THE HYBRIDIZATION OF COMPETITION LAW ENFORCEMENT: SOME LESSONS FROM JAPAN’S INTRODUCTION OF THE LENIENCY PROGRAM

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THE HYBRIDIZATION OF COMPETITION LAW ENFORCEMENT: SOME LESSONS FROM JAPAN’S INTRODUCTION OF THE LENIENCY PROGRAM

Steven Van Uyt sel *

ABSTRACT:

Japan has, with the adoption of a leniency program in 2005, caught up with an international trend in the enforcement of competition law. This paper looks into the effectiveness of this leniency program. This exercise is instigated by the fact that the Japanese government has introduced several amendments to the Antimonopoly Law (AML) in 2005, extending its powers over violations of the law. The effectiveness of the leniency program is measured against the number of cartel decisions taken, which has increased significantly. The analysis shows a tendency to focus on cartels involving the same firms. Another remarkable trend is the disproportion between the applications for leniency and the number of firms receiving leniency. By borrowing concepts and theories of criminal law, both in a general and a Japan specific context, this paper argues that the, at first sight, lax attitude towards the leniency program may actually be productive in terms of enforcement of competition law.

I. INTRODUCTION

In a not so distant past, Japan was regarded as a cartel haven.1 The weak enforcement of the Antimonopoly Law (AML) was perceived as one of the problems.2 To turn the tide, the Japanese government has introduced several amendments to the AML in 2005, extending its powers over violations of the law.

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one of them being a leniency program. In doing so, Japan has followed the examples of the United States and the European Union in the hybridization of the public enforcement of competition law. This hybridization is being materialized through private actors that enter the process of public enforcement, allowing the public enforcement authorities to rely on these private actors to provide them with information regarding illegal cartel activities. In return, these private actors are awarded with immunity from, or a reduction of the administrative fine (usually referred to as a “surcharge”).

This hybrid form of enforcement has proved to be effective in the pursuit of illegal cartels. The leniency program not only revealed the existence of illegal cartel activities, it also allowed the enforcement authorities to better prepare for their investigations. Participants of illegal cartels have a better knowledge about the location of the compromising documents. In short, the leniency program enhanced the efficiency of enforcement of competition law. The Japanese legislators must have cherished a similar expectation when introducing a leniency program.

Early commentators on the Japanese leniency program confirmed the expectations and stated that the introduction of the leniency program in Japan has to be considered a success. The leniency program significantly strengthened the enforcement tools. Some lawyers went even as far as stating that the “Japan Fair Trade Commission (JFTC) now has teeth.” Commissioner Akira Goto would, without doubt, agree with this. Based on the assessment that 150 applications for leniency have been filed within nearly two years of operation, Goto claimed that the program is “a powerful weapon which,

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4 See Mario Monti in press release (ip/01/1011), “Commission launches debate on draft new leniency rules in cartel probes” (18 July 2001), online: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/1011&format=HTML&aged=1&language=EN&guiLanguage=en>. Considering that the inspection carried out by the Commission was mainly based on leniency application, Monti’s statement makes sense. See also Margaret Bloom, “Despite Its Great Success, the EC Leniency Program Faces Great Challenges” in Claus Dieter Ehlermann and Isabelle Atanasiu, eds., European Competition Law Annual 2006: Enforcement of Prohibition of Cartels (Hart Publishing, 2007) at 543, 552 (who mentioned that two-thirds of the inspections were based on leniency applications).


6 See Jiro Tamura and Andrew Chen “Competition and Fair Trade” in Gerald Paul McAlinn, ed., Japanese Business Law (Kluwer Law International, 2007) at 454 stipulating that the reforms were inspired to strengthen the JFTC system and make it the guardian of the market.

combined with increased penalties, has changed the mindset of Japan’s business community.”

Goto is not alone in his assessment of the Japanese leniency program. Akinori Uesugi certainly agreed. In his assessment of the leniency program after one year of its operation, his conclusion that the leniency program functions effectively is reflected in three observations. First, a relatively high number of leniency applications was noticed during the first half year following its introduction. Second, the cartel cases following the leniency applications were disposed of in a record-quick timeframe. Third, the leniency program offers the possibility of obtaining leniency even after the JFTC has started its investigation. The last is, according to Uesugi, a necessity to lessen the consequences of a leniency application on the reputation of a company.

In an earlier empirical study, I have supported these statements with numbers relating to leniency applications and decisions following these applications. The data revealed that there were indeed many applicants, resulting in a fair number of decisions. Recent data of the JFTC reveals that this trend of many applications has continued. However, the high number of applications has not led to an equally high number of decisions. In fact, the number of decisions is declining by the year. Further, in the decisions that are taken, it may be presumed that, just like in the early years of the leniency program’s operation, many of the applicants are situated in the post-investigation stage. This paper seeks to rationalize the small number of decisions as compared to the high number of applications, and to give an overview of possible explanations as to why post-investigation leniency is more frequently used than pre-investigation leniency.

This paper is structured as follows. Section II gives a schematic overview of the Japanese leniency program as it was introduced in 2005 and amended in 2009. Following the explanation on the leniency program, Section III introduces data in

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8 See “Japan’s leniency programme ‘a great success’” Global Competition Review (16 October 2007). The enthusiasm about the leniency program is in sharp contrast with the skepticism towards the leniency program in the period before its inception. The leniency program faced objections because it would be against the harmonious business culture. In other words, it was regarded as an evil for Japan. See Akinori Uesugi, “How Japan is tackling enforcement activities against cartels” (2005) 13 Geo. Mason L. Rev. at 349, 362.


11 The high number of post-investigation applications is comprised of post-investigation application following an application for immunity and solely post-investigation applications (i.e. application for which no earlier application for immunity exists).
relation to the leniency program until the end of 2008. This time period is chosen because most of the early evaluations situate around that point in time. Section IV elaborates on Section III by providing data on the use of the leniency program between the beginning of 2009 and the middle of 2012. This will reveal the above-mentioned problems with the Japanese leniency program. Section V explores the possible reasons for the tendency for an overuse of the post-investigation leniency, and thus why there may be no real race to Kasumigaseki, the place where the JFTC holds its office. Before concluding the analysis on the Japanese leniency program in Section VII, Section VI rationalizes the small number of decisions compared to the total number of leniency applications.

II. THE FEATURES OF THE AMENDED LENIENCY PROGRAM

A. Pre- and Post-Investigation Leniency Applications

The Japanese leniency program is inscribed in the AML in Article 7-2 from paragraphs 10 to 18. Article 7-2 of the AML mainly prescribes the surcharges, a kind of administrative fine that allows the JFTC to take away the financial profits gained by an illegal competition law activity. By incorporating the leniency program into this article, the scope of application of the program automatically reduces. The leniency program will not be extendable to the other sanctions provided for in the AML, whether they are criminal penalties or private damages actions.\(^\text{12}\)

Within this limited scope of application, a distinction is made between the pre-investigation stage,\(^\text{13}\) in which the JFTC has not yet launched an investigation (dawn-raid), and the post-investigation stage,\(^\text{14}\) in which the JFTC has started an investigation. The incentives for self-reporting, limited to a maximum of five entrepreneurs,\(^\text{15}\) vary between the two stages.


\(^{13}\) See Art. 7-2(10) and (11) of the Antimonopoly Law (“AML”).

\(^{14}\) See Art. 7-2(12) of the AML.

\(^{15}\) The original leniency program only provided for leniency for up to three entrepreneurs. Experts within a study group under the Cabinet Office, the *dokusen kinshi hou kihon mondai kohandai*, trans. “the Round Table Conference on the Fundamental Problems of the Antimonopoly Law”, advised to extend the potential for leniency to five entrepreneurs. This group comprised academics, business people, the private bar and consumer organizations. The JFTC officials did not form part of this group, but it decided to respect the decision of this panel. See, interview with Takujiro Kono, Senior Officer for Leniency
In the pre-investigation stage, the leniency program offers full immunity for the first entrepreneur\(^\text{16}\) who applies for and obtains leniency successfully.\(^\text{17}\) Four more entrepreneurs can receive partial leniency in this stage. The second entrepreneur who applies successfully will get a reduction of 50\%,\(^\text{18}\) while the third,\(^\text{19}\) fourth\(^\text{20}\) and fifth entrepreneurs,\(^\text{21}\) who obtain leniency successfully will receive a reduction of 30\% each. It is important to note that only the fourth and fifth entrepreneurs have to provide information on the facts that have not been ascertained by the JFTC yet.\(^\text{22}\) Any other applicant beyond the fifth entrepreneur will not be granted a reduction.\(^\text{23}\)

If, however, an investigation has already begun, only partial leniency is available. By waiving 30\% of the surcharge for each entrepreneur in the post-investigation stage, there is no discrimination based on the order in which the entrepreneurs come forward with information.\(^\text{24}\) Unlike in the pre-investigation stage, only three applicants shall receive reduction of the surcharges in the post-investigation stage on the condition that no more than two entrepreneurs successfully obtained leniency in the pre-investigation stage.\(^\text{25}\) If the investigation was started \textit{ex officio}, and thus no successful applicants in the pre-investigation stage exist, no more than three entrepreneurs shall receive reduction in the post-investigation stage.\(^\text{26}\) For post-investigation applicants, the same condition applies to the fourth and fifth applicants under the pre-investigation stage. The information submitted needs to include facts that are not yet ascertained by the JFTC.\(^\text{27}\)

If we visualize the possible combinations of leniency applications under the Japanese leniency program, the following major categorizations are possible:\(^\text{28}\)

