

A Comparative US and EU Perspective on the Japanese Antimonopoly Law's Leniency Program

ヴァン・アーツル, ステーヴェン
九州大学大学院法学研究院 : 講師

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Steven Van Uytsel*

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* LL.B., LL.M. (University of Antwerp), LL.M., LL.D. (Kyushu University); Assistant Professor, Kyushu University Faculty of Law, Fukuoka, Japan. The author would like to thank the participants of the German-Japanese Symposium on Law and Behavior for their comments on an earlier draft of this paper (March 10-11, 2008, Munich).

1. INTRODUCTION

Leniency programs constitute a remarkable international policy change related to the enforcement of competition law in the last decade¹. This policy change, whereby immunity from penalties was provided in exchange for information, was instigated by the difficulty to find enough evidence on illegal cartel activity that could lead to conviction². Indeed, aware of the illegality of their cartel activity, companies devote considerable efforts to avoid detection by the enforcement authorities. Written documents are avoided as a communication method; face-to-face meetings, if possible in the context of a trade association, are encouraged. Any paper trail will be destroyed or stored outside the premises of the company³.

Facing identical problems and inspired by the success of leniency policies in other countries, Japan included leniency rules in the Japanese Antimonopoly Law (AML)⁴ in 2005 (Japanese Leniency Program)⁵. Together with the amend-

¹ See Joe Chen and Joseph E. Harrington, *The Impact of the Corporate Leniency Program on Cartel Formation and the Cartel Price Path 2* (Center for International Research on the Japanese Economy, Working Paper No. CIRJE-F-358, 2005), available at <http://www.e.u-tokyo.ac.jp/cirje/research/dp/2005/list.htm> (last visited 8 August 2008)

² See Jennifer McNeil, *Understanding Prohibited Cartel Behaviour in order to Minimise the Risk of Prosecution* (Speech presented at the Lexis Nexis Trade Practices Conference 2004, 9 September 2004), available at <http://www.accc.gov.au/content/index.phtml/itemId/583697/fromItemId/8973> (last visited 8 August 2008) (deducting out of a study of Wouter Wils that only one in six or seven cartels are detected.)

³ See JOHN M. CONNOR, *GLOBAL PRICE FIXING* 32 (2nd ed., 2007)

⁴ See Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No. 54 of 14 April 1947 (amended by Act No. 35 of 2005) (Antimonopoly Law or AML), available at http://www.jftc.go.jp/e-page/legislation/ama/amended_ama.pdf (last visited 8 August 2008) (translation)

⁵ Kazuhiko Takeshima, *Leniency Programme and Bid Riggings in Public Sector: Enforcement Experiences in Japan* (Speech presented at The International Symposium on Enforcement of Antimonopoly Law of the People's Republic of China, 14 December, 2007), available at <http://www.jftc.go.jp/e-page/policyupdates/speeches/SAICSymposium2007.pdf> (last visited 8 August 2008). (stating that “[b]efore introducing the programme, we had to rely on voluntary cooperation from the entrepreneurs that we investigated and on voluntary provision of information necessary to demonstrate violations. As sanctions against cartel activity strengthened and society became more critical of cartels, cartel activities became more devious and covert. Thus, we had great difficulty in obtaining statements from corporate personnel involved in cartel activities.”)

ments of the fines, these changes meant a significant strengthening of the AML. Some lawyers went even as far as stating that the “JFTC now has teeth.”⁶ Commissioner Akira Goto would, without doubt, agree with this. Based on the assessment that 150 applications for leniency have been filed within the nearly 2 years of being operative, Goto claimed that the program is “a powerful weapon which, combined with increased penalties, has changed the mindset of Japan’s business community.”⁷

Goto is not alone in his assessment of the Japanese leniency program. Akinori Uesugi would also agree. In his assessment of the leniency program after 1 year of operations, his conclusion that the leniency program functions effectively is reflected in three observations⁸. First, there was a relative high number of leniency applications during the first half year following its introduction. Second, the cartel cases following the leniency applications were disposed of in a record quick time framework. Third, the leniency program offers the possibility to obtain leniency even after the JFTC has started its investigation. The latter is, according to Uesugi, a necessity to lessen the consequences of a leniency application for the reputation of a company.

The success of the Japanese leniency program may be explained because of heavy reliance on the European Commission’s 2002 Notice on Immunity from Fines and Reduction of Fines in Cartel Cases (2002 Leniency Notice)⁹ for

⁶ Casper Lawson, Yasuto Hashinaga, Hiroya Yamazaki and Mamiko Nagai, *Changes to the Anti-Monopoly Law Came into Effect on 4 January 2006: The JFTC now Has Teeth*, January 2006, <http://www.linklaters.com/pdfs/publications/asia/AntiMonopolyLawNoteEnglish.pdf> (last visited 8 August 2008)

⁷ *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 against 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*, 13 GEO. MASON L. REV. 349, 362 (2005) (Uesugi (2005a))

⁸ See Akinori Uesugi, *The Japanese Leniency Program – One Year In*, 21 ANTITRUST 79, 83-4 (2007) (Uesugi (2007))

drafting the Japanese rules¹⁰. Indeed, this version of the European Leniency Notice reflects the lessons learned from earlier experiences¹¹. Even though the 2002 Leniency Notice improved the leniency policy significantly, the Commission once again revised its 2002 Leniency Notice in 2006¹². The recent improvements in the European leniency policy may suggest that also the Japanese Leniency Program can be improved¹³.

This paper will investigate whether changes to the Japanese Leniency Program can contribute to an even more successful leniency policy in Japan. By engaging in this kind of research, this paper does in no way pretend to create an optimal leniency program for Japan. Such an endeavor will eventually fail for any country, as a leniency program basically is a strategy determining game. In order to choose for an optimal outcome of the strategy, full information for each of the participants of the game on each other is required. This may seldom be the case¹⁴. The aim of the paper is rather limited to analyze whether

⁹ European Commission, Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, O.J. C45/3 (2002) (European Commission (2002))

¹⁰ See Lawson, Hashinaga, Yamazaki and Nagai, *supra* note 6, at 2; Influences from other systems can, of course, not be excluded. The United States had experience for about three decades and the OECD had compiled a code of best practices. See AKINORI UESUGI AND KAORI YAMADA, RINIENSHI JIDAI NO DOKKINHOU JIMU - GURUOBARU KEIZAIIKA NI OKERU KONPURAANSU TAIYOU [*ANTIMONOPOLY LAWS AND PRACTICES IN THE AGE OF LENIENCY - HOW TO COMPLY WITH ANTIMONOPOLY LAWS IN A GLOBALIZED ECONOMY*] 81-2 (2007)

¹¹ See, e.g., CHRISTOPHER HARDING AND JULIAN JOSHUA, REGULATING CARTELS IN EUROPE: A STUDY OF LEGAL CONTROL OF CORPORATE DELINQUENCY 216-9 (2003); Andreas Stephan, *An Empirical Assessment of the 1996 Leniency Notice* (ESRC Centre for Competition Policy and The Norwich Law School, Working Paper No. 05-10, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=911592 (last visited 8 August 2008); European Commission, Commission Notice on Non-imposition or Reduction of Fines in Cartel Cases, O.J. C207/4 (1996) (European Commission (1996))

¹² European Commission, Commission Notice on Immunity from Fines and Reduction of Fines in Cartel Cases, O.J. C298/17 (2006) (European Commission (2006)); See, e.g., Jatinder S. Sandhu, *The European Commission's Leniency Policy: A Success*, 28 ECLR 148-57 (2007)

¹³ See Kawai and Shimada, *infra* note 75, 87-9 (suggesting that some of the provisions are problematic, such as limiting leniency to three corporations or excluding trade associations); There have also been amendments submitted to change parts of the Japanese Leniency Program. These mainly focus on the expanding the number of entrepreneurs eligible for leniency and the possibility of introducing a group application. See Japan Fair Trade Commission, *Submission of the Antimonopoly Act Amendment Bill to the Diet* (Press Release, 11 March 2008), available at <http://www.jftc.go.jp/e-page/pressreleases/index08.html> (last visited 8 August 2008)

there are enough incentives to report illegal cartel activity and whether these incentives are not hampered by legislative shortcomings.

In order to evaluate the Japanese Leniency Program, the paper will engage in a law and economics analysis as well as a comparative one. The former is necessary to indicate the environment in which information can be given in return for a lenient treatment. The latter will be used to exemplify, and occasionally to contradict, the former. Differently, the accumulated experiences of the United States and the European Union will basically be used to investigate the predictions made by the economic theories¹⁵. By using this information, a statement will be made regarding the Japanese legislation.

The paper is structured as follows. The Japanese Leniency Program constitutes the core of our assessment. Paragraph 2 will therefore introduce the different rules in the AML concerning the Japanese Leniency Program. In Paragraph 3, the paper will describe the strategic game in which different actors will be engaged in order to set out the framework against which a leniency program can be evaluated. Once this framework has been shaped, the paper will deal with each element contributing to the facilitation of the strategic game separately. For each of these elements, a comparative perspective will be given in order to test the theoretical perspectives. The findings of the theoretical perspectives, supplemented with the empirical evidence of our comparative research, will then be used to evaluate Japanese legislation. From Paragraph 4 onwards, the different elements influencing a strategic game will be elabor-

¹⁴ See HARDING AND JOSHUA, *supra* note 11, at 216; Massimo Motta and Michele Polo, *Leniency Programs and Cartel Prosecution 22* (Innocenzo Gasparini Institute for Economic Research, Working Paper No. 150, 1999), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=165688 (last visited 8 August 2008)

¹⁵ The choice for these jurisdictions is justified by the fact that they are the two first users of leniency within the framework of competition law. The United States started to use lenient treatments since 1978, while the European Union initiated it in 1996. Further, due to bad experiences, both jurisdictions have revised their rules.

ated. Paragraph 4 will highlight the need for a pre- and post-investigation stage. Whether immunity is considered as an incentive to apply for leniency will be discussed in Paragraph 5. Paragraph 6 deals with the extent of lenient treatment. In other words, the paper will investigate the necessity to limit leniency to few applicants. A discretionary power for the competition authorities, and the danger that it can cause, is the topic of Paragraph 7. Before concluding, Paragraph 8 will assess the different conditions that may have an influence on the strategic game woven into the leniency program.

2. THE FEATURES OF THE JAPANESE LENIENCY PROGRAM

The Japanese leniency program is inscribed in the AML in article 7-2 from paragraph 7 to 13. This article's main purpose is to prescribe 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 in this article, the scope of application automatically reduces. The leniency program will not be extendable to the other penalties provided for in the AML, whether they are criminal penalties or damages¹⁶.

Within this limited application scope of the leniency program, a distinction is made between a pre-investigation stage¹⁷, in which the JFTC has not yet launched an investigation, and a post-investigation stage¹⁸, in which the JFCT has started with an investigation. The incentives for self-reporting vary within each of these respective stages. In the pre-investigation stage, the leniency program offers full immunity for the first entrepreneur¹⁹ applying successfully²⁰.

¹⁶ See AKIRA INOUE, JAPANESE ANTITRUST MANUAL: LAW, CASES AND INTERPRETATION OF THE JAPANESE ANTIMONOPOLY ACT 113-4 (2007); See also UESUGI AND YAMADA, *supra* note 10, at 170-4

¹⁷ See Art. 7-2 (7) and (8) AML

¹⁸ See Art. 7-2 (9) AML

¹⁹ Present paper will address the subject of competition law according to the terminology

Two more entrepreneurs can receive partial leniency in this stage. The second entrepreneur applying successfully will get reduction of 50%²¹, while the third entrepreneur applying successfully will receive reduction of 30%²². If, however, an investigation has begun, only partial leniency is available. By waiving 30% of the surcharge for each company in the post-investigation stage, there is no discrimination between when a company comes forward with the information²³.

	First	Second	Third	Any other
Pre-investigation	100%	50%	30%	0
Post-investigation	30%	30%	30%	0

*Visualization of the Japanese leniency program.

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, where the JFTC is located. Immunity will only be granted in the pre-investigation stage to the applicant who first submits a report²⁴ independently from any other entrepreneur and supplements it with

used in the respective legislation. Hence, talking about Japan, the paper will use the concept of 'entrepreneur'. Describing the EU situation, the paper will employ the term 'undertaking'. 'Corporation' is the concept used when explaining the US situation. In a neutral context, the concept of firm is used.

