

# Japan's New Antitrust Leniency Program: Key Features and Considerations

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Japan has enacted an amendment to its Antimonopoly Act that revises its antitrust leniency program. As required by law, the amendment will come into effect on or before December 25, 2020, with the exact effective date to be announced.

On April 2, 2020, in anticipation of the amendment taking effect, the Japan Fair Trade Commission (JFTC) published a set of proposed rules and guidelines to implement the new leniency program.

This post highlights some key changes of Japan's new leniency program brought by the amendment as well as the proposed rules and guidelines.

## More Flexibility in the JFTC's Determination of Available Cooperation Credit

The most significant changes in Japan's new leniency program concern cooperation credit. The JFTC now has some flexibility in determining the number of cooperators eligible for credit, and the amount of surcharge reduction available depending on a company's degree of cooperation during the investigation.

The table below compares the new leniency program with the previous program.

SURCHARGE REDUCTION RATE		
	UNDER NEW PROGRAM	UNDER PREVIOUS PROGRAM

		SURCHARGE REDUCTION RATE		
		UNDER NEW PROGRAM		UNDER PREVIOUS PROGRAM
THE DATE OF APPLICATION	THE ORDER OF APPLICATION	REDUCTION ACCORDING TO THE ORDER OF APPLICATION	ADDITIONAL REDUCTION ACCORDING TO THE DEGREE OF COOPERATION	REDUCTION ACCORDING TO THE ORDER OF APPLICATION
Before Start of Investigation	First	Immunity	–	Immunity
	Second	20%	Up to 40%	50%
	Third – Fifth	10%	Up to 40%	30%
	Sixth or After	5%	Up to 40%	Not Applicable
After Start of Investigation	<ul style="list-style-type: none"> <li>First – Third, if there was no applicant before start of investigation</li> <li>Up to Fourth in total, if there was one applicant before start of investigation</li> <li>Up to Fifth in total, if there were at least two applicants before start of investigation</li> </ul>	10%	Up to 20%	30%

SURCHARGE REDUCTION RATE				
		UNDER NEW PROGRAM		UNDER PREVIOUS PROGRAM
After Start of Investigation	• Fourth or after, if there was no applicant before start of investigation	5%	Up to 20%	Not Applicable
	• Fifth or after, if there was one applicant before start of investigation			
	• Sixth or after, if there were at least two applicants before start of investigation			

While the previous program allowed only up to five companies to apply for leniency, the amendment relaxes the limitation on the number of leniency applicants and does not set a firm limit on the number of companies to obtain credit.

Moreover, under the new leniency program, the applicable reduction rate will depend not only on the order of the company's application with respect to other leniency applicants, but also on the degree of contribution the company makes by cooperating with the JFTC's investigation.

As shown in the table above, there may be more cooperation credit available for cooperating companies that are not the first to apply for leniency. For instance, under the previous program, a company third to apply for leniency could only receive a fixed 30% reduction in its fine for cooperating with the JFTC's investigation. Under the new program, the third company in line can get a maximum 50% fine reduction, if it meets the cooperation requirements (including a 10% reduction for its order of application, and an additional 0-40% discount for its cooperation in the investigation). The JFTC's stated goal is to incentivize greater cooperation from companies seeking leniency.

## Guidelines on Specific Factors for the JFTC to Consider in Determining the Degree of Contribution

The proposed rules and guidelines as published by the JFTC on April 2, 2020, introduced the following changes intended for Japan's new antitrust leniency program:

- The method for a company to apply for Japan's leniency program is changed from "facsimile" to "email."

- The order of application is determined by the order of the JFTC's receipt of the email.
- The factors for the JFTC to consider in evaluating a company's contribution to the JFTC's investigation include whether the content of the company's report:
  - i. is detailed and concrete;
  - ii. includes all the relevant materials contributing to revealing the truth of the case as stipulated in the guidelines (e.g. the content of the agreement, participants in the cartel, the time when the cartel started, the amount of sales of goods or services subject to the cartel, etc.); and
  - iii. is corroborated by materials submitted by the company.

DEGREE OF CONTRIBUTION TO REVEALING TRUTH OF THE CASE	REDUCTION ACCORDING TO THE DEGREE OF CONTRIBUTION (APPLICATION SUBMITTED BEFORE THE START OF INVESTIGATION)	REDUCTION ACCORDING TO THE DEGREE OF CONTRIBUTION (APPLICATION SUBMITTED AFTER THE START OF INVESTIGATION)
<b>High</b> (i.e. a company's report satisfies all three factors)	40%	20%
<b>Medium</b> (i.e. a company's report satisfies two of the three factors)	20%	10%
<b>Low</b> (i.e. a company's report satisfies only one of the three factors)	10%	5%

As shown in the table above, the JFTC will determine the level of fine reduction by considering whether the company's report satisfies all three factors listed. For instance,

- If a company submitted reports to the JFTC by email before the start of the investigation and was the second in line for leniency, it will obtain a basic fine reduction of 20% according to the order of its application;
- It may obtain an additional 20% reduction if its reports satisfy two out of the three factors considered by the JFTC, because, for example, its reports
  - include all the relevant materials contributing to revealing the truth of the cases as stipulated in the guidelines and
  - are detailed and concrete, but
  - are not corroborated by evidence.

The proposed guidelines clarify the factors that the JFTC will consider in determining a company's fine reduction according to its degree of contribution, and they accordingly improve predictability for companies seeking leniency.

Finally, the JFTC proposes a new procedure that would afford some protection to attorney-client communications relating to cartel investigations. Under the current system, there is no recognition of attorney-client privilege, so the JFTC may seize and use as evidence confidential communications between companies or individuals and their attorneys.

**Key Takeaway:** With the additional reductions in fines introduced by the new leniency program, the JFTC will likely require a higher degree of cooperation from companies applying for leniency. Cooperation can also bring greater benefits to leniency applicants. Thus, it will be even more important for companies to work with experienced attorneys when considering their leniency applications and reports. Critically, companies should evaluate their antitrust compliance programs to ensure they are robust and allow for prompt detection and reporting of any violations, and establish systems permitting the company to analyze information and effectively cooperate with government authorities if it is the subject of an antitrust investigation.

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