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16 The present paper addresses the subject of competition law according to the terminology used in the Japanese AML. Hence, the paper will use the term “entrepreneur” to indicate the actor that infringes the AML.
17 See Art. 7-2(10) of the AML.
18 See Art. 7-2(11)(i) of the AML.
19 See Art. 7-2(11)(ii) of the AML.
20 See Art. 7-2(11)(iii) of the AML.
21 Ibid.
22 Ibid.
23 See Art. 7-2(12) of the AML.
24 See Art. 7-2(12)(i) of the AML.
25 See Art. 7-2(12)(ii) of the AML.
26 Ibid.
27 See Art. 7-2(12)(i) of the AML.
28 Note that for the visualization, the starting point is to involve all five entrepreneurs in the leniency application, if the rules allow for it. In the fourth example, the rules do not allow for five entrepreneurs to apply if an investigation has started \textit{ex officio}.
B. Conditions Attached to a Leniency Application

In order to enjoy immunity from or a reduction of the surcharge, the applicant has to fulfill certain conditions. It is not sufficient that an applicant wins the race to Kasumigaseki. Immunity will only be granted in the pre-investigation stage to the applicant who first submits the reports. While the 2005 leniency program used to require each entrepreneur to submit a report independently of other entrepreneurs, since

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29 The process of submitting reports to the JFTC is described in detail in the Rules on Reporting and Submission of Materials Regarding Immunity from or Reduction of Surcharges, Fair Trade Commission Rule No. 7 of 2005, see online <http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/immunity.pdf>. In order to apply for leniency, the applicant has to submit three different kinds of reports. The procedure for the leniency application starts by faxing Form No. 1. This form only requires a statement on the identity of the applicant and a short description of the illegal activity, as well as the names of the other entrepreneurs involved. Following this report, the applicant has to submit a more detailed Form No. 2. Besides the previously reported information, this form needs to give a detailed overview of all persons involved in the illegal activity and a listing of the attached evidentiary materials. In the post-investigation stage, the applicant will have to submit Form No. 3.
the 2009 amendments to the AML, reports can now be submitted either individually or jointly. The submission of this report needs to be kept secret from any third party.

Once reported, the applicant has to terminate the illegal conduct and provide additional assistance in the form of information upon the request of the JFTC. The information provided must not turn out to be false. Further, the applicant may not have coerced other entrepreneurs to participate in the leniency program or prevented an entrepreneur from ceasing such conduct. Similar conditions apply to the applicants who are only entitled to a reduction of the surcharge.

In the pre-investigation stage, it is important to determine the order of the applicants because the rewards differ. The procedure in this regard is quite rigid. The submission of the first report only secures the position of the applicant provisionally. Failing to submit the second report and the required evidentiary materials within the time period stipulated by the JFTC (usually two weeks) automatically revokes the applicant’s previously secured position. An applicant who successfully submits the reports and evidence will be promptly informed about the receipts of such documents. This notice of acceptance does not legally guarantee the grant of immunity or reduction. Leniency is only officially granted by the JFTC when the decision is taken to issue the surcharge payment orders against the other AML violators.

III. DATA ON THE EARLY APPLICATION OF THE LENIENCY PROGRAM

In a study conducted in 2008, I pointed out the success of the leniency program. With
179 applications for leniency by the end of 2008, Japan had outnumbered the leniency applications of any of the earlier leniency programs of the United States and the European Union.\textsuperscript{43} These applications had led to 24 decisions by the JFTC by the end of 2008. Due to the practice of asking leniency applicants to apply for the publication of their leniency results, more detailed data is available in this respect.\textsuperscript{44}

Out of the 24 publicized leniency cases between 2006 and 2008, 20 cases involved the grant of immunity.\textsuperscript{45} Application for reduction solely situated in the post-investigation

\textsuperscript{43} Supra note 10 at 709-706.

\textsuperscript{44} The JFTC publicizes the name, the place of the head office and the name of the representative of the leniency applicants. See JFTC, “kachoukin genmenseido no tekiyou jigyousha no kouhyou ni tsuite”, trans. “Publication of the Entrepreneur’s Application for Exemption of Surcharges”, online: <http://www.jftc.go.jp/dk/genmen/kouhyou.html>, partly reproduced in Kozo Kawai and Madoka Shimada, “kachoukin genmenseido no arikata – ichinenhan no jimu no unyou wo fumaete” trans. “The Exemption of Surcharges – One Year and a Half in Operation” (2007) 1342 Juristo at 83, 84.

\textsuperscript{45} Ibid. The cases concerned are, for (a) year 2006: (i) kyushuto kousoku doryou koukai ga hacchu su ronneru kanki setsubii kouji no nyuuatsu sanka gyousha ni tai suru kanchoukin noufu meirei kankei, trans. “Order for the payment of surcharges to the bid participants of a public work for a tunnel ventilation ordered by the former Metropolitan Expressway Public Corporation”; (b) year 2007: (i) dokuritsu gyouseihoujin mizu shigen kikou ga hacchu su rorotei damuyou suimon setsubii kouji no nyuuatsu sanka gyousha ni tai suru kanchoukin noufu meirei kankei, trans. “Order for the payment of surcharges to the bid participants of the construction of flood gate facilities for a specific dam ordered by the Japan Water Agency”; (ii) kokudou koutsuushou kakuchihou seibikyoku ga hacchu su rorotei kasenyou suimon setsubii kouji no nyuuatsu sanka gyousha ni tai suru kanchoukin noufu meirei kankei, trans. “Order for the payment of surcharges to the bid participants of the construction of flood gate facilities for specific rivers ordered by the local branches of the Ministry of Land, Infrastructure, Transport and Tourism”; (iii) kokudou koutsuushou kakuchihou seibikyoku ga hacchu su ru tokutei damuyou suimon setsubii kouji no nyuuatsu sanka gyousha ni tai suru kanchoukin noufu meirei kankei, trans. “Order for the payment of surcharges to the bid participants of the construction of flood gate facilities for specific dams ordered by the the local branches of the Ministry of Land, Infrastructure, Transport and Tourism"; (iv) nagoya shiei chikatestu ni kakaru doboku kouji no nyuuatsu sanka gyousha ni tai suru kanchoukin noufu meirei kankei, trans. “Indictment related to a bid-rigging case of public works for Nagoya City’s subway”; (v) kinki chihou ni okeru tennen gasueko sulfatei kensetsu kouji no nyuuatsu sanka gyousha ni tai suru kanchoukin noufu meirei kankei, trans. “Order for the payment of surcharges to the bid participants of the construction of flood gate facilities for specific rivers ordered by the the local branches of the Ministry of Land, Infrastructure, Transport and Tourism"; (vi) nagoya shiei chikatestu ni kakaru doboku kouji no nyuuatsu sango jiken ni kikou kakuhatsu kouhyou ni tsuite trans. “Order for the payment of surcharges to the bid participants of the construction of flood gate facilities for specific rivers ordered by the the local branches of the Ministry of Land, Infrastructure, Transport and Tourism"; (vii) gasuyou poriechiren kudazugite no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei, trans. “Order for the payment of surcharges to manufacture and sales firms of polyethylene pipe joints for gas”; (viii) gasuyou poriechiren kudazugite no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei, trans. “Order for the payment of surcharges to manufacture and sales firms of polyethylene pipes for gas”; (ix) osaka ateji kabushiki gaisha ga hacchu su rorotei chuuatsu gasu doukan kouji no nyuuatsu sanka gyousha ni tai suru kanchoukin noufu meirei kankei, trans. “Order for the payment of surcharges to the bid participants of the construction of medium pressure gas conduits ordered by Osaka Gas Co., Ltd” and (x) tokyou ateji kabushiki geisha ga hacchu su rorotei kousoku kouji no nyuuatsu sanka gyousha ni tai suru kanchoukin noufu meirei kankei, trans. “Order for the payment of surcharges to the bid participants of the construction of high pressure gas conduits ordered by Tokyo Gas Co., Ltd” and (c) year 2008: (i) marihoho no seizou hanbai gyoushara ni tai suru kanchoukin noufu meirei kankei, trans. “Order for the payment of surcharges to manufacture and sales firms of marine hoses”; (ii) gasuyou furekishiburu kudazugite no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei, trans. “Order for the payment of surcharges to manufacture and sales firms of flexible pipe joint for gas”; (iii) gasuyou furekishiburu kudazugite no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei, trans. “Order for the payment of surcharges to manufacture and sales firms of flexible pipe joints for gas”; (iv)

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stage, i.e. application not preceded by an application for immunity, occurred only in three of the publicized cases. The extensive use of the pre-investigation immunity and the extremely low rate of solely post-investigation reductions showed that any cultural hesitance towards the use of the leniency program barely existed and allayed the fear that leniency programs would not take root in a Japanese business environment.

The fact that the solely post-investigation cases are quite limited does not mean that leniency within the post-investigation stage has not been used in Japan. Several entrepreneurs have been receiving reduction of the surcharge after an investigation had started. In many of these cases, the investigation started after the JFTC received an application for immunity. In about 12 of the publicized cases, the immunity application in the pre-investigation stage has been followed by an application for reduction in the post-investigation stage. This kind of post-investigation application, i.e. the ones following an immunity application, involved 21 entrepreneurs.