²⁰ See Art. 7-2 (7) AML

²¹ See Art. 7-2 (8) (i) AML

²² See Art. 7-2 (8) (ii) AML

²³ See Art. 7-2 (9) AML

²⁴ 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. See Fair Trade Commission, Rules on Reporting and Submission of Materials Regarding Immunity from or Reduction of Surcharges (Fair Trade Commission Rule No. 7 of 2005), available at <http://www.jftc.go.jp/e-page/legislation/ama/immunity.pdf> (last visited 8 August 2008) (translation); In order to apply for leniency, the applicant has to submit three different kinds of reports. The procedure for the leniency application will be initiated by faxing the Form No. 1. This form only requires a statement about 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 rather concise 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 apply via Form No. 3.

reports and other documents²⁵. Once reported, the applicant has to stop the conduct²⁶ and provide additional assistance in the form of information upon the request of the JFTC²⁷. The information provided may not turn out to be false²⁸. Further, the applicant may not have coerced other entrepreneurs to participate or prevented an entrepreneur to cease such a conduct²⁹. Similar conditions apply to the applicants who are only entitled to a reduction of the surcharge³⁰.

In the pre-investigation stage it is important to determine the order of the applicants, since the rewards differ. The procedure in this regard is quite rigid³¹. Only the submission of the first report provisionally secures the position of the applicant³². Failing to submit the second report and the required evidentiary materials within the by the JFTC designated term, usually two weeks, automatically means the revocation of the once secured position³³. An applicant who successfully submits the reports and evidence will be promptly informed about their receipts³⁴. This notice of acceptance does not legally guarantee the grant of immunity or reduction³⁵. Leniency is only granted by the JFTC at the moment the decision is taken to issue the surcharge payment orders against the other AML violators³⁶.

²⁵ See Art. 7-2 (7) (i) AML

²⁶ See Art. 7-2 (7) (ii) AML

²⁷ See Art. 7-2 (11) AML

²⁸ See Art. 7-2 (12) (i) AML

²⁹ See Art. 7-2 (12) (iii) AML

³⁰ See Art. 7-2 (8) (i) and (ii) and (9) (i) AML (report and evidence); Art. 7-2 (8) (iii) and (9) (ii) AML (termination of the illegal conduct); Art. 7-2 (11) AML (continued assistance) and Art. 7-2 (12) AML (false information and coercion)

³¹ See Rule No. 7

³² See Art. 7 Rule No. 7

³³ See Art. 7-2 (12) AML

³⁴ See Art. 7-2 (10) AML

³⁵ See Fumio Koma and Akira Inoue, *Japan*, in BAKER AND MCKENZIE'S GLOBAL LENIENCY MANUAL 5 (Samantha J. Mobley ed., 2008)

³⁶ See Art. 7-2 (13) AML

3. EVALUATING LENIENCY PROGRAMS

3.1. A Game of Strategic Rational Behavior

Leniency programs situate themselves in the realm of law enforcement. The aim of these leniency programs in competition law is to modify the rules prescribing penalties for illegal cartel behavior. The modification exists either in the non-imposition or the reduction of the penalties³⁷. Of course, in return for this lenient treatment by the competition authorities, the firm has to give information regarding the illegal cartel activity. The given information should enable the competition authorities to convict the participants in the illegal cartel activity. Facilitating competition law enforcement in relation to cartels will then increase the deterrent effect of the competition law³⁸.

By granting a lenient treatment in return for information, a leniency program gives incentives to firms participating in an illegal cartel activity to withdraw from this activity. Indeed, a cartel, just like any other competition law infringement, is very much based on rational behavior³⁹. Rational behavior will make that firms cooperate if the expected profit is so high that it will outweigh the negative consequences of cooperating, which is determined by the behavior of the other cartel participants and the enforcement of the competition law⁴⁰. If

³⁷ See Giancarlo Spagnolo, *Optimal Leniency Programs 2* (Fondazione Eni Enrico Mattei, Working Paper No. 42.2000, 2000), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=235092 (last visited 8 August 2008) (Spagnolo 2000a); See also Patrick Massey, *Criminalization and Leniency: Will The Combination Favourably Affect Cartel Stability?*, in CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT: ECONOMIC AND LEGAL IMPLICATIONS FOR THE EU MEMBER STATES 176, 177-8 (Katalin J. Cseres, Maarten Pieter Schinkel and Floris O.W. Vogelaar eds., 2006); Wouter P.J. Wils, *Leniency in Antitrust Enforcement: Theory and Practice 4* (Conference Paper presented at the Conference on New Political Economy, 12-14 October 2006) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=939399 (last visited 8 August 2008)

³⁸ See ROGER VAN DEN BERGH AND PETER CAMESASCA, EUROPEAN COMPETITION LAW AND ECONOMICS 322 (2006)

³⁹ Robert M. Feinberg, *The Enforcement and Effects of European Competition Policy: Results of Legal Opinion*, 23 JCMS 373 (1985)

⁴⁰ See VAN DEN BERGH AND CAMESASCA, *supra* note 38, at 160-162

the costs are too high, rational people will refrain from engaging in or terminate a conduct that causes these losses⁴¹.

A leniency program will definitely inflate the costs of cooperating, which are present in each cartel. A cartel is by nature a “nervous and potentially unstable form of organization⁴².” The leniency program will add to that. This may not necessarily be reflected at the formation stage of the cartel. At that moment, the cartelization calculus may still be positive. However, once the balance tips to the other side, the cartel participants will try to find ways to leave the cartel⁴³. It is in their own self-interest to do so without incurring any extra costs. When this can only be realized by using the leniency program, the cartel participants will not hesitate, unless other factors influence this decision.

Entering or ending a cartel, the latter of importance for the leniency program, always presupposes a calculation. For a part, the calculation is based upon what a firm expects the other (possible) cartel participants to do. This strategic interaction between different firms has often been framed in the context of game theory and its most well-known tool the “prisoners’ dilemma”⁴⁴. The prisoners’ dilemma in which the cartel participants are caught in case of the leniency program, is between confessing the illegal activity or not. From a firm’s individualistic perspective, defecting may be the best strategy to follow. The common interest most likely is the opposite, as it may deprive the competi-

⁴¹ Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECONOMY 169, 170-9 (1968)

⁴² HARDING AND JOSHUA, *supra* note 11, at 210

⁴³ *Id.* at 210 (eloquently describing this phenomenon as “[o]nce the reading of their own economic situation suggests that cooperation is no longer an advantage, then the will to cooperate rapidly disappears.”)

⁴⁴ See VAN DEN BERGH AND CAMESASCA, *supra* note 38, at 15-9 (in relation to cartel formation) and 322 (in relation to leniency programs). In the former, the game participants will choose between a cooperative and non-cooperative strategy, while in the latter it will be between a strategy to confess or not to confess; See also Glenn Harrison and Matthew Bell, *Recent Enhancement in Antitrust Criminal Enforcement: Bigger Sticks and Sweeter Carrots*, 6 HOUSTON BUS. AND TAX L. J. 207, 214-16 (2006)

tion authority of the evidence to proof the cartel activity⁴⁵.

Essential for this decision making, and thus also for game theory and a prisoners' dilemma, is information⁴⁶. The information can have two different dimensions, either the party is fully informed or the information is incomplete⁴⁷. The latter is often referred to as information asymmetry⁴⁸. Depending on the dimension of information, the strategy the players of the game will decide on will be different than the one they would have chosen if they were fully informed⁴⁹.

3.2. Information in Function of a Leniency Program

Since information is essential for a game theoretical model, it will also be crucial for the proper functioning of a leniency program. Any element that may cause an information asymmetry may have an impact on the working of the leniency program. In order to avoid undesired outcomes, which are deviations of the aim of leniency programs, a leniency program needs to be designed in such a way as to limit the possibility of information asymmetry. The two most important information asymmetries that may arise in the context of a leniency program are related to the other cartel partners and the competition authorities. A leniency program needs to anticipate the likelihood that the cartel partners will defect from the cartel. This kind of information needs to be supplemented with the guarantee that leniency will be granted if certain procedural rules are fulfilled.

⁴⁵ See VAN DEN BERGH AND CAMESASCA, *supra* note 38, at 322; See also GIORGI MONTI, EC COMPETITION LAW 332-4 (2007)

⁴⁶ DOUGLAS G. BAIRD, ROBERT H. GERTNER AND RANDAL C. PICKER, GAME THEORY AND THE LAW (1994)

⁴⁷ See *id.* at 79-158

⁴⁸ See ROBERT COOTER AND THOMAS ULEN, LAW AND ECONOMICS 41 (2nd ed., 1996); Ian Ayres, *Playing Games with the Law*, in GAME THEORY AND THE LAW 3, 13 (Eric B. Rasmusen ed., 2007)

⁴⁹ See VAN DEN BERGH AND CAMESASCA, *supra* note 38, at 322

Theoretical literature has pinpointed to several issues influencing information relevant to determining the strategy in the strategic game created by the leniency program⁵⁰. A common theme in this theoretical literature is the attempt to predict the actions of cartel participants if a leniency program is offered. Even though these theoretical models are limited in their scope, as they all depend on the parameters within which they are framed⁵¹, a common line is detectable in their conclusions. There is a general agreement that leniency programs, of which the actual content may differ according to the theoretical study, will induce cartel participants to come forward with information on illegal cartel activity⁵².

Disagreement exists in relation to the moment leniency should be provided. Massimo Motta and Michele Polo assume that lenient treatment is not only efficient in the pre-investigation stage, but also in the post-investigation stage⁵³.

⁵⁰ See, e.g., MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE 192-202 (2004); Maria Bigoni, Sven-Olof Fridolfson, Chloé Le Coq and Giancarlo Spagnolo, *Fines, Leniency, Rewards and Organized Crime: Evidence from Antitrust Experiments* (Stockholm School of Economics, Working Paper Series in Economics and Finance No. 698, 2008); available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1134725 (last visited 8 August 2008); Chen and Harrington, *supra* note 1; Giancarlo Spagnolo, *Divide et Impera: Optimal Leniency Programs* (2005), available at <ftp://ftp.zew.de/pub/zew-docs/veranstaltungen/rnic/papers/GiancarloSpagnolo.pdf> (last visited 8 August 2008) (Spagnolo 2005); Karine Brisset and Lionel Thomas, *Leniency Program: A New Tool in Competition Policy to Deter Cartel Activity in Procurement Auctions*, 17 EUR. J. LAW ECON. 5 (2004); Spagnolo (2000a), *supra* note 37; Giancarlo Spagnolo, *Self-Defeating Antitrust Laws: How Leniency Programs Solve Bertrand's Paradox and Enforce Collusion in Auctions* (Fondazione Eni Enrico Mattei, Working Paper No. 52.2000, 2000) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=236400 (last visited 8 August 2008) (Spagnolo 2000b); Motta and Polo, *supra* note 14

⁵¹ See Motta and Polo, *supra* note 14, at 22; See also Spagnolo (2004), *supra* note 50, at 27-30 (stating that his model does not take into account certain factors. Hence, the results of these theoretical models are only relevant if limited to the framework for which they have been constructed.)

⁵² See, e.g., Bigoni, Fridolfson, Le Coq and Spagnolo *supra* note 50, at 13-4; Chen and Harrington, *supra* note 1, 17; Spagnolo (2005), *supra* note 50, at 16-23; Steffen Brenner, *An Empirical Study of the European Corporate Leniency Program* 33-4 (Conference Paper presented at the European Association for Research in Industrial Economics, 1-4 September 2005), available at http://www.fep.up.pt/conferences/earie2005/cd_rom/Session%20VII/VII.G/brenner.pdf (last visited 8 August 2008); Christopher J. Ellis and Wesley W. Wilson, *What Doesn't Kill us Makes us Stronger: An Analysis of Corporate Leniency Policy* (2001), available at <http://www.uoregon.edu/~cjellis/Research/Research.html> (last visited 8 August 2008); Motta and Polo, *supra* note 14, at 22

⁵³ See Massimo Motta and Michele Polo, *Leniency Programs and Cartel Prosecution*, 21 INT.

Giancarlo Spagnolo, on the contrary, argues that cartels are convicted to disappear once they are detected. Hence, there is only a need to focus on cartels that are not yet under investigation⁵⁴. However, starting from the presumption that a leniency program functions on the basis of a cost-benefit analysis, there would be no reason to exclude this kind of rational behavior from the post-investigation stage. A majority of the literature confirms this viewpoint⁵⁵.

