

7.1 Is there a requirement to keep the identity of a leniency applicant confidential?

Article 8 of the Leniency Guidelines explicitly states that leniency applicants (those which have submitted Forms 1 and 2 under the Leniency Guidelines to the JFTC) shall not disclose the fact of such a submission to third parties unless a justifiable reason exists. Disclosure to a foreign competition authority for the purpose of an application for leniency in the relevant jurisdiction is considered to constitute a justifiable reason.

7.2 At which stage of the process is the identity of the leniency beneficiary disclosed?

On 8 September 2006, the JFTC released its policy concerning the public announcement of the results of leniency applications. The policy states that, if the successful applicant requests that a public announcement be made, the JFTC will publicly announce the name, address, name of representative and grant of immunity or reductions in terms of percentage. Usually an applicant would request a public announcement of its name, etc, since without the public announcement the company will not have access to a shorter period of suspension of nomination in the public bidding processes of various government bodies.

7.3 Is there an obligation on the leniency applicant to keep the fact of its application confidential and if so, until which point in the process must it do so?

Pursuant to article 8 of the Leniency Guidelines, the leniency applicant bears a confidentiality obligation.

7.4 Is the information provided by a leniency applicant disclosed to other undertakings under investigation? If so, how?

Neither the AMA nor the Leniency Guidelines explicitly state whether and to what extent the JFTC may or may not disclose the information submitted by leniency applicants to third parties. However, in practice, the JFTC has a policy not to disclose the information to any third parties. The JFTC in practice does not disclose the leniency application forms or other evidence provided by the applicants to other defendants or interested parties, or even to a Japanese court. However, information obtained by the JFTC through its own investigation, including interviews with key employees and executives, are submitted as evidence to the hearing procedures and are disclosed to other defendants. The JFTC will not disclose the identity of one or more successful leniency applicants unless the applicants request that a public announcement be made.

8. Co-operation with other jurisdictions

8.1 Does the agency co-operate with agencies in other jurisdictions and if so to what extent? Will it share the details of the application with other agencies? If so, how and at which stage of the process?

Neither the AMA nor the Leniency Guidelines give the timing and process of the JFTC's sharing of information with other agencies. However, there are several cases where it can reasonably be assumed that the JFTC shared the information obtained through leniency proceedings with other agencies.

9. Recent developments

9.1 Provide details of key recent developments.

See 9.2 below.

9.2 Are there any reform proposals in the pipeline?

A possible reform of the AMA has been discussed at the special council of the Cabinet Office, which published a report proposing certain amendments on 26 June 2007. The report suggests that cooperation with the JFTC should be considered as a mitigating factor for the purpose of calculation of surcharges (which is not the case unless the offender has qualified for leniency), but leaves open the details of this suggested change and the coordination with the current leniency policy.

The Japanese leniency policy has been harshly criticised on the basis that it does not appear to anticipate a situation where a group of companies (e.g., parent and its subsidiary) apply for leniency. This criticism is based on the requirement of 'independence', and where a group of companies that record turnover in a single market face difficulties in applying for leniency. Other aspects of the policy which have been the subject of lobbying for reform include the insufficient guarantee of confidentiality by the JFTC to leniency applicants, and lack of opportunity for unsuccessful applicants to file objections against the JFTC's decision not to grant leniency until receipt of a surcharge payment order.

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