46 Ibid. The cases concerned are, for (a) year 2007: (i) naisou koujiyou keisan karushiumu ita no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei, trans. “Order for the payment of surcharges to manufacture and sales firms of polypropylene shrink films”; (v) oosakashi hacchuu no byouinra muke tokutei ekusu senshouchi no nyuusatsu sanka gyousha ni tai suru kanchoukin noufu meirei kankei, trans. “Order for the payment of surcharges to the bid participants of specific X-ray equipment for hospitals ordered by Osaka City”; (vi) oosakashi hacchuu suru no kenkoujora muke tokutei ekusu senshouchi no nyuusatsu sanka gyousha ni tai suru kanchoukin noufu meirei kankei, trans. “Order for the payment of surcharges to the bid participants of specific X-ray equipment for health centers ordered by Osaka City”; (vii) zaidanhoujin kekkaku yoboukai hacchuu no tokutei kenshinsha no nyuusatsu sanka gyousha ni tai suru kanchoukin noufu meirei kankei, trans. “Order for the payment of surcharges to the bid participants of the construction of specific flood gate facilities ordered by agricultural agencies of the Ministry of Agriculture, Forestry and Fisheries of Japan” and (x) koukangui no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei, trans. “Order for the payment of surcharges to manufacture and sales firms of steel pipe piles”.


48 See JFTC, supra note 45 (the cases concerned are number (i) of 2006, numbers (i), (ii), (iii), (vi) and (vii) of 2007, and numbers (i) to (vi) of 2008).

49 Supra note 45.
Five post-investigation applications were seemingly not triggered by an immunity application. This low number may suggest that firms are willing to come forward with information, and are not waiting for the JFTC’s investigations to reveal information. However, the information disclosure does not seem to be the result of anxiety among the cartel participants. If there would be more anxiety, one would expect a high number of 50% pre-investigation reductions. With only four entrepreneurs being granted 50% reductions, it is hard to draw another conclusion than that there does not seem to be a race to Kasumigaseki.

IV. THE JAPANESE LENIENCY PROGRAM AFTER 2008: THE DATA

A. Leniency Applications

The Japanese leniency program continued to attract many applications. Based on the available data, 85 entrepreneurs applied for leniency in 2009. This number grew to 131 in 2010. Except for 2008 that had 74 applications, this meant a yearly increase of the number of applications since the legislation came into force in 2006. That year had 26 applications, followed by 79 applications in 2007. In total, the JFTC received 480 leniency applications over the five years of operation.

This staggering number of leniency applications translated itself into a yearly expanding number of decisions. For 2006, one decision was published. In 2007, 12 decisions were taken. 14 decisions were made in 2008, followed by 16 decisions in 2009 and 15 decisions in 2010. A decline in the number of decisions is noticeable from 2011, which only saw four decisions. As of now, 2012 has one decision more than 2011, i.e. five decisions in total.

50 Supra note 46.
51 See JFTC, supra note 45 (the cases concerned are numbers (v) and (viii) of 2007 and numbers (ix) and (x) of 2008).
53 See JFTC, supra note 45 and 46; JFTC, infra note 54. The data have been compiled by counting the published decisions on a calendar year basis. The JFTC website provides the data on a fiscal year basis. For an overview of the number of cases per fiscal year, see also JFTC, supra note 45. See also Appendix Table II: Total Number of Decisions. However, the number of entrepreneurs receiving leniency is not equivalent to the number of leniency applicants. See Appendix Table III: Leniency Receiving Entrepreneurs versus Leniency Applications without Decisions.
B. A Breakdown of the Data on Leniency Applications

By the end of 2009, the JFTC had taken another 16 decisions. Only four decisions involving immunity were publicized. Ten decisions only mentioned two 30%

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54 See JFTC, supra note 44. The cases for year 2009: (i) enka biniiruka oyobi doukeishu no seizou hanbai gyousha ni tai suru ken, trans. “Case against the manufacturers and sellers of vinyl chloride pipes and joints”; (ii) kokusai koukou kouhappou shiito no seizou hanbai gyousha ni tai suru ken, trans. “Case against international air freight forwarders”; (iii) kakeyou kouhappou shiito no seizou hanbai gyousha ni tai suru ken, trans. “Case against manufacturers and distributors of cross-linked high foaming polyethylene sheets”; (iv) kokudou koutsushou ga tohoku chihou seibikyoku ni oite hachchu suru sharyou kanri jimyu nyuusatsu sanka gyousha ni tai suru ken, trans. “Case against the participants in the bidding for vehicle management jobs of the Tohoku Regional Development Bureau ordered by the Ministry of Land, Infrastructure, Transport and Tourism”; (v) kokudou koutsushou ga kantou chihou seibikyoku ni oite hachchu suru sharyou kanri jimyu nyuusatsu sanka gyousha ni tai suru ken, trans. “Case against the participants in the bidding for vehicle management jobs of the Kanto Regional Development Bureau ordered by the Ministry of Land, Infrastructure, Transport and Tourism”; (vi) kokudou koutsushou ga hokuriku chihou seibikyoku ni oite hachchu suru sharyou kanri jimyu nyuusatsu sanka gyousha ni tai suru ken, trans. “Case against the participants in the bidding for vehicle management jobs of the Hokuriku Regional Development Bureau ordered by the Ministry of Land, Infrastructure, Transport and Tourism”; (vii) kokudou koutsushou ga chubu chihou seibikyoku ni oite hachchu suru sharyou kanri jimyu nyuusatsu sanka gyousha ni tai suru ken, trans. “Case against the participants in the bidding for vehicle management jobs of the Chubu Regional Development Bureau ordered by the Ministry of Land, Infrastructure, Transport and Tourism”; (viii) kokudou koutsushou ga kinki chihou seibikyoku ni oite hachchu suru sharyou kanri jimyu nyuusatsu sanka gyousha ni tai suru ken, trans. “Case against the participants in the bidding for vehicle management jobs of the Kinki Regional Development Bureau ordered by the Ministry of Land, Infrastructure, Transport and Tourism”; (ix) kokudou koutsushou ga chugoku chihou seibikyoku ni oite hachchu suru sharyou kanri jimyu nyuusatsu sanka gyousha ni tai suru ken, trans. “Case against the participants in the bidding for vehicle management jobs of the Chugoku Regional Development Bureau ordered by the Ministry of Land, Infrastructure, Transport and Tourism”; (x) kokudou koutsushou ga shikoku chihou seibikyoku ni oite hachchu suru sharyou kanri jimyu nyuusatsu sanka gyousha ni tai suru ken, trans. “Case against the participants in the bidding for vehicle management jobs of the Shikoku Regional Development Bureau ordered by the Ministry of Land, Infrastructure, Transport and Tourism”; (xi) kokudou koutsushou ga kyuushu chihou seibikyoku ni oite hachchu suru sharyou kanri jimyu nyuusatsu sanka gyousha ni tai suru ken, trans. “Case against the participants in the bidding for vehicle management jobs of the Kyushu Regional Development Bureau ordered by the Ministry of Land, Infrastructure, Transport and Tourism”; (xii) kokudou koutsushou ga korakuen kidasu kouhan no seizou hanbai gyousha ni tai suru ken, trans. "Case against the travel agency managing the school trips of the public junior high school of the city of Okayama"; (xiii) tenri torihiki ni yori hanbai sareru GL koupan no seizou hanbai gyousha ni tai suru ken, trans. “Case against the manufacturers and sellers of GL steelplates that are sold by store sales business”; (xiv) himo tsuki torihiki ni yori keiryou tenjou shita jizou seizou gyousha muke ni hanbai sareru GI koupan no seizou hanbai gyousha ni tai suru ken, trans. "Case against manufacturers and sellers of GI steel plates that are sold under conditions directly to manufacturers of light weight ceiling and cellar materials" and (xv) himo tsuki torihiki ni yori kenzai seihin seizou gyousha muke ni hanbai sareru tokutei karaa kouhan no seizou hanbai gyousha ni tai suru ken, trans. "Case against the manufacturers and sellers of special color steelplates that are sold under conditions directly to manufacturers of building materials".

55 Supra note 54 (the cases concerned are numbers (i), (xiv), (xv) and (xvi)).
reductions, with any reference to immunity.\textsuperscript{56} Since only three entrepreneurs could apply for leniency and all of the decisions mentioning only a 30% reduction already involved two entrepreneurs, the conclusion can be drawn that these reductions must be situated in the post-investigation stage. Three of the decisions mentioning immunity also involved a 30% reduction in the post-investigation stage. There is one decision that only mentioned one entrepreneur receiving 30% reduction.\textsuperscript{57} As the extensive use of post-investigation can be seen, it could be presumed that this is also a post-investigation decision. However, it is unclear whether there is a non-publicized pre-investigation decision. In one decision, the JFTC found that the entrepreneurs were not involved in behavior requiring the imposition of a surcharge.\textsuperscript{58}

Out of the 15 decisions in 2010,\textsuperscript{59} only two decisions have a publicized immunity