The discussion on the moment of offering lenient treatment does not extend to the amount of leniency that should be offered. In an optimal situation, a generous reward is offered to the applicant⁵⁶. Less courageous leniency programs, which only offer a reduction or at best cancel penalties, will be less effective⁵⁷. Again, the more lenient treatment is offered in the less courageous programs the more effective these moderate programs will be⁵⁸. Whether the program is courageous or modest, the probability of reporting increases if the lenient treatment is restricted to a certain number of firms. The fewer the number, the more likely it will be that a cartel participant will come forward with information⁵⁹. Some studies even point out that rewards for individuals

J. IND. ORG. 347 (2001) (Motta and Polo (2001)); Motta and Polo, *supra* note 14, at 15

⁵⁴ See Bigoni, Fridolfson, Le Coq and Spagnolo *supra* note 50, at 24; Spagnolo (2000a), *supra* note 37, at 6

⁵⁵ See, e.g., Chen and Harrington, *supra* note 1, at 12; Eberhard Feess and Markus Walzl, *Corporate Leniency Programs in the EU and the USA* 3, 7-8 and 17 (German Working Papers in Law and Economics, Working Paper No. 24, 2003), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=384740 (last visited 8 August 2008); Ellis and Wilson, *supra* note 52, at 17-8

⁵⁶ See Spagnolo (2005), *supra* note 50, at 18-9; Spagnolo (2000a), *supra* note 37, at 12; Spagnolo (2000b), *supra* note 50, at 37 (indicating that the size of the discount determines the prevention of negative consequences for a leniency program); See also Wouter P.J. Wils, *supra* note 37, at 44-7

⁵⁷ See Chen and Harrington, *supra* note 1, at 16 (stating that partial leniency programs can enhance the formation of cartels);

⁵⁸ See *id.* at 16 (arguing that more leniency is making collusion less profitable); Spagnolo (2005), *supra* note 50, at 20-2; Spagnolo (2000a), *supra* note 37, at 10-1

⁵⁹ See, e.g., Spagnolo (2005), *supra* note 50, at 17 and 26; Ellis and Wilson, *supra* note 52, at 23 ; But see Evgenia Motchenkova and Rob van der Laan, *Strictness of Leniency Programs and Cartel Asymmetric Firms* 27 (Tilburg Law and Economic Centers, Working Paper No. 2005-74, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=756345 (last visited 8 August 2008) (stipulating that in a cartelized economy complete exemption from the

will be more effective than the ones for corporations⁶⁰.

Besides the positive effects of well-designed leniency programs, the theoretical literature also points to negative consequences of installing a leniency program. Due to lenient treatment, the costs of collusion decrease. Investigation followed by a prosecution of the cartel does not necessarily have to end up only in penalties. The penalties can be waived, completely or partially. Hence, if it is possible for cartel participants to anticipate a leniency application, the costs of cooperating reduce. Consequently, cartel formation will be stimulated⁶¹. A similar conclusion could be drawn for offering lenient treatment at a stage in which a cartel has collapsed⁶².

Even though these theoretical observations mainly focus on a cost-benefit analysis of the cartel participants, indirectly they have also an impact on the behavior of the competition authorities. By concluding that certain incentives have a positive effect on reporting the illegal cartel activity, these incentives should not be jeopardized by actions of the competition authority. This has an

fine should be granted to all the self-reporters. The paper only agrees with limiting the leniency to the first firm in an economy not knowing a high degree of cartelization); Motta and Polo, *supra* note 14, at 21 (saying that leniency should be provided to any firm revealing information)

⁶⁰ See Cécile Aubert, Patrick Rey and William Kovacic, *The Impact of Leniency Programs on Cartels* 4 (2003), available at http://idei.fr/doc/by/rey/impact_leniency.pdf (last visited 8 August 2008); But see Philipp Festerling, *Cartel Prosecution and Leniency Programs: Corporate versus Individual Leniency* (University of Aarhus, Department of Economics, Working Paper No. 2005-20, 2005), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=861744 (last visited 8 August 2008)

⁶¹ See Daniel Leliefeld and Evgenia Motchenkova, *To Protect in order to Serve, Adverse Effects of Leniency Programs in View of Industry Asymmetry* (Tilburg Law and Economics Center, Working Paper No. 2007-007, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=963110 (last visited 8 August 2008); Iwan Bos, *Leniency and Cartel Size: A Note on How Self-Reporting Nurtures Collusion in Concentrated Markets 2* (Amsterdam Center for Law and Economics, Working Paper No. 2006-03, 2006) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=896670 (last visited 8 August 2008); Wouter P.J. Wils, *supra* note 37, at 26-30; Chen and Harrington, *supra* note 1, at 17-8 (demonstrating that partial leniency programs may have the perverse effect of increasing the collusive value. Cheating will be punished by excessive use of the leniency program); Spagnolo (2005), *supra* note 50, at 15-6; Ellis and Wilson, *supra* note 52, at 3

⁶² See VAN DEN BERGH AND CAMESASCA, *supra* note 37, at 323

impact on the substantive formulation of a leniency program. A leniency program should neither grant powers to competition authorities to second-guess the application, nor contain provisions obstructing or obscuring the application process⁶³.

Several policy conclusions can be drawn from the above-mentioned observations. Before turning to the policy conclusions, it is worth to note that the conclusions drawn here will not directly deal with sanctions and detection risk, even though both elements contribute to the success of a leniency program as well⁶⁴. First, a leniency program needs to give an incentive to defect from the cartel and report. This criterion does not only apply to the pre-investigation stage, but also to the post-investigation stage. The importance of an incentive directly links with the prevention of turning the leniency program into a collusion-supporting instrument. Therefore, the leniency should ideally be high and limited. Second, competition authorities should not possess any form of discretion in relation to the application of leniency program. Third, the application process should be as transparent as possible.

The following paragraphs will further elaborate on these policy conclusions in the order that they have been just presented. At first, the paper will highlight how the United States and the European Union has taken these policy conclusions into account. Eventual deviations will be further analyzed for their effects. These observations will be subsequently used to evaluate the Japanese Leniency Program.

⁶³ See Motta and Polo, *supra* note 14, at 4 (stating that they start from a basic model)

⁶⁴ See, e.g., WOUTER P.J.WILS, THE OPTIMAL ENFORCEMENT OF EC ANTITRUST LAW: ESSAYS IN LAW AND ECONOMICS (2002); Wouter P.J.Wils, *Optimal Antitrust Fines: Theory and Practice*, 29 WORLD COMPETITION 183 (2006); Massimo Motta, *On Cartel Deterrence and Fines in The European Union*, 29 ECLR 209 (2008); Patrick Massey, *supra* note 34, at 191

4. LENIENCY FOR THE PRE-AND POST-INVESTIGATION STAGE

4.1. Few Lessons from Practice

The only jurisdiction that has been experimenting with pre-investigation incentives alone has been the United States. Their original *Corporate Leniency Policy* (1978 Leniency Policy)⁶⁵, which was established in 1978, offered a lenient treatment only in the pre-investigation stage. Corporations could not enjoy lenient treatment under this policy once the Department of Justice (DOJ) had started its investigation. When the 1978 Leniency Policy came up for revision in the 1990s⁶⁶, one of the elements changed in the policy was exactly the scope of leniency⁶⁷. Rather than limiting the leniency to the pre-investigation stage, the DOJ expanded it to the post-investigation stage creating the presumption that this expansion would augment the likelihood of discovering and punishing illegal cartel activity⁶⁸.

If this policy change had been the only one, the subsequent increase of applications would definitely have been enough proof of the necessity to have a leniency program in the post-investigation stage⁶⁹. However, as will be indi-

⁶⁵ See Department of Justice, *Corporate Leniency Policy* (4 October 1978), explained by John H. Shenefield, *The Disclosure of Antitrust Violations and Prosecutorial Discretion* (Statement Before the 17th Annual Corporate Counsel Institute, 4 October 1978), noted in Trade Reg. Rep. (CCH) par. 50,388

⁶⁶ For various other reasons discussed below, the 1978 Leniency Policy did not turn out to be successful. According to the Antitrust Division of the DOJ, 17 corporations applied for leniency between 1978 and 1993. Six requests were denied and 10 corporations qualified for amnesty. Only 4 out of these 10 corporations qualified for amnesty before 1987, the year in which an amnesty program for individuals started. All the other requests followed, suggesting that the increased success of the Leniency Policy is partly due to the instigation of this policy. Over the whole time span, six requests for leniency were denied. At the time of revision, still one request was pending. The initial Leniency Policy had an average of approximately one leniency application per year. See Bruce H. Kobayashi, Symposium, *Antitrust, Agency, and Amnesty: An Economic Analysis of the Enforcement of Antitrust Laws Against Corporations*, 69 GEO. WASH. L. REV. 715, 728-31

⁶⁷ Donald C. Klawiter, *US Corporate Leniency After the Blockbuster Cartels: Are we Entering a New Era?*, in EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS 489, 490-1 (Claus Dieter Ehlermann and Isabelle Atanasu eds., 2007)

⁶⁸ Anne K. Bingaman, *Antitrust Enforcement: Some Initial Thoughts and Actions* (Speech presented at the Antitrust Section of the American Bar Association, 10 August 1993), available at <http://www.usdoj.gov/atr/public/speeches/0867.htm> (last visited 8 August 2008)

cated below, many other reasons have prevented the 1978 Leniency Policy to be successful. Therefore, the policy change cannot be more than a presumption of the necessity to have a leniency program for the post-investigation stage.

Welfare considerations oblige to consider the installation of a leniency program in the post-investigation stage. Investigations are costly. Competition authorities, which have a suspicion on illegal cartel activity, will have to make the necessary human, financial and material resources available to start an investigation. Obtaining information from the cartel participants has its limitations, though. The inspections at business premises or private houses of company employees will only give positive results if physical evidence exists. Whether or not this evidence exists, the competition authorities will have to find out. Unless they have specific information about the existence of the information and the place to find it, they will have to spend a lot of time going through many documents with the risk of finding nothing at all. In the latter case, all the resources made available are wasted⁷⁰.

The costs of a certain method of investigation should be weighed against its benefits. If the costs outbalance the benefits, the use of that method is not justified⁷¹. A less costly method should be preferred. It is for sure leniency programs can, if they are well designed, lower the search costs. Indeed, as Wouter Wils indicates, these costs will be shifted from the competition authority to the company and its staff⁷². Since they are more familiar with the illegal

⁶⁹ See Scott D. Hammond, *Detecting and Deterring Cartel Activity through an effective Leniency Program*, footnote 2 (Speech presented at the International Workshop on Cartels, 21 November 2000), available at <http://www.usdoj.gov/atr/public/speeches/9928.htm> (last visited 8 August 2008); See also Stephan, *supra* note 11, at 4 and 15 (indicating that the difficulty to get data on the US Amnesty Program)

⁷⁰ See Wils, *supra* note 37, at 20; See also WOUTER P.J. WILS, PRINCIPLES OF EUROPEAN ANTITRUST ENFORCEMENT 148 (2005) (WILS (2005))

⁷¹ See WILS (2005), *supra* note 70, at 143

⁷² See *id.* at 148

activity, collecting the relevant information will likewise be much cheaper. Whereas this analysis says something about the desirability of a leniency program in the post-investigation stage, nothing can be deducted from these considerations as to how the leniency program should look like in detail.

4.2. Leniency beyond the Pre-Investigation Stage in Japan

Theory suggests that a pre- and post-investigation stage is desirable to detect as many cartels as possible in a cost effective way. The Japanese Leniency Program, by starkly distinguishing between a pre- and post-investigation stage, followed the suggestion and the general trend in practice. Having both a pre- and post-investigation stage could be explained from a theoretical perspective. The post-investigation stage could be justified on the basis that not all investigations necessarily lead to the desired result, being conviction for illegal cartel activity. In other cases, the absence of a leniency in the post-investigation stage may prolong the investigation unnecessarily. Therefore, the leniency program could be warranted to reduce the search costs.

Even though the post-investigation stage could have a rational background, the literature has put forward a different explanation. Very often Japanese commentators on leniency programs have stated that leniency is not a part of Japanese business culture, or even culture in general⁷³. Reporting under a leniency program would thus harm the reputation of the entrepreneurs. By giving the entrepreneurs the possibility to report after the investigation has been started, they have to worry less about the consequences for their leniency⁷⁴. The existence of post-investigation leniency removes, in other words, a major

⁷³ See Uesugi (2005a), *supra* note 7, at 362; See also Akinori Uesugi, *A Leniency Program à la Japonnaise – How it is going to be Enforced* 3-4 (Speech presented at Antitrust Section of the American Bar Association, 16 November 2005), available at http://www.jftc.go.jp/e-page/policyupdates/speeches/051116uesugi_aba.pdf (last visited 8 August 2008) (Uesugi 2005b)

⁷⁴ See Uesugi (2007), *supra* note 8, at 84

concern against the leniency program in general.

