

## Cartel Leniency: Japan

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A Q&A guide to cartel leniency law in Japan.

The Q&A gives a succinct overview of leniency and immunity, the applicable procedure and the regulatory authorities. In particular, it covers the conditions to be satisfied, the method of making an application, availability of immunity from civil fines to individuals, the scope of leniency, circumstances when leniency may be withdrawn, leniency plus, confidentiality and disclosure, and proposals for reform.

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This Q&A is part of the PLC multi-jurisdictional guide to competition and cartel leniency. For a full list of jurisdictional Cartel Leniency Q&As visit [www.practicallaw.com/leniency-mjg](http://www.practicallaw.com/leniency-mjg).

For a full list of jurisdictional Competition Q&As which provide a high level overview of merger control, restrictive agreements and practices, monopolies and abuse of market power, and joint ventures in multiple jurisdictions, visit [www.practicallaw.com/competition-mjg](http://www.practicallaw.com/competition-mjg).

*Yoshihiro Takatori, Shinsuke Yakura and Kazuo Isshiki, Orrick, Herrington & Sutcliffe LLP, Orrick Tokyo Law Offices, a gaikokuho joint enterprise*

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## Regulation

### 1. What laws provide for a leniency programme and which regulatory authority administers it? Is there any published guidance?

#### Applicable laws and guidance

The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (generally called Japanese Anti-Monopoly Act (AMA)), as amended and effective from 4 January 2006, provides the legal basis for a leniency programme. In particular, section 7-2 of the AMA (section 7-2) is the primary source of the leniency programme.

In addition to section 7-2, there is a published guidance entitled The Rules on Reporting and Submission of Materials Regarding Immunity From or Reduction of Surcharges (Leniency Guidelines), which describes detailed procedures concerning submission of reports and materials as well as confidentiality obligations of the parties that have submitted a leniency application.

#### Regulatory authority

The Japan Fair Trade Commission (JFTC) is the enforcement agency empowered by the AMA. The JFTC comprises five members, a Chairman and four commissioners, with the practical support provided by the General Secretariat and other administrative divisions of the JFTC.

## Scope of application

### 2. What infringements of competition law does the leniency programme cover?

The leniency programme under the AMA covers unreasonable restraint of trade through the creation of cartels among competitors with the aim of controlling the price of goods, volume, market shares and transaction counterparties (*sections 7-2 (1),(7),(8) and (9), AMA*).

## Recent cases

### 3. What notable recent cases have applied the leniency programme?

The JFTC publishes annual reports; 131 leniency applications were submitted in 2010, compared to 85 applications in 2009.

On 21 May 2010, the JFTC imposed fines on five companies for the total of JPY16.9 billion (as at 1 December 2011, US\$1 was about JPY77.8) for their cartel activities concerning optical fibre cables. This is the record amount of fines for cartel activities in the enforcement history in Japan. The shareholders of one of the five companies initiated a derivative claim for damages against the directors based on their failure to submit a leniency application.

## Availability of leniency

## Civil liability

### 4. Is full immunity from civil fines available? What conditions must be met for immunity to be granted?

As part of its enforcement function, the JFTC can impose civil fines for cartel offences.

Full immunity from fines is available to the first leniency applicant if all of the following conditions are met:

Application must be submitted to the JFTC, including all necessary reports and materials in the form designated in the Leniency Guidelines.

Application must be made voluntarily and independently. According to the 2009 amendment of AMA (2009 Amendment), currently in effect, two or more undertakings can jointly apply for reduction in fines or immunity where the jointly applying undertakings:

are in the same corporate group; and

are affiliated through the period of violating conduct.

The applicant must cease illegal activities before the initiation of an investigation.

However, leniency will not be available, if any of the following applies:

The report or materials submitted by the applicant contained false information.

The applicant coerced another party to commit the violation or prevented another party from discontinuing the violation.

Meeting all of the conditions above also ensures immunity from criminal prosecution (see *Question 7, Circumstances*).

### 5. Is there a sliding scale of available leniency from civil fines?

There is a sliding scale of available leniency from civil fines. The 2009 Amendment increased the maximum number of applicants that can obtain a full immunity or partial reduction of fines from three to five. The extent of the reduction depends on whether the application is submitted before or after the initiation of investigation:

Application filed before the initiation of investigation:

1st applicant: full immunity;

2nd applicant: 50% reduction;

from 3rd to 5th applicant: 30% reduction.

Application filed after the initiation of investigation: 30% reduction. A maximum of three applicants can apply after the investigation start date (see *Question 8*).