\textsuperscript{56} Ibid. (the cases concerned are numbers (iii) to (xii)).
\textsuperscript{57} Ibid. (the case concerned is number (ii)).
\textsuperscript{58} Ibid. (the case concerned is number (xiii)).
\textsuperscript{59} See JFTC, supra note 44. The cases for year 2010: (i) toukyou denryoku kabushiki kaisha oyobi dengen kaihatsu kabushiki kaisha ga hacchuu suru denryoukuyou densen no mitsumori awase mata wa kyousou nyuustsu no sanka gyousha ni tai suru ken, trans. “Case against the participants in quotation collection or competitive bidding for power cables ordered by Tokyo Electric Company and Electric Power Companies”; (ii) tohoku denryoku kabushiki kaisha ga hacchuu suru denryoukuyou densen no mitsumori awase no sanka gyousha ni tai suru ken, trans. “Case against the participants in quotation collection or competitive bidding for power cables ordered by Tohoku Electric Company”; (iii) chubu denryoku kabushiki kaisha ga hacchuu suru denryoukuyou densen no mitsumori awase mata wa kyousou nyuustsu no sanka gyousha ni tai suru ken, trans. “Case against the participants in quotation collection or competitive bidding for power cables ordered by Chubu Electric Company”; (iv) hokuriku denryoku kabushiki kaisha ga hacchuu suru denryoukuyou densen no mitsumori awase no sanka gyousha ni tai suru ken, trans. “Case against the participants in quotation collection or competitive bidding for power cables ordered by Hokuriku Electric Company”; (v) chugoku denryoku kabushiki kaisha ga hacchuu suru denryoukuyou densen no mitsumori awase mata wa kyousou nyuustsu no sanka gyousha ni tai suru ken, trans. “Case against the participants in quotation collection or competitive bidding for power cables ordered by Chugoku Electric Company”; (vi) kyushuu denryoku kabushiki kaisha ga hacchuu suru denryoukuyou densen no mitsumori awase no sanka gyousha ni tai suru ken, trans. “Case against the participants in quotation collection or competitive bidding for power cables ordered by Kyushu Electric Company”; (vii) okinawa denryoku kabushiki kaisha ga hacchuu suru denryoukuyou densen no mitsumori awase no sanka gyousha ni tai suru ken, trans. “Case against the participants in quotation collection or competitive bidding for power cables ordered by Okinawa Electric Company”; (viii) boueishou koukuu jietai ga hacchuu suru gouseikankyo kouji nyuusatsu sanka gyousha ni tai suru ken, trans. “Case against the manufacturer of office furniture ordered by the Air Self-Defense Force of the Ministry of Defense”; (ix) kawazakishi ga hacchuu suru gouseikankyo kouji nyuusatsu sanka gyousha ni tai suru ken, trans. “Case against the manufacturers of optical fiber cable products ordered by the entrepreneurs of Nippon Telegraph and Telegraph East Corporation”; (x) aomorishi ga hacchuu suru doboku isshiki kouji no nyuusatsu sanka gyousha ni tai suru ken, trans. “Case against the participants in the bidding for engineering works ordered by the city of Aomori”; (xi) higashi nihon denshin denwa kabushiki kaisha tou no jigyousha ga hacchuu suru hikari faiba keeburu seihin no seiou gyousha ni tai suru ken, trans. “Case against the manufacturers of FAS connectors ordered by the entrepreneurs of Nippon Telegraph and Telegraph East Corporation”; (xii) kouhou shizai kabushiki kaisha ga hacchuu suru netsushuushuku suriiifu no seiou gyousha ni tai suru ken, trans. “Case against the manufacturers of heat
application.\textsuperscript{60} All the other decisions, 13 in total, only referred to a 30% reduction. Six out of the 13 decisions mentioned only one applicant for a 30% reduction.\textsuperscript{61} Only two decisions mentioned two applicants for 30% reduction.\textsuperscript{62} The other five decisions involved three applicants for 30% reduction.\textsuperscript{63} To date, only one decision has an applicant for 50% reduction.\textsuperscript{64}

Unlike in the previous two years, immunity applications have led to several of the decisions taken in 2011 and 2012. In eight of the nine publicized decisions for this period,\textsuperscript{65} immunity was granted to a leniency applicant.\textsuperscript{66} That means only one decision did not mention immunity. Again, it is difficult to estimate whether this decision was based only on post-investigation applications or whether there was a non-publicized immunity applicant. What is for sure is that the 50% reduction was only used once in 2011, but relatively often in 2012. Almost each decision in 2012, i.e. three out of five,\textsuperscript{67} was taken after a successful pre-investigation application for immunity

\begin{itemize}
  \item Six cases concerned are numbers (i) to (iv).
  \item Seven cases concerned are numbers (v) to (xv).
\end{itemize}

\textsuperscript{60} Supra note 59 (the cases concerned are numbers (viii) and (xv)).
\textsuperscript{61} Ibid. (the cases concerned are numbers (ix) to (xiv)).
\textsuperscript{62} Ibid. (the cases concerned are numbers (ii) and (iv)).
\textsuperscript{63} Ibid. (the cases concerned are numbers (i), (iii), (v), (vi), and (vii)).
\textsuperscript{64} Ibid. (the case concerned is number (xv)).
\textsuperscript{65} See JFTC, supra note 44. The cases for year 2011: (i) easepareeto gasu no seizou gyousha oyobi hanbai gyousha ni tai suru ken, trans. “Case against the manufacturers and sellers of air separation gases”; (ii) LP gasu youki no seizou gyousha ni tai suru ken, trans. “Case against the manufacturers of LPG pressure adjusters”; (iii) VVF keeburu no seizou gyousha oyabi hanbai gyousha ni tai suru ken, trans. “Case against the manufacturers and sellers of VVF cables” and (iv) LP gasu kyoyukyuki no seizou gyousha ni tai suru ken, trans. “Case against the manufacturers of LPG instruments”. The cases for year 2012: (i) toyota jidousha kabushiki kaisha tou ga hachchu suru jidoushaya waiyaa haanesu oyobi doukanren seihin no mitsumori awase no sanka gyousha ni tai suru ken, trans. “Case against the participants in a quotation collection for automotive wire harnesses and related products ordered by Toyota Motor Company”; (ii) daihatsu kougyou kabushiki kaisha ga hachchu suru jidoushaya waiyaa haanesu oyobi doukanren seihin no mitsumori awase no sanka gyousha ni tai suru ken, trans. “Case against the participants in a quotation collection for automotive wire harnesses ordered by Daihatsu Motor Company”; (iii) honda giken kougyou kabushiki kaisha ga hachchu suru jidoushaya waiyaa haanesu oyobi doukanren seihin no mitsumori awase no sanka gyousha ni tai suru ken, trans. “Case against the participants in a quotation collection for automotive wire harnesses and related products ordered by Honda Motor Company”; (iv) nissan jidousha kabushiki kaisha tou ga hachchu suru jidoushaya waiyaa haanesu oyobi doukanren seihin no mitsumori awase no sanka gyousha ni tai suru ken, trans. “Case against the participants in a quotation collection for automotive wire harnesses and related products ordered by Nissan Motor Company” and (v) fujitsu kougyou kabushiki kaisha ga hachchu suru jidoushaya waiyaa haanesu oyobi doukanren seihin no mitsumori awase no sanka gyousha ni tai suru ken, trans. “Case against the participants in a quotation collection for automotive wire harnesses and related products ordered by Fujitsu Motor Company”.
\textsuperscript{66} Supra note 65 (the cases concerned are numbers (ii) to (iv) of 2011 and (i) to (v) of 2012.)
\textsuperscript{67} Ibid. (the cases concerned are numbers (i) to (iii) of 2012.)
and 50% reduction.

A major highlight in the post-2008 period is the absence of a publicized immunity application, especially the decisions taken in 2009 and 2010 which had a low number of immunity decisions. The trend changed again in 2011, before consolidating itself in 2012.\(^{68}\) The latter two years are, however, characterized by a substantially lower number of decisions.

Another feature of the post-2008 period is the difficulty of making an accurate statement on whether the 30% reduction in 2010 is a pre- or post-investigation reduction. The number of applicants eligible for leniency has since the beginning of 2010 increased from three to five, with a possibility of three entrepreneurs receiving leniency in the pre-investigation stage. Hence, if the data of the JFTC mentioned three entrepreneurs receiving 30% reduction, it could be interpreted as both a pre- or post-investigation leniency. The same applies to the decisions mentioning even less than 30% reductions. Having said this, the Japanese leniency program has not had many decisions in which there was an extensive use of the pre-investigation leniency. There is no reason to believe that this might have changed when the number of applicants increased from three to five.

From 2011, and especially in 2012, the trend reversed again. Immunity was widely published. Moreover, 50% reductions were also often granted. In these cases, it is not sure whether there was even a post-investigation at all. Ultimately, the fact that a 50% reduction had been used may indicate that something else other than a sudden friction, for example, is at play in the break-up of the cartel.

V. DELAYED APPLICATION FOR LENIENCY

A. No Race to Kasumigaseki

Cartel participants do not seem to be in a hurry to reveal their cartel participation to the JFTC. If this were not the case, the number of pre-investigation reduction of 50% would be much higher. Currently, it has only been used in a total of nine decisions.\(^{69}\) This

\(^{68}\) See Appendix Table IV: Publicized Immunity Decisions versus Number of Decisions.

\(^{69}\) Supra note 65 (the cases concerned are numbers (i) to (iii) of year 2012 and (iii) of year 2011); supra
indicates that, since the beginning of the leniency program, there has been quite some trust among the cartel members not to defect. The leniency application of one of the cartel participants must have come as a surprise for the other cartel participants.