Looking at the vast amount of applicants that have received immunity, the cautious argument for installing a post-investigation leniency bears minor importance in practice. Due to the practice of offering the leniency applicants to apply for publication of their leniency results, some data is available in this respect⁷⁵. Out of the 24 publicized leniency cases between 2006 and 2008, 20 cases involve the granting of immunity⁷⁶. Application for reduction in the

⁷⁵ The JFTC publicizes the name, place of the head office and the name of the representative of the leniency applicants. See Japan Fair Trade Commission (JFTC), *kachoukin genmenseido no tekiyou jigyousha no kouhyou ni tsuite* [*Publication of the Entrepreneur's Application for Exemption of Surcharges*], available at <http://www.jftc.go.jp/dk/genmen/kouhyou.html> (last visited 8 August 2008); Partly reproduced in Kozo Kawai and Madoka Shimada, *kachoukin genmenseido no arikata – ichinenhan no jimu no uyoy wo fumaete* [*The Exemption of Surcharges – One Year and a Half of Practice and Application*], 1342 *Juristo* 83, 84 (2007). Details in relation to some cases can be found in Uesugi and Yamada, *supra* note 10, at 198-203

⁷⁶ See *id.* The cases concerned are for the *a) year 2006*: 1) *kyuushuto kousoku douro koudan ga hacchuu suru tonneru kanki setsubi kouji no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei* [*Surcharges payment order to the bid participants of a public work for a tunnel ventilation ordered by the former Metropolitan Expressway Public Corporation*]; 2) *year 2007*: 1) *dokuritsu gouseihoujin mizu shigen kikou ga hacchuu suru tokutei damuyou suimon setsubi kouji no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei* [*Surcharges payment order to the bid participants of the construction of flood gate facilities for a specific dam ordered by the Japan Water Agency*]; 2) *kokudou koutsuushou kakuchihou seibikyoku ga hacchuu suru tokutei kasenyou suimon setsubi kouji no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei* [*Surcharges payment order 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*]; 3) *kokudou koutsuushou kakuchihou seibikyoku ga hacchuu suru tokutei damuyou suimon setsubi kouji no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei* [*Surcharges payment order 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*]; 4) *nagoya shiei chikatestu ni kakaru doboku kouji no nyuusatsu dangou jiken ni kakaru kokuhatsu kankei* [*Indictment related to a bid-rigging case of public works for Nagoya City's subway*]; 5) *kinki chihou ni okeru tennen gasueko suteshion kensetsu kouji no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei* [*Surcharges payment order to the bid participants of construction works for natural gas stations in the Kinki region*]; 6) *gasuyou poriechiren kudazugite no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei* [*Surcharges payment order to manufacture and sales firms of polyethylene pipe joints for gas*]; 7) *gasuyou poriechiren kuda no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei* [*Surcharges payment order to manufacture and sales firms of polyethylene pipes for gas*]; 8) *oosaka ateji kabushiki gaisha ga hacchuu suru chuutsu gasu doukan kouji no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei* [*Surcharges payment order to the bid participants of the construction of medium pressure gas conduits ordered by Osaka Gas Co., Ltd*]; 9) *toukyou ateji kabushiki geisha ga hacchuu suru kouatsu gasu doukan kouji no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei* [*Surcharges payment order to the bid participants of the construction of high pressure gas conduits ordered by Tokyo Gas Co., Ltd*];

post-investigation stage only occurred in three of the publicized cases⁷⁷. The extensive use of the pre-investigation immunity and the extremely low rate of sole post-investigation reductions, shows that any cultural hesitance towards the use of the leniency program barely exists.

The fact that the sole post-investigation cases are quite limited, does not mean that the post-investigation stage has not been used in Japan. Several entrepreneurs have been receiving reduction of the surcharge after an investigation has been started. In many of these cases, the investigation started after the JFTC received an application for immunity. In about twelve of the publicized cases, the immunity application in the pre-investigation stage has been followed by an

and c) year 2008: 1) marinhoosu no seizou hanbai gyoushara ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to manufacture and sales firms of marine hoses*]; 2) gasuyou furekishiburu kudazugite no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to manufacture and sales firms of flexible pipe joint for gas*]; 3) gasuyou furekishiburu kudazugite no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to manufacture and sales firms of flexible pipe joints for gas*]; 4) poripurupirensai shurinkufuirumu no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to manufacture and sales firms of polypropylene shrink films*]; 5) oosakashi hacchuu no byouinra muke tokutei ekusu senshouchi no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to the bid participants of specific X-ray equipment for hospitals ordered by Osaka City*]; 6) oosakashi hacchuu suru no kenkoujora muke tokutei ekusu senshouchi no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to the bid participants of specific X-ray equipment for health centers ordered by Osaka City*]; 7) zaidanhoujin kekkaku yoboukai hacchuu no tokutei kenshinsha no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to the bid participants of specific car for medical examinations order by the Japan Anti-Tuberculosis Association*]; 8) yokohamashira hacchuu no tokutei ekusu ekusu senshouchi no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to the bid participants of specific X-ray equipment for health centers ordered by Osaka City*]; 9) kouyaita no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to manufacture and sales firms of steel sheet piles*]; 10) koukangui no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to manufacture and sales firms of steel pipe piles*].

⁷⁷ See id. The cases concerned are for the a) year 2007: 1) naisou koujiyou keisan karu-shiumu ita no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to manufacture and sales firms of calcium silicate board for interior constructions*]; 2) nouriinsuisanshou kakounouseikyoku ga hacchuu suru tokutei suimon setsubi kouji no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order 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 year 2008: 1) yokohamashi hacchuu no tokutei ekususen shouchi no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to the bid participants of specific X-ray equipment ordered by the city of Yokohama*].

application for reduction in the post-investigation stage⁷⁸. By looking at the data only, nothing can be said about the usefulness of the post-investigation stage. It may well be that the conceptualization of this stage should be reconsidered. The paper will come back to this issue when it discusses the conditions connected to the information that the applicant has to submit⁷⁹.

5. IMMUNITY AS AN INCENTIVE

5.1. Immunity, only for the Pre-Investigation Stage?

The 1978 Leniency Policy granted complete immunity to the first successful

⁷⁸ See *id.* The cases concerned are for the *a) year 2006*: 1) kyuushuto kousoku douro koudan ga hacchuu suru tonneru kanki setsubi kouji no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to the bid participants of a public work for a tunnel ventilation ordered by the former Metropolitan Expressway Public Corporation*]; 2) kokudou dokuritsu gyouseihoujin mizu shigen kikou ga hacchuu suru tokutei damuyou suimon setsubi kouji no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to the bid participants of the construction of flood gate facilities for a specific dam ordered by the Japan Water Agency*]; 3) kokudou koutsuushou kakuchihou seibikyoku ga hacchuu suru tokutei kasenyou suimon setsubi kouji no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to the bid participants of the construction of flood gate facilities for specific dams ordered by the local branches of the Ministry of Land, Infrastructure, Transport and Tourism*]; 4) gasuyou poriechiren kudazugite no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to the bid participants of the construction of flood gate facilities for specific dams ordered by the local branches of the Ministry of Land, Infrastructure, Transport and Tourism*]; 5) gasuyou poriechiren kudo no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to manufacture and sales firms of polyethylene pipes for gas*]; and *c) year 2008*: 1) marinhoosu no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to manufacture and sales firms of marine hoses*]; 2) gasuyou furekishiburu kudazugite no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to manufacture and sales firms of flexible pipe joint for gas*]; 3) gasuyou furekishiburu kudazugite no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to manufacture and sales firms of flexible pipe joints for gas*]; 4)) poripuropirensei shurinkufuirumu no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to manufacture and sales firms of polypropylene shrink films*]; 5) oosakashi hacchuu no byouinra muke tokutei ekusu senshouchi no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to the bid participants of specific X-ray equipment for hospitals ordered by Osaka City*]; 6) oosakashi hacchuu suru no kenkoujora muke tokutei ekusu senshouchi no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to the bid participants of specific X-ray equipment for health centers ordered by Osaka City*].

⁷⁹ See *infra* Paragraph 8.4.2

applicant in a pre-investigation stage. There was no leniency provided under this program for any other cartel participant⁸⁰. The 1993 *Corporate Leniency Policy* (1993 Leniency Policy) did not change this. It only added immunity for the first successful applicant in the post-investigation stage⁸¹. In doing so, the United States Leniency Policy is inline with the theoretical predictions. A different approach was taken in the EU. The 1996 Leniency Notice provided for immunity or reduction for the first successful applicant in the pre-investigation stage. Subsequent applicants in this stage could enjoy leniency as well. In the post-investigation stage, only reduction was offered to the applicants⁸². The revision of this policy in 2002, only changed the format of immunity in the pre-investigation stage⁸³. The 2006 revision did not change anything to the incentives⁸⁴.

To know whether the United States' approach towards leniency is more effective than the European one, both systems have to be contrasted with each other. In an empirical assessment of the 1996 Leniency Notice, Stephan Andreas investigated whether the Notice could induce undertakings to come forward and reveal an illegal cartel⁸⁵. In a period between 1996 and 2005, Andreas counted

⁸⁰ Visualization of the 1978 Leniency Policy; See Department of Justice, *supra* note 65

	First	Second	Any other
Pre-investigation	100%	0	0

⁸¹ Visualization of the 1993 Leniency Policy; See Department of Justice, US Corporate Leniency Policy (10 August 1993), available at <http://www.usdoj.gov/atr/public/guidelines/0091.htm> (last visited 8 August 2008) (Department of Justice (1993))

	First	Second	Any other
Pre-investigation	100%	0	0
Post-investigation	100%	0	0

⁸² Visualization of the 1996 Leniency Notice; See European Commission (1996), *supra* note 11

	First	Second	Third	Any other
Pre-investigation	75-100%	10-50%	10-50%	10-50%
Post-investigation	50-75%	10-50%	10-50%	10-50%

⁸³ Visualization of the 2002 Leniency Notice; See European Commission (2006), *supra* note 12

	First	Second	Third	Any other
Pre-investigation	100%	30-50%	20-30%	≤20%
Post-investigation	30-100%	20-30%	≤20%	≤20%

⁸⁴ See European Commission (2006), *supra* note 12; See also Sandhu, *supra* note 12, 148

⁸⁵ See Stephan, *supra* note 11, at 5-6

33 cartel cases in which the Commission had taken a decision⁸⁶. Out of the 33 cases, 20 were triggered by a leniency application⁸⁷. The 20 cases could then be further divided in two categories: cases that have a US preceding or simultaneous investigation, or cases that were only investigated in the EU⁸⁸. The former outnumbered the latter by 8, allowing Stephan to cautiously conclude that 14 EU leniency cases are likely to be on the back a successful US Leniency Policy⁸⁹. Indirectly, the author suggests that the US Leniency Policy was better conceptualized.

More important than the observation that EU leniency cases are preceded by investigations in other jurisdictions, the leniency applications in the EU were mainly after dawn-raids by the Commission were held⁹⁰. In other words, the 1996 Leniency Notice was most successful in the post-investigation stage. This Notice was not conceptualized to induce undertakings to come forward with information in a pre-investigation stage. In fact, immunity was only granted in three cases over a period of six years. This is in stark contrast with the 2002 Leniency Notice, which was able to attract twenty applications for immunity in the first year of being in operation⁹¹, with a similar amount of applications in each of the next two years⁹². Unlike the 1996 Leniency Notice, the 2002

⁸⁶ See id. at 5; See also Margaret Bloom, *Despite Its Great Success, the EC Leniency Programme Faces Great Challenges*, in EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS 543, 550 (Claus Dieter Ehlermann and Isabelle Atanasiu eds., 2007)

⁸⁷ See Stephan, *supra* note 11, at 5

⁸⁸ See id. at 5-6

⁸⁹ See id. at 6; See also Bertus Van Barlingen, *The European Commission's 2002 Leniency Notice after One Year of Operation*, 2 COMPETITION POLICY NEWSLETTER 16-7 (2003) (revealing, as an insider, that nearly all of the leniency application in the six years of operation of the 1996 Leniency Notice has been the result of dawn-raids organized by the Commission due to close cooperation with competition authorities from other jurisdictions, like the United States, Canada and Japan.)