## 6. Is immunity or leniency for civil fines available to individuals? If so, what conditions apply?

Generally, under Japanese law, individuals are not exposed to civil fines for cartel offences. However, they may face damages claims brought by the victims of cartel activities under the AMA and Japanese Civil Act.

## Criminal liability

### 7. Is immunity or leniency available for companies and/or individuals in relation to criminal prosecution? What are the implications for individuals when an undertaking has been granted immunity or leniency?

## Circumstances

According to the JFTC's policy entitled The Fair Trade Commission's Policy on Criminal Accusation and Compulsory Investigation of Criminal Cases Regarding Antimonopoly Violations (7 October 2005) (Criminal Accusation Policy), if an undertaking is the first to successfully report and submit materials relevant to the investigation in the required manner before the start of the JFTC's investigation, the JFTC will not seek to criminally prosecute such an undertaking. The prosecution against the second and third undertakings to come forward is a matter of the JFTC's discretion.

The JFTC will actively seek criminal penalties in the following cases (*Criminal Accusation Policy*):

Major violations of competition law which are considered to have widespread influence on people's lives.

Repeat offenders or those who do not abide by the elimination measures.

Cases where administrative measures alone are not considered to fulfil the purpose of the AMA.

## Proceedings against individuals

An individual can be sentenced to one of the following for restraint of trade:

Imprisonment of up to five years.

Criminal fine of up to JPY5 million.

An individual cannot apply for and receive immunity from prosecution independently from any application made by a company for which he works. The application must be made by the company itself.

However, the JFTC will not prosecute an officer, employee or director of the applying undertaking who can be treated as the said undertaking in relation to the undertaking's submission of reports and materials to the JFTC, response to the investigation following the said submission, and so on.

In addition, the involved board members, officers and employees of the successful leniency applicants may also be immune from criminal prosecution provided that such individuals co-operate with the JFTS in relation to the leniency application (*Criminal Accusation Policy*). This is a matter of JFTC's discretion.

## Employees' interests

See above, *Proceedings against individuals*.

## Application proceedings

### 8. When should an application for leniency be made?

The application for full immunity must be made before the initiation of the JFTC's investigation by submitting Form 1 and 2.

Within 20 days after the start of the JFTC's investigation, an application for a 30% reduction of the fine can be made by submitting Form 3. Such application must contain the information which the JFTC has not obtained through the investigation.

### 9. What are the procedural rules for leniency applications?

#### Relevant authority

Form 1 and 3 must be faxed to the Senior Officer for the Leniency Programme at the Investigation Bureau of the JFTC (see box, *The Regulatory authority*). Form 2 can be submitted post also.

#### Applicant

The undertaking or its legal representatives applying for immunity must make the application. An application can be made jointly by two or more undertakings if certain conditions are met (see *Question 4*).

The application must be based on the undertaking's decision, and not that of the board members or employees.

#### Informal guidance

Informal guidance can be provided on a confidential basis. Such guidance relates to the:

Availability of full immunity.

Rank order of application (this requires an applicant to provide more detailed information about the name of the undertaking, type of violation and so on).

Type of information that should be disclosed to benefit from leniency.

#### Form of application

Depending on the circumstances, the application can be made on Form 1 and Form 2, or Form 3, provided by the JFTC (see *Questions 8 and 10*). The application must be submitted in Japanese. Documents in English must be submitted with the translation into Japanese.

## Markers

When an applicant submits Form 1, the JFTC notifies the provisional order of the application and the deadline for submission of Form 2. If the applicant successfully submits Form 2 within the set time limit, the definite order of the application will be disclosed.

Form 1 can only be faxed to the JFTC.

## Information/evidence

The Leniency Guidelines specify the type of information and evidence that the applicants are expected to provide. Therefore, the following information should be provided:

**Form 1.** This should include information relating to:

goods and services subjected to the violating conduct;

the nature and extent of the violating conduct (for example, the cartel participants, subjected geographical area and so on);

the duration of the violating conduct.

**Form 2.** This should include the following:

more detailed information about goods and services subjected to the violating conduct (for example, where the violating conduct comprises collusive bidding, the name of the undertakings involved, competitive bidding systems and so on);

more detailed information about the nature and extent of the violating conduct (for example, the contents of the parties' agreement);

the name and address of all the violating undertakings;

the duration of the violating conduct (this should be more detailed than in relation to Form 1, for example, if price controls were agreed several times, the history of each of them should be described in detail);

the name and title of the involved executives and employees of the applying undertaking;

the name and title of the involved executives and employees of the other undertakings;

other relevant and useful information;

documentary evidence and its explanation (for example, memorandum, minutes, list of attendees, materials used at the conference, sales diaries, and correspondence with other undertakings including e-mails and audio recordings).