The International Competition Network (ICN) has, in its study on drafting and implementing an effective leniency program, listed two elements that contribute to the success of a leniency program. First, the ICN identifies a rigorous enforcement system as a pre-requisite for a successful leniency program. Second, the ICN summarizes the comments of lawyers regarding possible inhibitions on self-reporting. According to lawyers, advice not to come forward with information in the framework of a leniency program may be given in the following cases:

- Uncertainty about the ability to obtain leniency after an investigation has commenced
- Inability of the applicant to anonymously explore with an agency whether leniency is available
- Possible disclosure to other enforcement agencies or third parties without the applicant’s approval
- Absence of “amnesty plus” credit (in systems where leniency programs do not contain predictable and transparent rules for reduction of fines)
- Absence of a marker system
- Absence of automatic leniency for the first applicant to self-report before an investigation
- Discoverability of information and documents produced, not only in the jurisdiction where leniency is granted, but also mainly in other jurisdictions
- Lack of standard form letters setting out obligations and protections for both the applicants and the agency, unless such obligations and protections follow clearly from the program itself
- A requirement to submit written leniency applications
- A requirement to establish all the elements of an offence before receiving

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Note 54 (the case concerned is number (xv) of 2009); supra note 45 (the cases are numbers (ix) and (x) of year 2008 and numbers (v) and (viii) of year 2007). The argument could be made that it is just because of the secretive nature of the leniency application that there are few applicants taking the second position in the pre-investigation stage. Keeping the immunity application secret, allows the enforcement agency to prepare for the dawn raid and surprise the other cartel participants. However, the point made in this section is that, if a leniency program offers incentives to report, the reporting should occur irrespective of the fact that one knows that the other cartel participant has already reported.
Many of the problems identified by lawyers as possible reasons for inhibiting self-reporting are not present in the Japanese context. Indeed, leniency can be obtained after investigation has started. Potential applicants for leniency can inform themselves with the JFTC on whether leniency is still applicable. The leniency program in Japan is transparent and clear, not requiring an amnesty plus system to be in place. The JFTC has flowcharts detailing the obligations of all parties in each stage of the leniency procedure. Leniency is automatic for the first applicant, as long as he complies with a set of clear and simple obligations. The order of the application is determined by the time the JFTC receives a fax from the applicant on a fax machine installed for this purpose. This initial submission of information does not have to be more than a document revealing the existence of a cartel and the names of the entrepreneurs involved, thus acting as a kind of indicator. The applicants do not have to establish all the elements of an offence; they only have to provide the information they have at hand.

Excluding cultural issues from the path to a successful leniency program is extremely difficult. The business community has indicated that such cultural issues will prevent the leniency program from operating effectively, which has been earlier rebutted by the fact that the entrepreneurs would apply for leniency in the pre-investigation stage.

A Japanese lawyer has further indicated that some of the other issues mentioned above may be problematic. A leniency application can reveal the cartel for other

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71 See Section II on “The Features of the Amended Leniency Program”
72 Supra note 10 at 673.
73 Ibid. at 675-679.
75 Supra note 10 at 673-674.
76 Ibid. at 676.
77 Supra note 47.
78 See Intensive Lecture by Monotobu Wakabayashi, Lawyer, Oh-Ebashi LPC & Partners, in Fukuoka
enforcement authorities, being public prosecutors. By extension, private parties may also learn of the cartel and start civil damages actions against the cartel participants, including the applicant for leniency. Without any further problematic elements present in the Japanese leniency program, the analysis has also to turn to the presence of a pre-requisite for a successful leniency program, i.e. a rigorous enforcement system. Linked to this issue is the question whether a leniency application in one jurisdiction may lead to an investigation in another jurisdiction. Lawyers have indicated that this may inhibit self-reporting. This will be even truer if the other jurisdiction has a stricter competition law and policy than the jurisdiction where leniency is concerned.

B. The Fear for Criminal Prosecution and Leniency Applications

The scope of the Japanese leniency program is limited to the administrative surcharge. The leniency program does not apply to the criminal sanctions provided for in the AML. This means that the JFTC still has the power to file a criminal accusation with the public prosecutor. The JFTC has the exclusive power to do so. Hence, it is somehow within the discretion of the JFTC to take steps in a case for which it has granted immunity from or reduction of the surcharge. As long as no steps are taken by the JFTC, the public prosecutor cannot act. The problem really starts, though, from the moment a criminal accusation has been made. Not the JFTC, but the public prosecutor decides at this stage who among the cartel participants should be prosecuted.

Aware that this discretion belonging to both the JFTC and the public prosecutors may prevent cooperation under the Japanese leniency program, the Ministry of Justice has declared that the public prosecutors need to respect the decisions of the JFTC.

(47) 79 See Art. 96 of the AML. The public prosecutor can only file criminal prosecutions. In the case of the AML, the public prosecutor can only do so after a complaint of the JFTC.
decision to be made by the JFTC is to exclude an entrepreneur, granted immunity, from a criminal accusation. Hence, at this level, the discretion still stands. The use of this discretion will be exercised more likely in the case of the second and third applicants.\(^8\)

In any case, the JFTC will assess whom to exclude from a criminal accusation, in close cooperation with the Public Prosecutor’s Office.

The first case in which the JFTC has filed a criminal accusation after an entrepreneur was granted immunity involved the bid-rigging for a project to extend subway Line 6 from Nonami to Tokushige. Five major companies agreed to prearrange the bid winner and also the bidding price. In doing so, they violated several articles of the AML on which criminal sanctions are also imposed.\(^5\) When the JFTC decided to proceed with the criminal accusation, they expressly stated that the first applicant under the leniency program, Hazama, would not face the criminal accusation.\(^4\) Several other cases developed along the same line, confirming the practice that the applicant for leniency is shielded for a criminal accusation.\(^5\)

Even though the practices of the JFTC and the public prosecutor are in line with the guidelines, it should be pointed out that lawyers often inform their clients of a possible risk of prosecution if they apply for leniency.\(^6\) These lawyers fulfill their duty to inform the clients about the risks related to revealing participation in illegal activities so that they cannot be held responsible for any breach of informational duty.

Entrepreneurs estimating the risk they are taking by revealing their participation in a cartel will most likely not be scared off by the lawyers’ advice. In general, criminal prosecution has been barely used. This may be an indicator that this kind of cases are being perceived as a graver infringement of the AML than other price fixing cartels, which seem to be the majority of cartels exposed by a leniency application.

\(^8\) Supra note 47 at 12.

\(^5\) Supra note 47 at 12.


\(^5\) Supra note 45 (the case concerned is (iv) of 2006).


\(^7\) Supra note 78.
C. The Fear for Private Damages Actions and Leniency Applications

The leniency program in Japan does not extend to private damages actions. Nonetheless, Article 25 of the AML provides private parties with the avenue to file for damages in court when they sustain harm from a competition law infringement. Further, it is accepted practice that the general tort provision of the Japanese Civil Code, Article 709, can also be the basis of a private competition law action. The major difference between these two ways of obtaining damages is that Article 25 of the AML provides a jump start for the private enforcer as the JFTC has already handed down a formal decision on the competition law infringement, while under Article 709 of the Civil Code, the private parties launching the complaint have to prove the competition law infringement themselves.  

Even though the legislation and the courts allow for private damages actions, these have been underused for a long time. In fact, Japan has been criticized by the United States for its lack of private actions. From the adoption of the AML in 1947 until the beginning of the 1970s, there were only five private damages actions reported. The slight increase in private damages actions during the 1970s could not consolidate itself. It was only since the 1990s that a surge in private damages actions was noticeable. A study conducted by Simon Vande Walle details the characteristics of this surge in private damages actions. According to this scholar, the increase in filings has been caused by residents’ law suits and suits for injunctive relief. The real private damages actions, i.e. the ones not related to residents’ suits and injunctive relief, only increased after 2002.

In another study, Vande Walle points out that the increase of private damages actions may contribute to deterrence. The deterrent effect is not due to an increased

91 Ibid.
92 Ibid. at 17-19.
93 Ibid. at 17 (Graph 2).
94 See Simon Vande Walle, “Deterrence of Antitrust Violations: Do Actions for Damages Matter in
detectability of cartels; instead, it is the monetary increase of the sanctions that is contributing to the deterrent effect.\textsuperscript{95} Most of the private damages actions followed an investigation of the JFTC. Vande Walle further indicates that most of these private damages actions related to bid-rigging infringements.\textsuperscript{96}

Putting together these observations by Vande Walle, one could intuitively draw the conclusion that leniency is not a desired strategy for entrepreneurs engaged in bid-rigging. The chance of having to pay damages is relatively higher in the case of bid-rigging than other forms of price fixing. Whether entrepreneurs in Japan want to avoid these private damages actions is an empirical question not yet answered. However, it is a fact that since the implementation of the leniency program in Japan, the total number of decisions on bid-rigging has dropped.\textsuperscript{97} The number of bid-rigging cases revealed through leniency was still high in the early years of the leniency program. However, this number now equates with the number of other price fixing cartels.\textsuperscript{98}

\textbf{D. The Fear for Foreign Follow-Up Actions}

Even though Japan has made considerable efforts in stepping up its enforcement of competition law, the enforcement and sanctioning are still not equivalent to those in the European Union and the United States. The European Union can count on fierce public enforcement of competition law, which allows for the imposition of substantial fines. The United States relies much more on private enforcement, in which the affected parties can rely on treble damages. Japan, on the contrary, is limited by the law in the calculation of fines, and private enforcement has not become a substantial part in the enforcement.\textsuperscript{99}

\textsuperscript{95}Ibid. at 22-25.
\textsuperscript{96}Supra note 90 at 20 (the explanation is presented in Graph 3).
\textsuperscript{97}See Appendix Table V: Types of Cartels. Note that the affected party in a bid-rigging case has an advantage over the affected parties in other price fixing cartels. The affected parties are not dispersed, hence no coordination problems occur. The directly affected parties are most likely to be with a small number. The financial stake in the price fixing cartel will be fairly high. Therefore, the affected party has an incentive to start a private damages action. It should also be pointed out that legislation has been adopted to reduce bid-rigging in Japan.
\textsuperscript{98}The number of bid-rigging cases in fiscal year 2011 is relatively high compared to the price fixing cases. However, no detailed information has yet been given regarding the involvement of leniency in either of this kind of cartel cases. Japan Fair Trade Commission, “Enforcement of the Antimonopoly Act in FY2011 (Summary)” (6 June 2012), online: <http://www.jftc.go.jp/en/pressreleases/120606EnforcementofAMAinFY2011_Summary.pdf>.
\textsuperscript{99}Supra note 90 at 27-28 indicating that private enforcement has not been developed in Japan yet, unlike in the United States); see also supra note 94 at 11 detailing the reasons why Japan is not able to reach an
Being confronted with rigorous enforcement regimes abroad, lawyers will be careful in advising their clients to proceed with a leniency application for an international cartel in the least harmful competition law regime. A rational approach would be to first secure lenient treatment in the overseas jurisdictions; except for the cartel involving motor parts, which seems to be triggered by the JFTC’s investigation into related sectors investigations, data seems to confirm this proposition. Almost all of the cartel participants applying for leniency were involved in a cartel domestic in nature. Recently there seems to be a reversed trend, whereby the Japanese companies are seeking for leniency after having been investigated in other jurisdictions.