⁹⁰ See Van Barlingen, *supra* note 89, at 17

⁹¹ See id. at 17; See also Ulrich Blum, Nicole Steinat and Michael Veltinus, *On the Rationale of Leniency Programs: A Game-Theoretical Analysis*, 25 EUR. J. LAW ECON. 209, 213 (2008); Alan Riley, *Beyond Leniency: Enhancing Enforcement in EC Antitrust Law*, 28 WORLD COMPETITION 377, 378 (2005)

⁹² See Blum, Steinat and Veltinus, *supra* note 91, at 213

Leniency Notice has automatic immunity.

Important conclusions can be drawn from this data in relation to immunity. As long as immunity is guaranteed in a pre-investigation stage, firms are willing to reveal information on the illegal cartel activity. Providing guaranteed immunity in a post-investigation stage does not seem to be a necessity in order to induce firms to cooperate with competition authorities in the framework of a leniency program. A combination of the lack of guaranteed immunity with the existence of leniency in the post-investigation stage, seems to support collusion. The data does not allow drawing conclusions on whether this immunity should be restricted to the first applicant or whether reductions should be offered to any subsequent applicant.

5.2. Japan Thrifty with Immunity

The Japanese Leniency Program reserves immunity for the pre-investigation stage. Limiting immunity to the pre-investigation stage, the Leniency Program obviously aims at the revelation of information by entrepreneurs before the JFTC starts doing any investigation. According to the US and EU experience, immunity as an incentive in the pre-investigation stage and if it is not hampered by any other element should do in order to convince entrepreneurs to defect from the illegal cartel. Looking at the publicized cases, immunity seems to have this effect indeed. In not less than the 20 cases, immunity was granted⁹³.

Also in line with the findings of the comparison between the US and EU practice, immunity does not seem to be necessary to attract entrepreneurs to confess their participation in illegal cartel activity in the post-investigation stage. Not less than 26 entrepreneurs applied for reduction in the post-

⁹³ See *supra* text accompanying note 76

investigation stage⁹⁴. This exceeds the amount of entrepreneurs that applied in the pre-investigation stage with two. Yet, there may be a problem with the utterly successful post-investigation stage. Out of the 26 entrepreneurs applying for reduction in the post-investigation stage, only five did so without being triggered by an immunity application⁹⁵.

Offering reduction in the post-investigation stage seems to cause opportunistic behavior among cartel participants. The least we can say is that this opportunistic behavior is rational. Making a cost-benefit analysis, it is still better to pay a reduced surcharge than a full surcharge⁹⁶. A similar thing could be said about the EU practice under the 1996 Leniency Notice, under which undertakings quickly filled applications once they got aware of the Commission's knowledge of the cartel activity via the competition authorities in other jurisdictions. However, the degree to which both leniency programs allow for opportunistic behavior is determined by the conditions set forward in relation to the information that has to be submitted⁹⁷.

6. A RACE TO THE COURTHOUSE DOOR

6.1. Limiting Leniency to the First Applicant?

The United States Leniency Policy, whether it was the 1978 or the 1993 version, limited the lenient treatment to the first company successfully applying. The difference between being the first and the second is immense in the US context. The first corporation will enjoy immunity, while the second, theoretic-

⁹⁴ See *supra* text accompanying note 77 and note 78

⁹⁵ See *supra* text accompanying note 77; See also Harrington, *infra* note 98, at 17 (pointing out that only reductions would not be the right policy to induce entrepreneurs to report)

⁹⁶ Even though this is rational for the firms, this behavior would probably be categorized as negative effect of a leniency program. Hence, the fact that this kind of action occur, warrant a change of the program in order to avoid this negative effect. Wouter P.J. Wils, *supra* note 37, at 26-8

⁹⁷ See *infra* Paragraph 8.4.2.

ally speaking⁹⁸, will have to bear the consequences of a cartel prosecution⁹⁹. This difference is even supposed to set up a race between corporations to the door of the Antitrust Division of the DOJ¹⁰⁰. This race, usually referred to as the "race to the courthouse door,"¹⁰¹ will mortgage cartel activity. It will be very hard to establish the necessary trust among corporations to engage in cartel activity¹⁰². In the 1993 format, the Leniency Policy got about 3 applications for immunity per month¹⁰³. However, in the two first years after the new policy, only 15 corporations applied¹⁰⁴.

By choosing for this model, the United States greatly follows the theoretical observations related to leniency programs. The encouragement to race to the competition authorities will diminish if more than one firm can enjoy leniency. The speed with which the race will start depends further on the difference between the degree of leniency offered to the different firms¹⁰⁵. If the difference in leniency between the first applicant and the second is minimal, the leniency program obviously weakens the incentive to be the first. Firms will

⁹⁸ See Joseph E. Harrington, *Corporate Leniency Programs and the Role of the Antitrust Authority in Detecting Collusion* 15 (Competition Policy Research Center, Working Paper No. CPDP-18-E, 2006), available at <http://www.jftc.go.jp/cprc/DP/CPDP-18-E.pdf> (last visited 8 August 2008) (stating that the United States has besides its Corporate Leniency Policy also the possible to enter in plea-bargaining. Hence, corporations, which do not qualify for leniency, can hope that the DOJ enters in a plea bargain. However, the DOJ is not committed to provide to provide lower penalties via this option. It belongs to their discretionary power to do so.)

⁹⁹ See HARDING AND JOSHUA, *supra* note 11, at 216 (giving the message to would-be leniency applicants that they must "cooperate or else - remember it hurts to come in second")

¹⁰⁰ See Kobayashi, *supra* note 66, at 729-30

¹⁰¹ See John M. Conner, *A Critique of Partial Leniency for Cartels by the U.S. Department of Justice* 5 (2008), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=977772 (last visited 8 August 2008) (mentioning that the US has not only the Leniency Policy but also plea bargaining)

¹⁰² See HARDING AND JOSHUA, *supra* note 11, at 215-6

¹⁰³ See Giancarlo Spagnolo, *Leniency and Whistleblowers in Antitrust* 37 (Centre for Economic Policy Research, Working Paper No. 5974, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=936400 (last visited 8 August 2008) (Spagnolo (2006))

¹⁰⁴ See Gary R. Spratling, *Corporate Crime in America: Strengthening the "Good Citizen" Corporation - The Experience and View of the Antitrust Division* Part V (Speech presented at A National Symposium Sponsored by the U.S. Sentencing Commission, 8 September 1995), available at <http://www.usdoj.gov/atr/public/speeches/speech1grs.htm> (last visited 8 August 2008)

¹⁰⁵ See Harrington, *supra* note 98, at 15

then engage in a waiting game, resulting in the possibility that no firm comes forward with information¹⁰⁶.

Even though the 1996 Leniency Notice did not conceptualize a guaranteed immunity, its practice has some relevance for assessing the theoretical considerations above. Whereas the degree of leniency may have been uncertain under this program, the differences between the amount of reductions was minimal. Of all cases during the period when the 1996 Leniency Notice was in force, only three cases were related to immunity¹⁰⁷. All the rest were leniency cases after the Commission did a dawn-raid¹⁰⁸. Even though the degree of leniency in the pre-investigation stage was still higher than in the post-investigation stage, undertakings did not attempt to reveal any information in the pre-investigation stage. This may indicate that the undertakings have been waiting until the moment they had to save their skin. In other words, absence of a clear incentive triggers a waiting game.

When immunity became established as a certainty in the 2002 Leniency Notice, a shift was noticeable from a waiting game to a game in action. Rather than waiting and applying for reduction, the undertakings engaged in illegal cartel activity straightly applied for immunity¹⁰⁹. The majority of leniency applications in the three years after the adoption of the 2002 Leniency Notice was for immunity and submitted before an investigation took place¹¹⁰. The data on the remaining part of the applications do not allow categorizing these

¹⁰⁶ See *id.* at 15; See also Dirk Schroeder and Silke Heinz, *Requests for Leniency in the EU: Experience and Legal Puzzles*, in CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT: ECONOMIC AND LEGAL IMPLICATIONS FOR THE EU MEMBER STATES 161, 164 (Katalin J. Cseres, Maarten Pieter Schinkel and Floris O.W. Vogelhaar eds., 2006)

¹⁰⁷ See Van Barlingen, *supra* note 89, at 17; See also Margaret Bloom, *supra* note 86, at 549-50

¹⁰⁸ See Van Barlingen, *supra* note 89, at 17

¹⁰⁹ See Spagnolo (2006), *supra* note 103, at 13-14; Van Barlingen, *supra* note 89, at 17; See also Margaret Bloom, *supra* note 86, at 548

¹¹⁰ See Spagnolo (2006), *supra* note 103, at 13

applications for reduction in the pre- or post-investigation stage. It is not unthinkable, however, that at least a part of the applications situate in the post-investigation stage.

With an average of 25 applications for immunity per year, the 2002 Leniency Notice reaches 11 applications less than the 1993 Leniency Policy. Whether this difference is attributable to the fact that second, third and even fourth undertakings can enjoy leniency and thus causing a waiting game, is difficult to say. However, if we know that nearly half of the immunity application in the US have to be located in the post-investigation stage, while the immunity application in the EU are all in the pre-investigation stage, the conclusion that leniency to more than one firm leads to a waiting game, most likely does not hold. The risk was not too high before.

The expected leniency discount needs to be sufficient in order to outweigh the possible gains of the cartel. In this respect, both the EU and the US have put a full immunity of 100% forward. The higher the penalties that can be waived, the higher the success rate of a leniency program. This also implies that the infringer must be able to calculate the amount of the fine. In order to fortify the strength of the immunity, the US has also regulated that the treble damages, usually applicable to antitrust infringements, will be reduced to single damages.

6.2. A Race to Kasumigaseki?

By offering immunity to the first applicant and reduction to the subsequent two applicants, the Japanese Leniency Program disregards the outcomes of the theoretical studies. The partial leniency to subsequent applicants softens the need to win the race to the Kasumigaseki, the place in Tokyo where the JFTC is located¹¹¹. Besides, the knowledge that subsequent corporations can apply for leniency has been qualified as a factor inducing corporations to wait. The

incentive to collide grows by the inclusion of this kind of option. The inducement is even quite big if the difference between full immunity and the subsequent leniency is not so great. Japan tries to keep this inducement within limits, as it only extends the subsequent leniency to two corporations¹¹². According to JFTC officials, this is done to obtain enough information concerning the cartel and not to fall into the trap of making the firms wait¹¹³.

The amount of applications received in a period of nearly two years, could suggest that the theoretical studies are wrong. Would the JFTC receive more than 150 leniency applications¹¹⁴ if the program was designed to create a waiting game? Yet, a definite answer cannot be given as it will be impossible to compare this number with the total amount of cartels in Japan. An attempt can be made, though, to show that the Japanese example may not be in line with the theoretical predictions. A waiting game would suggest that entrepreneurs apply as soon as another entrepreneur does. This should result in a substantial amount of second applications. Looking at the 20 cases involving immunity, there have only been four firms given 50% reduction as second applicant in the pre-investigation stage¹¹⁵. In all the other 16 cases, there was only 30% reduction in a post-investigation¹¹⁶ or no further application for reduction¹¹⁷. Fur-

¹¹¹ See Japan Fair Trade Commission, available at http://www.jftc.go.jp/e-page/aboutjftc/contact_us.html (last visited 8 August 2008)

¹¹² See Art. 7-2 (7) AML, art. 7-2 (8) (i) AML, art. 7-2 (8) (ii) AML, and art. 7-2 (9) AML

¹¹³ See Akinori Uesugi, *Leniency Program in Japan* 3-4 (Panel discussion at the International Symposium of the Competition Policy Research Center of Hitotsubashi University, 27 January 2006), available at <http://www.jftc.go.jp/cprc/english/sympo/060127sympo1e.pdf> (last visited 8 August 2008) (Uesugi (2006))

¹¹⁴ See Takeshima, *supra* note 5, at 4

¹¹⁵ See JFTC, *supra* note 75; The cases concerned are for the *a) year 2007*: 1) kinki chihou ni okeru tennen gasueko suteeshion kensetsu kouji no nyuusatsu sanko gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to the bid participants of construction works for natural gas stations in the Kinki region*]; 2) oosaka ateji kabushiki gaisha ga hacchuu suru chuutsu gasu doukan kouji no nyuusatsu sanko gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to the bid participants of the construction of medium pressure gas conduits ordered by Osaka Gas Co., Ltd*]; and *c) year 2008*: 1) kouyaita no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to manufacture and sales firms of steel sheet piles*]; 10) koukangui no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to manufacture and sales firms of steel pipe piles*].

ther, one would expect a higher rate of only post-investigation cases if a waiting game would be stimulated.