**Form 3.** The same information required in Form 2 should contain in Form 3. However, this form is used after the commencing date of the JFTC's investigation and therefore the JFTC considers only the information that has not been known yet.

## Oral statements

Evidence required for Form 2 and Form 3 can be submitted orally only if the JFTC considers that the circumstances are exceptional, for example, where submitted documents may be subjected to discovery in foreign courts (see *Question 15, Domestic submissions and foreign discovery*).

## Short-form applications

### 10. What are the applicable procedures and timetable?

#### Applications before the commencing date of the investigation

The procedure is as follows:

Submission of Form 1 to the Senior Officer for the Leniency Programme by fax (informal guidance can be given before submitting Form 1 if necessary; see *Question 9, Informal guidance*).

The JFTC considers the submitted Form 1.

The JFTC determines the ranking order of applications based on the order in which Form 1 has been faxed to the JFTC.

The JFTC notifies the applicant of the provisional order of its application and the deadline for submission of Form 2 (generally two weeks).

The applicant prepares Form 2 and submits it with the required information and evidentiary materials (if more related information is discovered after the submission of Form 2 and before the deadline, such information can still be accepted).

The JFTC considers Form 2 and any supporting evidence; it may require further materials to be submitted.

The JFTC sends the acceptance notice of Form 2 and notifies to the applicant the final ranking order of its application.

#### Applications on or after the commencing date of the investigation

The following procedure applies:

Form 3 and any supporting evidence must be submitted by fax within 20 days after the commencing date of the investigation (informal guidance can be given before submitting Form 3 if necessary; see *Question 9, Informal guidance*).

The JFTC determines the ranking order of applications based on the order in which Form 3 has been faxed to the JFTC.

## Withdrawal of leniency

### 11. In what circumstances and at what stage of the proceedings can leniency be withdrawn? What implications does the withdrawal of leniency from one company have for other applicants?

Generally, leniency can be withdrawn only in exceptional circumstances.

For example, the JFTC can withdraw conditional leniency if the applicant does not provide the required information with Form 2 by the specified deadline. In these circumstances, the next applicant moves up in the leniency queue.

However, after the JFTC has determined the final ranking order of applications, it will not change the ranking order of the applicants even if it finds out that one of the applicants has provided misleading or false information, and withdraws immunity from that applicant on that basis.

## Scope of protection

### 12. What is the scope of leniency protection after it has been granted?

As a general rule, the scope of leniency protection is limited to the infringing activities revealed by the applicant to the JFTC. However, in the case of an application after the start of the investigation, leniency protection does not cover the facts already known to the JFTC.

### 13. Does the competition authority offer any further reduction in fines for an undertaking's activities in one market if it is the first to disclose restrictive agreements and practices in another market (leniency plus)?

There is no leniency plus in Japan.

## Confidentiality and disclosure

### 14. What are the rules relating to confidentiality during a leniency application?

#### Identity disclosure

As a general rule, the JFTC does not disclose the identity of a leniency applicant during an investigation or in a final decision. However, upon request from an applicant to whom the JFTC has granted immunity or leniency, the JFTC discloses the applicant's name, address, the name of its representative(s) and the fact of immunity or leniency on its homepage when the fine is imposed.

A leniency applicant is prohibited from disclosing the fact that it has applied for leniency without a legitimate reason. What constitutes a legitimate reason is a matter of fact. Typical examples of a legitimate reason would be discussions by the applicant with its counsel or parent company.

## Information disclosure

The AMA imposes general confidentiality obligation on the JFTC officials and staff members. The information provided by a leniency applicant is kept confidential and will not be passed on to other undertakings under investigation.

## Confidentiality requests

As a general rule, information provided by a leniency applicant is kept confidential without a request from the applicant (see above, *Information disclosure*).

### **15. What are the rules concerning disclosure of statements made in support of a leniency application?**

## Domestic submissions and domestic discovery

The JFTC has announced that it would not respond to requests from the domestic courts to disclose applications and documents submitted to the JFTC by leniency applicants.

## Domestic submissions and foreign discovery

In the TFT-LCD anti-trust litigation in the US (*In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. 07-1827), a special master appointed by the US court ordered the Japanese defendants to disclose documents that they had submitted to the JFTC in relation to its investigation in Japan for the purpose of the *in camera* (in private) review. In response to this, the JFTC sent a letter to the US court opposing the *in camera* review by arguing that disclosure of documents submitted by leniency applicants could undermine the JFTC's investigatory and enforcement efforts. The US court overruled objections by the defendants and the JFTC and the *in camera* review was conducted by the special master. Having analysed, among other things, whether the interest of the US in enforcing its anti-trust laws outweighed the interest of the JFTC in maintaining confidentiality of the documents, the special master denied the disclosure of documents submitted to the JFTC.