E. Less Saliency and Overconfidence Bias Builds Trust Among Cartel Participants

If the limited scope of the leniency program cannot be an explanation for the absence of a race to confess to the participation in an illegal cartel and there are no other specific problems with the conceptualization of the leniency program in Japan, attention has to be paid to what the ICN determines as the pre-requisites for a successful leniency program. A high risk of detection, making it a vigorous enforcement program, has to be combined with strong sanctions in order for cartel participants to defect the cartel.

It has been extensively documented that the enforcement of competition law in Japan used to be very weak. The weaknesses were entangled in many aspects. The JFTC

optimal sanction. See Schaede at supra note 1 at 117-118 where the author makes a comparison between the average profits earned from bid-rigging and the surcharged levied to indicate that the levied surcharge is often below profits gained.

Supra note 70 at 4 indicating that the possibility of an action elsewhere will diminish the chances of getting positive advice for applying for leniency.


Supra note 71 at 3.

was not given a high rank within the bureaucracy. Fiddling with the human resources of the JFTC by bringing in many bureaucrats of ‘rival’ ministries allowed these ministries to obstruct an effective operation of the JFTC. Not attributing enough human resources to the JFTC was also a compromising factor for the smooth functioning of the JFTC. Many exceptions were created to hollow out the effectiveness of the AML. Severe sanctions were avoided. Criminal sanctions, such as imprisonments, were barely used. Informal sanctions were preferred to formal sanctions. The monetary sanction imposed, i.e. the administrative surcharge, was generally regarded as below the level of having any deterrent effect. Private damages actions were barely used and even if they were used, they followed the JFTC’s actions and thus did not contribute to a greater risk of detection.

Nonetheless, many of the weaknesses of the Japanese AML have been addressed over the past decade. The JFTC has been allocated a bigger budget. The investigation section of the JFTC has been manned with more people. The level of sanctions has increased. The investigative powers have been upgraded. Private actors have become more active.

The big question, then, is to what extent the business community is aware of this evolution. The budget increase, translated into more human resources for the investigation division, is published on a yearly basis. If the business community does not receive news on the effective enforcement of the AML, this may not achieve the desired deterrent effect. The less noticeable cartel enforcement is, the higher the likelihood will be that the business community underestimates the probability to be detected.

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106 Supra note 87 at 32.
107 Ibid. at 31-32.
108 Ibid. at 38-39.
109 Ibid. at 51 indicating that since the 1970s, the JFTC has made an effort to overhaul the system of legal cartels and supra note 1 at 79, 81-92.
110 Supra note 10 at 120-121 and see also, Schaede, supra note 1 at 115-118.
111 See Schaede, supra note 1 at 115-118.
112 Supra note 94 at 11-12.
113 See Section 5, Part C on “The Fear for Private Damages Actions and the Leniency Program”.
Public enforcement is well published on the website of the JFTC. Each decision taken is published in Japanese, and almost all are translated into English.\textsuperscript{116} Some of the major cases reach the newspapers, but only the most egregious ones, which often also involve corruption,\textsuperscript{117} are spread out over several editions of the newspaper.\textsuperscript{118} Most of these eye-catching cases are again related to bid-rigging, a domain in which the leniency program is less effective. Data on private enforcement is even less visible to the general public. In order to create a database of all private damages actions in Japan, Vande Walle had to look at a variety of sources in his attempt to gather all private damages actions that Japan has known since the implementation of the AML.\textsuperscript{119} Business executives may therefore have underestimated the chance of being caught.

The lack of attention paid to cartel behaviour in the general newspapers may be compensated by compliance sessions. However, the impossibility to back up statements regarding infringements of competition law with hard numbers of entrepreneurs being caught will feed into the underestimation of the probability to be detected. The enforcement general enforcement statistics published at the end of each fiscal year on the JFTC website,\textsuperscript{120} reveal a downward trend in relation to the number of decisions taken on illegal competition law behavior.\textsuperscript{121}

Considering that people have a general tendency to “overestimate the probability of goods things happening to them, and underestimate the probability of bad things


\textsuperscript{117} Examples of this kind of cases are the Saitama Saturday Society involving bid-rigging which related to the Japan Green Resources Agency and the bid-rigging involving the governor of Wakayama, Fukushima and Miyazaki. See Reiji Yoshida, “How Japanese Tax-Payers’ Money is Lost in Bid-Rigging” \textit{The Japan Times} (24 January 2007), online: <http://www.japantimes.co.jp/text/nn20070703i1.html>.

\textsuperscript{118} \textit{Contra} e.g., the recent bid-rigging in Aomori (see “FTC acts on Aomori bid-rigging” \textit{The Japan Times} (23 April 2010), online: <http://www.japantimes.co.jp/text/nn20100423b4.html>) with the bid-rigging case in the prefecture of Miyazaki (see “Miyazaki Bid-rigging Probe Results in 11th Arrest” \textit{The Japan Times} (26 November 2006), online: <http://www.japantimes.co.jp/text/nn20061121a5.html>); “Miyazaki Governor to Resign over Public Works Bid Scandal” \textit{The Japan Times} (4 December 2006), online: <http://www.japantimes.co.jp/text/nn20061204a1.html>;

\textsuperscript{119} Supra note 90 at 14-15 and supra note 94 at 5-6.

\textsuperscript{120} See JFTC, “About the JFTC: The Outlines of Annual Reports / Annual Reports submitted to the OECD Competition Committee” (2011), online: <http://www.jftc.go.jp/en/about_jftc/annual_reports/index.html>.

\textsuperscript{121} See Appendix Table VI: Enforcement Status per Fiscal Year.
happening to them,” the already underestimated probability of detection will be fortified. This so-called overconfidence may contribute to the building of trust among the cartel participants. It is this trust among the cartel participants that prevents a cartel from internally busting up. In the absence of undermined trust among the cartel participants, the enforcement authorities have to wait either for conflicts to happen among the cartel participants, changes in the management of the cartel participants, or a controlled defection.

**F. Controlled Defection**

Wouter Wils has pointed out that the installation of a leniency program may have negative consequences. Lenient treatment reduces the costs of collusion. The combined sum of all the administrative surcharges imposed on the cartel participants will be lower if some of the cartel participants have applied for leniency, leaving much more profit to be distributed among the cartel participants. This requires, of course, that the cartel participants can anticipate that the enforcement authority will investigate their cartel.

It is unlikely that a concerted application will occur in the pre-investigation stage in Japan. Even if the entrepreneurs were taking advantage of the possibility to informally inquire with the JFTC on the availability of leniency, a concerted application would

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logically trigger a sudden revelation of information through the leniency program. The expected result would be the granting of not only immunity, but also 50% and 30% pre-investigation reductions. However, the 50% reductions are scarce.

It will be much easier to concert the application for leniency in the post-investigation stage. There will be knowledge of an investigation by the JFTC. However, it is hard to categorize this as a negative effect of the leniency program. It is rather, a rational choice for entrepreneurs to apply for leniency once they have knowledge of an investigation by the JFTC. This is also advantageous for the JFTC because they will receive more information from these entrepreneurs.

G. Difficulties in Judging the Lack of a Race

In 2009 and 2010, the data on the leniency program revealed a huge decrease in the number of firms that were granted immunity. During these years, the data on the leniency applications might have created the impression that immunity has barely been used. This may fortify the conclusion that there is no race to come forward with information. Such a conclusion cannot be drawn.

The publication of a leniency application is not an obligation. Hence, not all leniency applicants will decide to reveal their participation in the leniency program. A real incentive for publicizing the application does not exist, except for cases of bid-rigging. In these cases, an application for publication can reduce the period during which one cannot participate in a public bidding process by half. Hence, the exact motives of cartelists to publish their leniency application, barring those involved in bid-rigging cases, is unknown.