These considerations may suggest that the waiting game does not necessarily happen in the pre-investigation stage. The pre-investigation stage will be

¹¹⁶ See id. The cases concerned are for the a) year 2006: 1) kyuushuto kousoku douro koudan ga hacchuu suru tonneru kanki setsubi kouji no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to the bid participants of a public work for a tunnel ventilation ordered by the former Metropolitan Expressway Public Corporation*]; b) year 2007: 1) dokuritsu gyouseihoujin mizu shigen kikou ga hacchuu suru tokutei damuyou suimon setsubi kouji no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to the bid participants of the construction of flood gate facilities for a specific dam ordered by the Japan Water Agency*]; 2) kokudou koutsushou kakuchihou seibikyoku ga hacchuu suru tokutei kasenyou suimon setsubi kouji no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order 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*]; 3) kokudou koutsushou kakuchihou seibikyoku ga hacchuu suru tokutei damuyou suimon setsubi kouji no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to the bid participants of the construction of flood gate facilities for specific dams ordered by the local branches of the Ministry of Land, Infrastructure, Transport and Tourism*]; 4) gasuyou poriechiren kudazugite no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to manufacture and sales firms of polyethylene pipe joints for gas*]; 5) gasuyou poriechiren kuda no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to manufacture and sales firms of polyethylene pipes for gas*]; and c) year 2008: 1) marinhoosu no seizou hanbai gyoushara ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to manufacture and sales firms of marine hoses*]; 2) gasuyou furekishiburu kudazugite no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to manufacture and sales firms of flexible pipe joint for gas*]; 3) gasuyou furekishiburu kudazugite no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to manufacture and sales firms of flexible pipe joints for gas*]; 4) poripurpirensei shurinkufuirumu no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to manufacture and sales firms of polypropylene shrink films*]; 5) oosakashi hacchuu no byouinra muke tokutei ekusu senshouchi no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to the bid participants of specific X-ray equipment for hospitals ordered by Osaka City*]; 6) oosakashi hacchuu suru no kenkoujora muke tokutei ekusu senshouchi no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to the bid participants of specific X-ray equipment for health centers ordered by Osaka City*]; 7) zaidanhoujin kekkaku yoboukai hacchuu no tokutei kenshinsha no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to the bid participants of specific car for medical examinations order by the Japan Anti-Tuberculosis Association*]; 8) yokohamashira hacchuu no tokutei ekusu ekusu senshouchi no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to the bid participants of specific X-ray equipment for health centers ordered by Osaka City*].

¹¹⁷ See id. The cases concerned are for the year 2007: 1) nagoya shiei chikatestu ni kakaru doboku kouji no nyuusatsu dangou jiken ni kakaru kokuhatsu kankei [*Indictment related to a bid-rigging case of public works for Nagoya City's subway*]; 2) toukyou ateji kabushiki geisha ga hacchuu suru kouatsu gasu doukan kouji no nyuusatsu sanku gyousha ni tai suru kanchoukin noufu meirei kankei [*Surcharges payment order to the bid participants of the construction of high pressure gas conduits ordered by Tokyo Gas Co., Ltd*]

mainly a phase of balancing the costs of cooperating against the benefits of cooperating. When the calculation outweighs the benefits, the entrepreneurs will apply for leniency. The reason that relatively few entrepreneurs apply for immunity may be caused by other factors, like a low detection¹¹⁸ rate or low penalties¹¹⁹. This in turn may also explain why entrepreneurs prefer to engage in a waiting game once an entrepreneur applies for immunity, as the high number of post-investigation reductions in the immunity cases suggests. As already suggested several times, this may be linked to the conditions attached to the obligation of giving information¹²⁰.

7. THE ABSENCE OF DISCRETIONARY POWERS

7.1. Immunity or Not, That is the Question

The 1978 Leniency Policy attached several conditions for receiving immunity¹²¹. Most of the conditions were reasonable. In exchange for immunity, the applicant had to be the first to provide with candor and completeness previously unknown information, to promptly terminate its participation in the illegal activity, to continuously assist the Antitrust Division of the DOJ in their investigation, and to retribute the injured parties if possible. Further, the applicant should not have coerced others to participate or being the originator or leader of the illegal activity. However, one condition in specific was problematic since it was not in the control of the applicant. Even if the corporation would have met all the previously mentioned conditions, the DOJ could refuse

¹¹⁸ See, e.g., MICHAEL BEEMAN, *PUBLIC POLICY AND ECONOMIC COMPETITION: CHANGE AND CONTINUITY IN ANTIMONOPOLY POLICY, 1973-1995* (2002); ULRIKE SCHAEDE, *COOPERATIVE CAPITALISM: SELF-REGULATION, TRADE ASSOCIATION, AND THE ANTIMONOPOLY LAW IN JAPAN* 147-190 (2000)

¹¹⁹ See, e.g., John O. Haley, *Competition and Trade Policy: Antitrust Enforcement – Do Differences Matter?*, 4 PAC. RIM L. & P. J. 303, 131 (1995); Mark Ramseyer, *The Cost of the Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 YALE L. J., 604, 636 (1985)

¹²⁰ See *infra* Paragraph 8.4.2.

¹²¹ See Kobayashi, *supra* note 66, at 729-30

immunity based on the criteria of “reasonable expectation.”

The condition of reasonable expectation implies that whenever the DOJ has a reasonable expectation that it would have discovered the reported illegal activity even if the corporation had not reported it, the DOJ would not grant any lenient treatment¹²². The insecurity created by this provision was immense. The cost-benefit analysis to cooperate or to come forward with information could not be made anymore¹²³. For each calculation, the potential applicant had to predict the judgment of the DOJ. Without precedents, such a prediction is hard to make. Therefore, corporations chose to err on the side of caution and made the calculations on the worst presumptions, making the balance nearly always incline to the cost side. Nearly no corporation came forward with information.

Indeed, the 1978 Leniency Policy was barely used. According to the Antitrust Division of the DOJ, 17 corporations applied for leniency between 1978 and 1993¹²⁴. Six requests were denied, one case was pending and ten corporations qualified for immunity at the time of revision¹²⁵. Only four out of these ten corporations qualified for immunity before 1987, the year in which a leniency program for individuals started. All the other six requests followed, suggesting that the increased success of the Leniency Policy is partly due to the instigation of this policy¹²⁶. The initial Leniency Policy had an average of approximately one leniency application per year¹²⁷. Once the immunity was granted automati-

¹²² See *id.* at 729

¹²³ See Harrington, *supra* note 98, at 21

¹²⁴ See Spratling, *supra* note 104, at Part V

¹²⁵ See *id.* at Part V

¹²⁶ See Harrison and Bell, *supra* note 44, at 212 footnote 22; See also Robert E. Bloch, *The Antitrust Division's Amnesty Program* 4 (Speech presented at Antitrust Section of the American Bar Association, 23-24 February 1995), available at <http://www.mayerbrown.com/publications/article.asp?id=841&nid=6> (last visited 8 August 2008)

¹²⁷ See Kobayashi, *supra* note 66, at 729; See also Christopher R. Leslie, *Antitrust Amnesty, Game Theory, and Cartel Stability*, 31 J. CORP. L. 453, 454 (2006)

cally, the application rate increased twenty-fold¹²⁸.

7.2. Immunity or Reduction, That is the Question

The situation in the European Union was slightly different. The 1996 Leniency Notice was indecisive as to the degree of leniency provided to a cooperating undertaking. Rather than stating that an undertaking that is the first to successfully cooperate would be granted immunity, the 1996 Leniency Notice left a discretionary margin to the Commission. The first undertaking to report in a pre-investigation stage would benefit a reduction of 75% or more. In the best case, this could amount to immunity. In a post-investigation stage, the first undertaking would enjoy a reduction between 50% and 75%. The criterion to choose the degree of leniency was the decisiveness of the evidence to reveal the existence of an illegal cartel. Hence, it was up to the Commission to assess the value of the evidence provided.

Assessing the value of evidence provided is an internal process of the Commission. It entirely depends on how much evidence the Commission already has and what it will be able to acquire. Unless the applicant for leniency does not have a clear view on this aspect, as far as it is possible for evidence that may be acquired in the future, he will not be able to calculate his potential benefit of applying. From the viewpoint of a potential applicant, this leniency program will be perceived as “there *might* be *some* relief in relation to a *potential* fine from the Commission¹²⁹.”

The Commission saw the 1996 Leniency Notice as a success. Mario Monti, the at that time Competition Commissioner, stated in a press release in July 2001 that “[t] he Leniency Notice has played an instrumental role in uncovering and

¹²⁸ See Spagnolo (2006), *supra* note 103, at 37; See also Patrick Massey, *supra* note 34, at 187

¹²⁹ HARDING AND JOSHUA, *supra* note 11, at 219

punishing secret cartels¹³⁰.” Yet, this paper has already put forward a study of Stephan to refute this viewpoint¹³¹. Due to the uncertainty of obtaining immunity, there was no longer a need for undertakings to reveal any information in the pre-investigation stage. Taking the worst-case scenario in mind for the pre-investigation stage while making the calculus, the undertakings would have found out that it equaled with the worst-case scenario in the post-investigation stage. That is 10% reduction of the penalty. Nearly all of the leniency applications thus also happened in the post-investigation stage, after the Commission started investigation¹³².

Making immunity uncertain and putting the subsequent reduction penalties close to each other has consequently led to a major waiting game by the undertakings. Johan Carle, Pervan Lindeborg and Emma Segenmark somehow confirm this result of the 1996 Leniency Notice in the following terms:

since its entry into force in July 1996, the 1996 Notice has, as far as we are aware, merely been applied in approximately 16 cartel cases. In the majority of these cases the co-operating entity was only granted a reduction of 10-50 per cent. A very substantial reduction of 75 per cent has, as far as we have been aware of, been granted in a handful of cases under the 1996 Notice¹³³.

¹³⁰ Mario Monti in European Commission, *Commission Launches Debate on Draft New Leniency Rules in Cartel Probes* (Press Release IP/01/1011, 18 July 2001), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/01/1011&format=HTML&aged=1&language=EN&guiLanguage=en> (last visited 8 August 2008); Considering that the inspection carried out by the Commission were mainly based on leniency application, the statement of Monti makes sense. See Margaret Bloom, *supra* note 86, at 552 (mentioning that two-thirds of the inspections were based on leniency applications)

¹³¹ See Stephan, *supra* note 11, at 5-6

¹³² See HARDING AND JOSHUA, *supra* note 11, at 219

¹³³ Johan Carle, Pervan Lindeborg and Emma Segenmark, *The New Leniency Notice*, 23 ECLR 265 (2002)

Somewhat contradictory to his previous statement, Monti acknowledged that better results in this waiting game could be achieved by giving better incentives to the undertakings¹³⁴. However, it turned out that the way in which the incentives were conceptualized, was wrong.

7.3. Discretion or Not, That is the Question in Japan

The Japanese legislator obviously did not make the same mistakes as the DOJ or the Commission did when they were drafting respectively the 1978 Leniency Policy or the 1996 Leniency Notice. Obtaining immunity has not been conditioned with a second-guessing of the circumstances by the JFTC for whatever reason there may exist. Equally, by inscribing fixed percentages of reduction, the JFTC does not have any discretion in relation to the degree of leniency. A first successful applicant will be guaranteed immunity¹³⁵. However, the apparent absence of discretion may not cause us to turn a blind eye on other elements. One of the most important elements is the criminal procedure. It should not be forgotten that the leniency only applies to the surcharge and not to the criminal penalties¹³⁶.

The public prosecutor can only file criminal prosecutions in Japan. In case of the AML, the public prosecutor cannot start a criminal prosecution, unless the JFTC has filed a criminal accusation. The JFTC has exclusive power to do so¹³⁷. 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

¹³⁴ See Monti, *supra* note 131 (stating that "this fight can produce better results if companies are given a greater incentive to denounce this kind of collusion.")

¹³⁵ See Art. 7-2 (7) AML

¹³⁶ See INOUE, *supra* note 16, at 113-4; Cf. Kawai and Shimada, *supra* note 75, at 89-90 (stipulating that this may be problematic)

¹³⁷ See Art. 96 AML

been made. Not the JFTC, but the public prosecutor decides in this stage who among the cartel participants should be prosecuted¹³⁸.