## Foreign submissions and domestic discovery

There are no provisions in the AMA or court precedents in this respect.

## Inter-agency co-operation

### **16. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities from other jurisdictions in relation to leniency? If so, what is the legal basis for and extent of co-operation?**

The JFTC co-operates with regulatory authorities from other jurisdictions such as Department of Justice in the US and the European Commission. Under the AMA, the JFTC can disclose information obtained in the course of its duty to foreign regulatory authorities, provided that such disclosure does not:

Interfere with proper enforcement of the law.

Jeopardise Japanese national interest.

## Proposals for reform

### 17. Are there any proposals for reform?

There are currently no proposals to reform the leniency programme.

## The regulatory authority

### Japan Fair Trade Commission (JFTC)

**Head.** Kazuhiko Takeshima (Chairman)

**Contact details.** 1-1-1 Kasumigaseki

Chiyoda-ku

Tokyo

Japan

**T** +81 3 3581 2100

**F** +81 3 3581 5599

**W** [www.jftc.go.jp](http://www.jftc.go.jp)

**Responsibilities.** The JFTC is in charge of enforcing relevant law including the AMA in Japan.

**Person/department to apply to.** Senior Officer of the Leniency Programme at the Investigation Bureau of the JFTC (same contact details as above).

**Procedure for obtaining application documents.** Application documents are available at

[www.jftc.go.jp/dk/genmen/yosiki.html](http://www.jftc.go.jp/dk/genmen/yosiki.html).

## Contributor details

### Yoshihiro Takatori

Orrick, Herrington & Sutcliffe LLP, Orrick Tokyo Law Offices, a gaikokuho joint enterprise



**T** +81 3 3224 2911

**F** +81 3 3224 2901

**E** [ytakatori@orrick.com](mailto:ytakatori@orrick.com)

**W** [www.orrick.com](http://www.orrick.com)

**Qualified.** Japan, 1992; New York, 1999

**Areas of practice.** Cross-border litigation including international anti-trust matters; international arbitration.

#### **Recent transactions**

Assisted Japanese companies doing global business in multi-jurisdictional cartel cases, including negotiation with the European commission and US authorities.

Successfully represented clients in a number of IP-related litigation proceedings involving multi-jurisdictional anti-counterfeiting projects.

Provided strategic advice to US-based technology companies on cross-border IP infringements including in relation to patents, copyright, and trade secrets.

### **Shinsuke Yakura**

**Orrick, Herrington & Sutcliffe LLP, Orrick Tokyo Law Offices, a gaikokuho joint enterprise**



**T** +81 3 3224 2922

**F** +81 3 3224 2901

**E** [syakura@orrick.com](mailto:syakura@orrick.com)

**W** [www.orrick.com](http://www.orrick.com)

**Qualified.** Japan, 2000; New York, 2006

**Areas of practice.** Anti-trust and competition; international dispute resolution; IP; commercial litigation; compliance; mergers and acquisitions.

#### **Recent transactions**

Advising a Japanese electronics company on a cartel case in Japan, the US and EU.

Advising a Japanese company on a bribery investigation in outside Japan.

Advising a Japanese company on anti-competitive provisions in a patent licence agreement.

Advising a US-based networking solution company on copyright and trade secret issues in Japan.

Advising a US-based insurance company concerning patent, trade mark and copyright issues in Japan.

## Kazuo Isshiki

Orrick, Herrington & Sutcliffe LLP, Orrick Tokyo Law Offices, a gaikokuho joint enterprise



**T** +81 3 3224 2934

**F** +81 3 3224 2901

**E** [kisshiki@orrick.com](mailto:kisshiki@orrick.com)

**W** [www.orrick.com](http://www.orrick.com)

**Qualified.** Japan, 2008

**Areas of practice.** International dispute resolution; anti-trust and competition; intellectual property; commercial litigation.

### Recent transactions

Advised a Japanese technology company on a trade mark infringement case.

Advised a Japanese technology company on an anti-trust related dispute.

Advised a Japanese manufacturing company in relation to a product liability case.

Advised a country in the South Pacific on a securities related dispute.

Advised an international financial company in relation to the provisional attachment of property under the Civil Preservation Act.

## Resource information

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