Getting an exact picture of why many entrepreneurs have decided not to publish their application is impossible. The JFTC does not release any kind of information in this regard, not even a general number. Making a comparison between the list of cases in which leniency has been granted and the decisions to impose a surcharge from time to time reveals that some entrepreneurs do not have a duty to pay a surcharge. However, it

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126 See Interview with Takuiro Kono, supra note 15.
127 Ibid.
128 Ibid.
is not clear from the text of the decision whether that is due to immunity or because the nature of the activity is not forbidden.\textsuperscript{129}

VI. MANY APPLICATIONS - FEW DECISIONS, MAKING SENSE OF THE DATA

A. Many applications due to simple application criteria

The absence of a race to report is one characteristic of the Japanese leniency program. Another feature is the high number of applications. Indeed, nearly 500 applications were submitted during the six years of the leniency program’s operation. This high number may be explained by the fact that, once a cartel participant, for whatsoever reason, decides to apply for leniency, the application process is straightforward, especially in relation to the information that has to be submitted to the JFTC.

Immunity from or reduction of the surcharge does not come free. The AML requires the applicant to submit true reports and materials in relation to the illegal activity. Nothing in the AML mentions that this information needs to enable a dawn raid, to detect an infringement or to provide information with significant added value. However, the AML seems to require more than a good cartel story. The Rules on Reporting and Submission of Materials Regarding Immunity from or Reduction of Surcharges (Leniency Rules) detail the information that has to be submitted.\textsuperscript{130} The Leniency Rules establish that in the pre-investigation stage, two reports have to be submitted.\textsuperscript{131} The first report to be

\textsuperscript{129} Supra note 59, case number (ix) of 2010 which mentions that there are several firms to which the surcharge order does not apply, but it does not specify the reason. Hence, a definite conclusion regarding the granting of immunity cannot be drawn.

\textsuperscript{130} Supra note 29 accompanying text (note that in a post-investigation only one report needs to be submitted, see Form No. 3 and Instructions for Completing this Form, attached to the Leniency Rules, supra note 29 accompanying text. This document basically combines the two documents from the pre-investigation stage, but in a different order).

\textsuperscript{131} See Art.1 and 3 Leniency Rules. The fact that reports have to be submitted is distinct from the United States and the European Union. In both jurisdictions, paperless or oral applications exist. These are considered as important, especially in international cartel cases. Civil litigations in some jurisdictions are very real in these cases and one may face discovery procedures. See Shigeyoshi Ezaki, “Leniency for Japan” (2006) Global Competition Review 34; Bertus Van Barlingen and Marc Barennes, “The European Commission’s 2002 Leniency Notice in Practice” (2005) 3 Competition Policy Newsletter 6 at 9-10; Bertus Van Barlingen, “The European Commission’s 2002 Leniency Notice after One Year of Operation” (2003) 2 Competition Policy Newsletter 16 at 19-20; D. Jarret Arp & Christof R.A. Swaak, “Tempting Offer: Immunity from Fines for Cartel Conduct under the European Commission’s New Leniency Notice” (2003) ECLR 9 at 63-64; see supra note 47 at 7-8 explaining the reason why oral submission are not allowed. He first mentions the prevention of harassing as a reason and second, that a distinction needed to
submitted is a summary of the illegal cartel activity, including the name of the applicant, the market concerned, a description of the infringement and the time of implementation. The description of the infringement does not only require specifying the type of infringement but also the names of the cartel participants, the geographical reach of the cartel, and the influence the cartel has on pricing. Other types of infringements may need some infringement-specific information, such as the contract-awarding agency in case of bid-rigging.\textsuperscript{132}

The second report, for which the JFTC stipulates a deadline after submitting the first report, is more extensive.\textsuperscript{133} Besides repeating the content in the first report, information about the individual involved in the illegal cartel activity has to be provided. This information extends beyond the particulars of the applicant to the particulars of the entrepreneurs participating in the cartel. Ultimately, the second report expects the applicant to state the materials it has in relation to the illegal cartel activity.\textsuperscript{134} In other words, these materials should offer proof of the statements made in relation to the existence of the cartel and the involvement of the alleged cartelists. The materials can be memorandums of meetings, correspondence with other entrepreneurs or written reports in relation to the cartel activity.\textsuperscript{135} It is sufficient that these materials contain adequate information to start investigations; these materials need not to prove an infringement.\textsuperscript{136}

It can thus be said that, once the choice is made to reveal the cartel to the JFTC, relatively limited information needs to be submitted in order to be a successful leniency applicant. This certainly incentivizes defectors to apply for leniency, as not much ambiguity exists regarding the possibility of obtaining leniency.\textsuperscript{137} All the applications

\textsuperscript{132} See Form No. 1 and Instructions for Completing this Form, attached to the Leniency Rules, supra note 29 accompanying text.
\textsuperscript{133} See Art. 2 Leniency Rules; see also Takashi Kanai, Noboru Kawahama, and Fumio Sensui, dokusen kinshi hou, trans. “Antimonopoly Law” 450 (2nd ed., 2006) noting that the deadline is usually two weeks.
\textsuperscript{134} See Form No. 2 and Instructions for Completing this Form, attached to the Leniency Rules, supra note 29 accompanying text.
\textsuperscript{135} Ibid.
\textsuperscript{136} See Tadashi Shiraishi, dokusen kinshi hou, trans. “Antimonopoly Law” (2006) at 490-491; see also supra note 9 at 81; contra. Ezaki supra note 131 at 34-35 arguing that it is not all clear what the standard of disclosure is and requests the JFTC to draft a model conditional amnesty letter. This may have been written before the Leniency Rules were drafted.
\textsuperscript{137} Daniel Sokol, in doing research on the US enforcement system, has pointed out that generous leniency programs will trigger strategic behavior. It may be that many of the leniency applications to the JFTC are “questionable ‘gray’ behavior rather than clear-cut antitrust violations.” Entrepreneurs would engage in this kind of strategic leniency behavior to punish rivals in the market. D. Daniel Sokol, “Cartels,
are included in the statistics. However, not all these publicized applications lead to a decision. At first sight, this may seem odd in light of the increased budget which translates into more human resources for the investigation department.

B. Many applications but few decisions despite an increased budget

An estimation of the number of cartels that exist in a country is impossible. The secrecy in which cartels veil themselves does not even allow making a wild guess on what is happening in the business community. In that sense, it is also difficult to make an estimation on whether the leniency program is deterring businesses from forming cartels. The total number of decisions taken by the JFTC may push for such a conclusion. However, the total number of leniency applications indicates that something is going on, which does not find its reflection in the number of formal decisions. A possible explanation for this trend of few decisions may be the change in the enforcement policy.

The enforcement policy of the JFTC does not seem to be one of minimizing the need to tackle cartel behavior. Chairman Takeshima indicated in his welcome statement on the JFTC website that “[...] the amended Antimonopoly Act has been in effect since January 2010, expanding the types of practices subject to the surcharge system, extending the leniency program, and increasing the maximum jail term for cartel conduct.”138 With this statement, Chairman Takeshima basically confirmed a tendency of increased attention towards cracking down on cartel behavior. The legislation has been adapted to this aim several times in the last decade.

An enforcement policy is also determined by financial constraints. An enforcement authority operates within financial constraints, and it can only undertake so many investigations as it can handle. Therefore, the available budget will determine how the enforcement policy looks like. Budget wise, the JFTC has seen its budget increase for consecutive years at least since FY2005.139 This is one year ahead of the date that the

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The leniency program became effective. The increase of the budget translated into hiring more staff, especially in the investigation section which expanded following the policy of enlarging the human resources of the JFTC. The budget shrunk in FY2009 by 2.7%, but increased again in FY2010. In the following two fiscal years, the budget shrunk again but never declined below that in FY2008. Even though there was a decrease in budget, it did not seem to have affected the expansion of the investigation section. Nevertheless, the gradual increase of personnel in this section should not be interpreted as necessarily beneficial for the leniency program. Within the Investigation Bureau, the leniency program is only dealt with by one particular section, which comprises fewer than ten people. This group has to handle all the leniency applications. An increase in the number of applications will automatically mean that cases have to be prioritized amongst the other caseload of the JFTC. Once the leniency application has been processed, an investigation team has to be available to proceed with the case.

C. “Deferred Prosecution” - Another Way to be Lenient

Leniency programs are adopted to facilitate the finding of information in the highly secretive environment of cartel formation. A high number of applications statistically should intuitively result in a high number of decisions. This correlation is not reflected in the Japanese data. The lack of a correlation between the number of applications and
the number of leniency-receiving firms may be a result of the way data is collected. The simplicity of the application procedure means that any kind of application for leniency is reflected in the data that are published by the JFTC. Not all of these applications provide enough information to start a formal investigation. Some applications may be trivial, but are still reflected in the statistics. Other applications may be more relevant, but require an additional request for extra information.

What is for sure is that the leniency applicant will be under investigation. Besides the information that he has submitted in the reports and the necessary evidence to prove that information, the JFTC will send out requests for information. The applicant has to cooperate with these requests. During this period of time, the applicant has to keep his leniency application confidential, and he also has to withdraw from the cartel. The applicant’s sudden withdrawal from the cartel may undermine the trust among other cartel participants. In the worst case for the cartel (but the best case for the JFTC), the co-conspirators may be alarmed by such a withdrawal. Suspicion may grow that he has informed the JFTC about the cartel, eventually triggering off the termination of the cartel.