Aware that this discretion of both the JFTC and the public prosecutor may prevent cooperation under the Japanese Leniency Program, the Ministry of Justice has declared that the public prosecutors need to respect decisions of the JFTC¹³⁹. The decision to be taken 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 more likely in case of second and third applicants¹⁴⁰. In any case, the JFTC will assess whom to accuse in close cooperation with the Public Prosecutor's Office. Beyond this level, namely in the prosecutorial one, the discretion is replaced by a declaration.

For the time being, the JFTC has only once filed a criminal accusation after an entrepreneur was granted immunity. The case involved 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 also criminal sanctions are imposed¹⁴¹. When the JFTC decided to proceed with the criminal accusation, they expressly stated that the first applicant under the Leniency Program, being Hazama, would not be part of the criminal accusation¹⁴².

¹³⁸ See Uesugi (2006), *supra* note 113, at 7; Uesugi (2005b), *supra* note 73, at 12

¹³⁹ See Uesugi (2005b), *supra* note 73, at 12; See also INOUE, *supra* note 16, at 114; KANAI, KAWAHAMA, AND SENSUI, *infra* note 228, at 451-2; SHIRAIISHI, *infra* note 231, at 506-7; Uesugi 2007, *supra* note 8, at 80-1; SADAARI SUWAZANO, SHIRAKATTA DEWA SUMANAI KAISEIDOKU-KINHO [Not Forgiven to Say Not yet Learned the Amendment of the Japanese Antimonopoly Law] 50 (2005)

¹⁴⁰ See Uesugi (2005b), *supra* note 73, at 12

¹⁴¹ See Japan Fair Trade Commission, *The JFTC Filed a Criminal Accusation on the Bid-Rigging over Subway Construction Procured by the City of Nagoya* (Press Release, 28 February 2007), available at <http://www.jftc.go.jp/e-page/pressreleases/2007/February/070228.pdf> (last visited 8 August 2008)

¹⁴² See JFTC, *supra* note 75; The case concerned is: nagoya shiei chikatestu ni kakaru doboku kouji no nyuusatsu dangou jiken ni kakaru kokuhatsu kankei [*Indictment related to a bid-rigging case of public works for Nagoya City's subway*]

8. CLEAR CONDITIONS FOR QUALIFICATION

8.1. A Forgotten Aspect of Leniency Programs

Leniency programs have often been evaluated on the basis of incentives. Some scholars have discussed the need to provide incentives once investigations have started¹⁴³. Others have focused on the size of the incentives and how many firms should be able to enjoy them¹⁴⁴. An issue often returning in the literature is the discretion given to competition authorities in relation to the incentives. The focus of this discussion was mainly on the need to grant immunity automatically¹⁴⁵. Giving immunity automatically, implies that a discussion has to be held on the conditions attached to the incentives. Whereas law and economic literature tends to diminish the role of other conditions¹⁴⁶, recent legal literature, followed by the European Commission, tends to take a different approach¹⁴⁷.

Given that leniency is a strategic game based on information, this is a positive tendency. Anything that would make a firm hesitate is not favorable for a successful leniency program¹⁴⁸. The guiding principle should be certainty of the outcome. Scott Hammond puts the principle in the following terms:

How do you create an enforcement regime that causes management to conclude after it discovers a violation that it has but one viable choice – the company must self-report and cooperate or face certain and severe pen-

¹⁴³ See, e.g., Bigoni, Fridolfson, Le Coq and Spagnolo *supra* note 50, at 24; Motta and Polo (2001), *supra* note 53, at 347; Spagnolo (2000a), *supra* note 37, at 6; Motta and Polo, *supra* note 14, at 15

¹⁴⁴ See, e.g., Spagnolo (2005), *supra* note 50, at 18-9; Wouter P.J. Wils, *supra* note 37, at 44-7; Ellis and Wilson, *supra* note 52, at 23; Spagnolo (2000a), *supra* note 37, at 12; Spagnolo (2000b), *supra* note 50, at 37; Motta and Polo, *supra* note 14, at 21

¹⁴⁵ See, e.g., Stephan, *supra* note 11

¹⁴⁶ See, e.g., Spagnolo (2005), *supra* note 50, at 27-30 (being one of the few exceptions discussing extra conditions outside the theoretical model)

¹⁴⁷ See Sandhu, *supra* note 12, at 148; European Commission (2006), *supra* note 12

¹⁴⁸ See Julian M. Joshua, *The Uncertain Feeling: The Commission's 2002 Leniency Notice*, in EUROPEAN COMPETITION LAW ANNUAL 2006: ENFORCEMENT OF PROHIBITION OF CARTELS 511, 516 (Claus Dieter Ehlermann and Isabelle Atanasiu eds., 2007)

alties?¹⁴⁹

Certainty of outcome can already be reached by taking away discretion from the competition authority in relation to immunity. However, it should be clear that other provisions in the process may have an effect on the degree of certainty. Again, Hammond points this out with the following statement:

Prospective amnesty applicants come forward in direct proportion to the predictability and certainty of whether they will be accepted into the program. If a company cannot accurately predict how it will be treated as a result of a corporate confession, our experience suggests that it is far less likely to report its wrongdoing, especially where there is no ongoing government investigation. Uncertainty in the qualification process will kill an amnesty program¹⁵⁰.

Not only the incentives will have to be spelled out clearly, also the standards for qualifying, and their operation and application have to be transparent. The European Union, especially, has been giving quite a lot of attention to this issue. This could be partly explained by the fact that their leniency program is much more complicated than the one applicable in the United States. At the end, the European Union has to distinguish between the different categories of leniency provided, both in the pre- and post-investigation stage.

8.2. Overview of Conditions

A leniency program is a complex web of conditions. The broader the scope of the leniency program, the more complex this web will be. Despite this

¹⁴⁹ Scott D. Hammond, *Cornerstones of an Effective Leniency Program* (Speech presented ICN Workshop on Leniency Programs, 22-23 November 2004), available at <http://www.usdoj.gov/atr/public/speeches/206611.htm> (last visited 8 August 2008) (Hammond (2004))

¹⁵⁰ Id.

complexity, it is possible to divide the conditions into several main categories: information, order, time, obligations and cartel participants.

Leniency programs are conceptualized in order to get information about illegal cartel activity. The US 1993 Leniency Policy stipulates in relation to information that the DOJ does not have received the information yet; the applicant reports it with candor and completeness¹⁵¹. In a post-investigation stage, the information should be likely to result in a sustainable conviction¹⁵². The EU 2006 Leniency Notice is much more detailed. The first information submitted should enable the Commission to carry out targeted inspections¹⁵³ or to find an infringement of article 81¹⁵⁴ on the condition that the Commission does not have enough evidence yet to pursue either of them¹⁵⁵. The information should be complete¹⁵⁶. Further, the information should not be falsified nor disclosed to other persons¹⁵⁷. For subsequent applications, the information should represent a significant added value¹⁵⁸.

The time element in a leniency program points at the stage in which the applicant files for leniency. There are two stages; the application is filed either in the pre-investigation stage or in the post-investigation stage. The 1993 Leniency Policy does not stipulate the element making the difference between both stages, but these stages are clearly separated¹⁵⁹. In the 2006 Leniency Notice, the distinction between the two stages is less clearly described. The post-investigation stage is indirectly pointed at by stating that immunity can be

¹⁵¹ See Department of Justice (1993), *supra* note 81, ¶ A, 1 and 3

¹⁵² See *id.* at ¶ B, 2

¹⁵³ See European Commission (2006), *supra* note 12, point 8 (a)

¹⁵⁴ See *id.* at point 8 (b)

¹⁵⁵ See *id.* at point 10 and 11

¹⁵⁶ See *id.* at point 12 (a)

¹⁵⁷ See *id.* at point 12 (a) and (c)

¹⁵⁸ See *id.* at point 24

¹⁵⁹ See Department of Justice (1993), *supra* note 81, ¶ A and B

obtained if the applicant provides information leading to the establishment of an infringement of article 81 EC, presuming that this can happen even after the Commission has done a targeted investigation¹⁶⁰. Hence, a targeted investigation seems to be a lever between a pre- and a post-investigation stage.

Within the time element, it is important to know the order in which the applications are submitted to the competition authorities. The 1993 Leniency Policy determines that the first applicant can obtain immunity, whether it is in the pre- or post-investigation stage¹⁶¹. Similarly, the 2006 Leniency Notice mentions that the first applicant will be able to obtain immunity¹⁶². For the second, third and any other applicant, only a reduction of the penalty is available¹⁶³. Both systems provide for a marker system to secure the first position in an immunity application¹⁶⁴. For a reduction application in the EU, the order will be provisionally determined based on the order of submission on the condition that the information contains significant added value¹⁶⁵. The order is final at the moment takes the final decision¹⁶⁶.

Within the obligation part, several conditions are grouped together. Some of the obligations are related to the illegal activity directly. The 1993 Leniency Policy requires the applicant to prompt and effective actions to terminate the illegal activity¹⁶⁷. Similarly, the 2006 Leniency Notice requires the applicant to have ended its involvement in the alleged cartel immediately following its

¹⁶⁰ See European Commission (2006), *supra* note 12, point 8 (b)

¹⁶¹ See Department of Justice (1993), *supra* note 81, ¶ A, 1 and ¶ B, 1

¹⁶² See European Commission (2006), *supra* note 12, point 8

¹⁶³ See *id.* at point 23

¹⁶⁴ See Sandhu, *supra* note 12, at 150-2 (describing the EU marker which has been included in point 15 of the 2006 Leniency Notice); Klawiter, *supra* note 67, at 498-9 (describing the US marker)

¹⁶⁵ See European Commission (2006), *supra* note 12, point 29; See also Bertus Van Barlingen and Marc Barennes, *The European Commission's 2002 Leniency Notice in Practice*, 3 COMPETITION POLICY NEWSLETTER 6, 15 (2005)

¹⁶⁶ See *id.* at point 30

¹⁶⁷ See Department of Justice (1993), *supra* note 81, ¶ A, 2 and ¶ B, 3

application¹⁶⁸. The obligations in relation to information have been discussed above. Other obligations relate to the cooperation with the competition authorities. Both the 1993 Leniency Policy and the 2006 Leniency Notice demand continuous cooperation with the competition authorities¹⁶⁹. Still another obligation relates to the injured parties, be it only in the United States. The 1993 Leniency Policy asks for restitution of injured parties where possible¹⁷⁰.

In relation to the cartel participants, both the 1993 Leniency Policy and the 2006 Leniency Notice have provisions in relation to coercion. The programs do not allow immunity to be given to corporations that have coerced other parties to participate in the cartel¹⁷¹. The 1993 Leniency Policy has also one in relation to the ringleader. It stipulates that the leader or the originator of the illegal cartel activity can also not claim immunity¹⁷². In the post-investigation stage this is put under the general concept of unfairness¹⁷³. The latter does not limit the scope of application for the ringleaders, but it does so for undertakings that have been coercing others to undertakings to participate. These undertakings will only be eligible to apply for reduction but not for immunity.

8.3. Problematic Conditions

The above-described conditions already reflect the experimentation with leniency programs for about three decades. Some of the conditions have not been problematic at all from the beginning. The conditions on coercion have been part of the earliest leniency programs of the US, the 1978 Leniency Policy, and the EU, the 1996 Leniency Policy, without much change. Similarly, the

¹⁶⁸ See European Commission (2006), *supra* note 12, point 12 (b)

¹⁶⁹ See European Commission (2006), *supra* note 12, point 12 (a); Department of Justice (1993), *supra* note 81, ¶ A, 3 and ¶ B, 4

¹⁷⁰ See Department of Justice (1993), *supra* note 81, ¶ A, 5 and ¶ B, 6

¹⁷¹ See European Commission (2006), *supra* note 12, point 13; Department of Justice (1993), *supra* note 81, ¶ A, 6 and ¶ B, 7

¹⁷² Department of Justice (1993), *supra* note 81, ¶ A, 6

¹⁷³ See *id.* at ¶ B, 7

obligation to terminate the illegal activity and to continuously cooperate with the competition authorities has been part of the leniency programs since they were established in the US and the EU. The conditions in relation to information and order have caused more controversy and uncertainty for the application of the leniency programs. Besides, some concepts, such as ringleader and originator, have a history track of changes.