If the JFTC has enough information regarding the cartel, a dawn raid can be conducted for gathering further information. This dawn raid will most likely not be conducted only at the premises of the entrepreneur applying for leniency, since he has already submitted several documents during the application. In order to supplement that information, investigations will be held at the premises of the other entrepreneurs. This investigation is not limited to the search for documents; it can also involve the interrogation of persons and collection of statements. These investigations will reveal the knowledge of the JFTC regarding the illegal conduct. At this point, not only will the leniency applicant know that the JFTC is aware of the cartel, the other cartel participants whose premises have been raided will also be aware of the investigation. The investigative act will cause anxiety among the cartel participants, many of whom will want to save what can be saved and apply for leniency. This option, of course,
will only be open to those entrepreneurs who have knowledge to add on to the information that the JFTC already has. Post-investigation leniency applications will surely send a deathblow to the cartel. Not only does the original leniency applicant have to abstain from participating in the cartel, this duty of abstinence also rests on the post-investigation applicants. Even without post-investigation leniency applicants, the cartel participants may start suspecting and questioning one another as to how the JFTC became aware of the cartel. In the end, trust among the cartel participants, the most important element to guarantee the success of a cartel, will be undermined. The cartel is doomed to disappear.

The JFTC does not have to reach a formal decision to achieve a result that is desirable for the market, i.e. the disappearance of the cartel. Cartels can be eliminated without any of the possible negative collateral consequences arising from a formal decision. An example of these collateral consequences is the suspension from participating in future government procurements.

Bringing this idea even further, a formal decision will force the entrepreneurs who have not applied for leniency to bear the consequences of the illegal cartel activity, while the leniency applicants walk free. A competition law regime that does not focus on compensation for the illegal conduct could aim at reaching for the cartel problem that does not harm any of the cartel participants. This solution could be the pursuit of a strategy of merely investigating. The JFTC will concentrate on gathering information on illegal cartel conduct. The knowledge that the JFTC has information may automatically break the cartel and hold the cartel participants only responsible to the extent that the cartel disappears. In the end, the leniency applicant has to terminate his participation in the illegal cartel. Further investigation, with the loss of his place in the order of leniency applications, hangs as a sword of Damocles above the head of the leniency applicant for continued participation in the cartel.

The idea that the JFTC defers decision shows similarities with the practice of deferred prosecution agreements. The main aim of these deferred prosecution agreements is to impose “remediation and compliance conditions on companies that engage in wrongdoing.” Compliance with these conditions will free the company from

indictment. These conditions can be combined with the imposition of substantial fines. Unlike the deferred prosecution agreements, the conditions for deferral of a decision by the JFTC are not decided on a case-by-case basis. The conditions are statutory, stipulated in the AML. The JFTC also does not have the option to impose a substantial fine. However, the JFTC has the option to take up the case and issue a surcharge order until three years after the termination of the violation.

The cases on which the JFTC has chosen to defer the decision seem to be within their own discretion. No formal guidelines have been developed. Based upon the lately publicized cases, a prudent conclusion could be drawn that the JFTC has chosen to proceed on cases in which there is either a Japan-wide effect or in cases where the same entrepreneurs have been active in various cartels until a final decision is made. The non-availability of data on the applications that do not end up with a final decision implicates that the opposite conclusion cannot be drawn. In other words, it is not for sure that the cases where the JFTC is more lenient are cases of minor importance.

A cartel that has been reported to the JFTC, but on which the decision is being deferred brings several advantages towards the cartel participants. These advantages are not limited only to the leniency applicants, but also extend to all cartel participants. The cartel participants involved in these cartels cannot be considered as recidivists for the calculation of future surcharges. They will also face no exposure to criminal prosecution. Private damages actions will become more difficult as the private parties will share the full burden of proof for establishing the violations. Their participation in public procurement projects is also not impaired. Last but not least, none of the entrepreneurs will be stigmatized as a defector. In a community where durable economic relationships are considered important, this may be the preferred outcome. All cartel participants can easily rehabilitate within the business community.

The JFTC’s practice of ‘letting escape’ several of the AML offenders shows remarkable parallels with the Japanese criminal justice system. Daniel Foote has, in his study in “The Benevolent Paternalism of Japanese Criminal Justice”, indicated that the Japanese police succeeded in clearing on average about 60% of all reported crimes, but only

149 Ibid.
150 Supra note 44.
151 Supra note 87 at 286-287 indicating the different calculation methods depending on the status of the violator.
arrested less than 20% of the suspects.\textsuperscript{153} This does not mean, however, that all the other suspects are left ‘untouched’. Many of the suspects are being questioned carefully and all sorts of information are collected from them. The police seem to go further than only looking for evidence, to the extent that they are seeking to learn more about the character and the personal circumstances of the suspect. Besides, the police will also “admonish him or her not to commit crimes in the future.”\textsuperscript{154}

According to Foote, this whole approach is based on the fact that the Japanese authorities focus their criminal justice system on reintegration of the offender into the society. Giving lenient sanctions and portraying benevolence of the state towards the offender facilitate reintegration of such offenders.\textsuperscript{155} Extending this to the JFTC and the application of its leniency program, the JFTC engages in a careful investigation of the cartel before aiming at reinstituting the cartel participants into the business community. The investigations should function as the deterrent factor for discontinuing the current illegal activity and not engaging in this kind of activities in the future. The deferral of a decision is the authority practising benevolence.

To repay the benevolence, the criminal justice system is also paternalistic in the sense that it “depends on great trust in public official[s].”\textsuperscript{156} In order to protect the general interest of the society, the state appropriates a relatively big discretion. This discretion manifests itself in the gathering and use of information on the offender and the offence, but also in deciding how to deal with the case.\textsuperscript{157} The JFTC’s power to investigate may not be as extensive as the police’s or the prosecutor’s, but the JFTC nevertheless has discretion on what it does with a leniency application. Unlike the case where there is formal complaint, the JFTC does not have to justify at any moment what it has done with a leniency application. The JFTC has the discretion to decide which cases to pursue or which to defer at any stage.

VII. CONCLUSION

\textsuperscript{153} Ibid. at 342.
\textsuperscript{154} Ibid. at 343.
\textsuperscript{155} Ibid at 360; see also Dimitri Van Overbeke, Recht en Instellingen in Japan: Actuele Thema’s in een Historische Context, trans. “Law and Institutions in Japan: Recent Topics in a Historical Perspective” (2010) at 249-250.
\textsuperscript{156} Supra note 152 at 360.
\textsuperscript{157} Ibid. at 361.
This paper has given an analysis of the Japanese leniency program by looking at the data of its use. It could be said that the leniency program in Japan took a very good start. Within a short period of time, the number of applications surpassed the number of applications in other major jurisdictions. This number of applications has experienced a continuous growth, reaching about 470 applications in the fiscal year 2010. This high number of applications did not result in an equivalent number of entrepreneurs receiving leniency. An explanation for this discrepancy is the limited human resources of the JFTC section engaged with the leniency program. It has also been suggested that the inertia of the JFTC does not necessarily have to result in negative consequences.

In cases where a decision was taken and published, a trend is noticeable that an immunity application is not often followed by a second pre-investigation application. This may indicate a lack of a race to report the illegal cartel activity. Reasons for this inertia of the entrepreneurs include the fear of criminal sanctions, private damages actions or follow-up actions abroad, increased trust built among the cartel partners or concerted defection. Of all these possible reasons, the fear of private damages actions or follow-up actions abroad, together with an increased trust building amongst cartelists, may have been determinant to explain the absence of a real race to Kasumigaseki.
Appendix

Table I: Total Number of Leniency Applications

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>Total</th>
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<tbody>
<tr>
<td>Number of Applications</td>
<td>26</td>
<td>79</td>
<td>74</td>
<td>85</td>
<td>131</td>
<td>480</td>
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Table II: Total Number of Decisions

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<tr>
<th>Based on Calendar Year</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
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<th>2011</th>
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<td>Number of Decisions</td>
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<td>12</td>
<td>14</td>
<td>16</td>
<td>15</td>
<td>4</td>
<td>5</td>
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</table>


<table>
<thead>
<tr>
<th>Based on Fiscal Year</th>
<th>2006</th>
<th>2007</th>
<th>2008</th>
<th>2009</th>
<th>2010</th>
<th>2011</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Decisions</td>
<td>6</td>
<td>16</td>
<td>8</td>
<td>21</td>
<td>7</td>
<td>(at least) 9</td>
</tr>
</tbody>
</table>

* A fiscal year runs from the beginning of April in one calendar year to the end of March in the next calendar year

Table III: Leniency Receiving Entrepreneurs versus Applications without Decisions

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Amount of Application</th>
<th>Leniency Receiving Entrepreneurs</th>
<th>Applications without Decision</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>20</td>
<td>4</td>
<td>8</td>
</tr>
<tr>
<td>2007</td>
<td>40</td>
<td>8</td>
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</tr>
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<td>100</td>
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<td>84</td>
</tr>
<tr>
<td>2011</td>
<td>120</td>
<td>18</td>
<td>102</td>
</tr>
</tbody>
</table>


Table IV: Publicized Immunity Decisions versus Number of Decisions

<table>
<thead>
<tr>
<th>Year</th>
<th>Publications of Immunity</th>
<th>Number of Decisions</th>
</tr>
</thead>
<tbody>
<tr>
<td>2006</td>
<td>2</td>
<td>2</td>
</tr>
<tr>
<td>2007</td>
<td>6</td>
<td>4</td>
</tr>
<tr>
<td>2008</td>
<td>12</td>
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<td>12</td>
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<tr>
<td>2011</td>
<td>10</td>
<td>8</td>
</tr>
<tr>
<td>2012</td>
<td>6</td>
<td>4</td>
</tr>
</tbody>
</table>

*Source: Japan Fair Trade Commission, kachoukin genmen seido no tekiyou jigyousha no kouhyou ni tsuite, trans. “Publication of the Decisions of the Entrepreneurs that

Table V: Types of Cartels

![Bar Chart]

Table VI: Enforcement Status per Fiscal Year


Table VII: Number of Investigators