8.3.1. *Conditions for Information*

The problems in relation to the information provisions in the respective leniency programs are twofold. On the one hand, the applicant has to overcome the burden of finding out whether the illegal cartel activity has already been reported on or not. On the other hand, the applicant has to assess the meaning of general terms as “illegal activity,¹⁷⁴” “sustainable conviction,¹⁷⁵” “targeted inspection,¹⁷⁶” “infringement of art. 81,¹⁷⁷” or “significant added value.¹⁷⁸” During the nearly three decades of experimenting with leniency, the US and the EU have learned a lot in this regard. Especially the EU has been paying attention to these aspects, as it revised its Leniency Notice in 2006 to reflect the necessity of creating transparency in relation to information.

The 1993 Leniency Notice requires previously unknown information from the first applicant in order to consider immunity from penalties. Something similar is inscribed in the 2006 Leniency Notice. The Commission may have already enough evidence for adopting the decision to carry out a dawn raid or for finding an infringement of art. 81 EC, and so nullifying the right to obtain immunity. If the applicant is not aware of the deal that is on the table, the leniency applica-

¹⁷⁴ See *id.* at ¶ A, 1

¹⁷⁵ See *id.* at ¶ B, 2

¹⁷⁶ See European Commission (2006), *supra* note 12, point 8 (a)

¹⁷⁷ See *id.* at point 8 (b)

¹⁷⁸ See *id.* at point 24

tion will be a poker game¹⁷⁹. However, it will be a distorted poker game. The competition authority would play with its cards close to its chest, while the applicant has to put all its cards on the table¹⁸⁰. Much has been done to avoid this kind of situation, both in the US and the EU.

The US DOJ's approach towards this problem has been to allow anonymous non-prejudicial immunity inquiries¹⁸¹. The inquiry only needs to reveal information about the particular industry or a specific area of economic activity¹⁸². The EU approach is different¹⁸³. Anonymous inquiries are not accepted¹⁸⁴. Instead, the Commission has devised a hypothetical application mechanism. This system exists since the 2002 Leniency Notice¹⁸⁵. Unlike the US inquiry, the hypothetical application will need to supply quite a lot detailed information amounting to the level of evidence¹⁸⁶. Whether one system should be preferred above the other, depends on the conception of the leniency program. Anonymous inquiries may result in an abuse when more firms can enjoy lenient treatment, while in a system creating a race to the courthouse door it may work perfectly.

Generally formulated conditions related to information constitute the other major problem. Again, each of the investigated jurisdictions has such concepts

¹⁷⁹ See Julian Joshua and Peter Camesasca, *Cartels and Leniency: Hold or Fold? The Commission's New Leniency Policy*, GCR ANTITRUST REVIEW 1 (2005); See also Joshua, *supra* note 148, at 520

¹⁸⁰ See Joshua, *supra* note 148, at 520

¹⁸¹ See D. Jarret Arp and Christof R. A. Swaak, *Immunity from Fines for cartel Conduct under the European Commission's New Leniency Notice*, 16 ANTITRUST 59, 63 (2002)

¹⁸² See *id.* at 63

¹⁸³ See European Commission (2006), *supra* note 12, point 19

¹⁸⁴ See Van Barlingen, *supra* note 89, at 17 (opining that anonymous inquiries would undermine the cartel enforcement completely as the cartel partners can check whether the cartel has been reported or not. In the latter case, they can simply walk away without undertaking any further action.)

¹⁸⁵ See European Commission 2002, *supra* note 9, at point 16; See also Sophie Germont and Ole Anderson, *Public Enforcement by the Commission: A Strategic Perspective*, in EC COMPETITION LAW: A CRITICAL ASSESSMENT 675, 688 (Guiliano Amato and Claus-Dieter Ehlermann eds., 2007)

¹⁸⁶ See Van Barlingen, *supra* note 89, at 19 (indicating that a list of evidence has to be presented. The actual application will then compare the submitted evidence with the previously hypothetical application's list.)

in its leniency programs. The 1993 Leniency Policy has such a general concept in the pre-investigation stage, “illegal activity”, and in the post-investigation stage, “sustainable conviction.” With “targeted investigation,” “infringement of art. 81,” or “significant added value,” the 2006 Leniency Notice has more generally formulated conditions. The two previous versions of the Leniency Notice had similar conditions included. However, unlike the 2006 Leniency Notice, the previous versions did not elaborate on the meaning of these generally formulated conditions. A case-by-case evaluation had to prosper the necessary precedents¹⁸⁷. Judging from the Commission’s reaction in 2006, this work method did not provide the necessary clarity and certainty.

Left with a great deal of discretion, the Commission had to be “vigilant to ensure consistency.¹⁸⁸” Consistent treatment is not always easy to pursue. The EU practice has shown that the distinction between concepts started to blur, by asking more evidence than required under the one condition and less than required under the other condition¹⁸⁹. Therefore, the DOJ has adopted a two-fold policy. First, the initial amount of information does not need to be more than a “good cartel story,¹⁹⁰” which will expand, mainly driven by the DOJ, later on¹⁹¹. Second, the DOJ will “err in favour of the applicant where there is a genuinely close call.¹⁹²” The Commission has never made statements in this

¹⁸⁷ See Joshua, *supra* note 148, at 517

¹⁸⁸ *Id.* at 517

¹⁸⁹ See *id.* at 517-8 (stating that “practitioners coming in under 8(a) are finding that they are sometimes required by officials to provide far more evidence than what ought to suffice to enable the Commission to mount a dawn raid.” They further refer to the fact that “if a dawn raid produces only slim pickings, statements originally made by the amnesty applicant’s lawyers to support the 8 (a) application may well be used in the Statement of Objectives as a proof of the substantive violation.”)

¹⁹⁰ *Id.* at 519; See also Katalin J. Cseres, Maarten Pieter Schinkel and Floris O.W. Vogelaar, *Law and Economics of Criminal Antitrust Enforcement: An Introduction*, in CRIMINALIZATION OF COMPETITION LAW ENFORCEMENT: ECONOMIC AND LEGAL IMPLICATIONS FOR THE EU MEMBER STATES 1, 4 (Katalin J. Cseres, Maarten Pieter Schinkel and Floris O.W. Vogelaar eds., 2006)

¹⁹¹ See Joshua, *supra* note 148, at 519

¹⁹² *Id.* at 517; See also Hammond (2004), *supra* note 149 (indicating that “in order for a Leniency Program to work, an antitrust authority must do more than just publicize its policies and

regard. Instead, it has reformed its 2002 Leniency Notice in 2006 to create “upfront certainty on the part of a would-be leniency applicant as to the information and evidence required by the Commission.¹⁹³” Conditions like “targeted investigation,¹⁹⁴” “infringement of art. 81 EC,¹⁹⁵” and “significant added value.¹⁹⁶” By clarifying these concepts, the time elements has become much more transparent than before.

Information that has to be submitted to the competition authorities in the US and the EU differs considerably. Whereas the US 1993 Leniency Policy reaches certainty by its simplicity, the EU 2006 Leniency Notice achieves it by a detailed description of what has to be submitted. This complexity has been extended to the issue of inquiring whether the Commission already has enough information about the cartel and so to check whether the applicant can still enjoy immunity. This can be explained to avoid any kind of abuse. However, the complexity surrounding the submission of information could explain why the Commission still attracts less leniency applications.

8.3.2. Order of Applications

A firm calculating whether it is profitable to defect the cartel needs to be sure

educate the public. It has to be willing to make the ultimate sacrifice for transparency - the abdication of prosecutorial discretion.”)

¹⁹³ Sandhu, *supra* note 12, at 153

¹⁹⁴ See European Commission (2006), *supra* note 12, point 9. This point stipulates that the undertaking needs to prepare a corporate statement giving a detailed description of the cartel agreement (aim, activities, functioning, market scope, cartel participants), of the leniency applicant, and of the other competition authorities that will be approached). Further, all evidence in possession of the applicant has to be added to this statement.

¹⁹⁵ See *id.* at point 11. This point stipulates that the undertaking needs to prepare a corporate statement giving a detailed description of the cartel agreement (aim, activities, functioning, market scope, cartel participants), of the leniency applicant, and of the other competition authorities that will be approached). Further, incriminating evidence has to be added to this corporate statement.

¹⁹⁶ See *id.* at point 25. This point stipulates that written evidence from the period in which the illegal cartel was active has greater value than subsequently established evidence. Incriminating evidence prevails above general or indirect evidence. Compelling evidence will also have more significant added value. See Sandhu, *supra* note 12, at 153-4 (stating that a marker for the reduction applications would create even more incentives)

that he can win the race to the courthouse door. In other words, the leniency procedure needs to offer the firm the certainty that, when it makes the initial step, the position secured by this step does not get lost. The initial step may have to be taken in quite a rush. Yet, in order to obtain immunity, the firm has to come forward with enough information related to the illegal cartel. The hastiness, in which the initial step had to be taken, may have caused a lack of time to prepare the information as evidence sufficiently. The incompleteness of the application may not be a problem at first. However, when another firm realizes what happened, it may be inclined to submit an application containing more relevant information. Due to the high value of the second applicant's information, he may supersede the first application. Such a situation can occur if the initial step does not secure the order of application.

The 1996 and 2002 Leniency Notice reflected this situation¹⁹⁷. Undertakings applying for leniency derived benefit from submitting extensively documented leniency application to the Commission. Incomplete leniency applications were dangerous in two ways. First, the application could have been rejected on the ground that it did not fulfill all the substantive conditions¹⁹⁸. Second, another undertaking may be getting ahead and offer a “smoking gun¹⁹⁹” to the Commission²⁰⁰. Commission officials have pointed out that in the latter case it is the Commission's practice that “the moment the second applicant submits evidence, the first applicant can no longer supplement its application with further evidence. Its application will be evaluated on the basis of the evidence it had submitted until the moment the second application was made.²⁰¹” This uncertainty, combined with generally formulated conditions related to information,

¹⁹⁷ See European Commission (2002), *supra* note 9, at ¶ E; European Commission (1996), *supra* note 11, at point 12-19

¹⁹⁸ See Joshua, *supra* note 148, at 522

¹⁹⁹ *Id.* 148, at 522

²⁰⁰ See *id.* at 522

²⁰¹ Barlingen and Barennes, *supra* note 165, at 10

have without a doubt scared off risk averse undertakings to make use of the leniency program.

The US practice differs in that it allows the applicant to put down a marker, a sign keeping a place in the queue. This marker can be easily set. A call to the Antitrust Division of the DOJ requesting a marker with the explanation that the corporation needs more time to collect the evidence, is usually sufficient²⁰². The marker will be granted, almost always together with a time limit. Within this time limit, the applicant has, in principle²⁰³, to perform his promises; this is collecting and arranging information allowing him to make a proffer. The proffer is basically an outline of what the applicant is able to offer, and it does not need to be evidence²⁰⁴. At the end of the proffer, a conditional leniency letter can be asked. The actual grant of immunity will follow in short order²⁰⁵. In other words, evidence is looked for after the granting of immunity and largely driven by the DOJ²⁰⁶.

A marker system contributes to the predictability of a leniency program. Several scholars have therefore argued that a similar system should be introduced in the Leniency Notice. This happened in 2006²⁰⁷. The marker system that the Commission introduced has a set of objective conditions to be fulfilled. Yet, they are not sufficient to guarantee that the marker will be granted. This is reflected in two elements. First, the Commission *may* grant a marker²⁰⁸. Second, the applicant has to *justify* its request for the marker²⁰⁹.

²⁰² See Klawiter, *supra* note 67, at 499; Joshua, *supra* note 148, at 519

²⁰³ See Klawiter, *supra* note 67, at 499 (stating that there have been cases in which the time limit attached to a marker has been extended. However, this will be most unlikely when there is a second applicant that is willing to come forward with information)

²⁰⁴ See Joshua, *supra* note 148, at 519; See also Michael J. Reynolds and David G. Anderson, *Immunity and Leniency in EU Cartel Cases: Current Issues*, 27 ECLR 82, 85 (2006)

²⁰⁵ See Joshua, *supra* note 148, at 519

²⁰⁶ See *id.* at 519

²⁰⁷ See European Commission (2006), *supra* note 12, at point 15

²⁰⁸ See *id.* at point 15

²⁰⁹ See *id.* at point 15

The former will likely have an effect on risk-averse undertakings. Rather than applying for a marker, they probably prefer to make a full immunity application. In doing so, they may have lost the race or at least delayed the whole process. It is clear that the race to the regulator is undermined²¹⁰. The latter puts the applicant in a defensive position. What else than disclosing a cartel could justify the request for a marker? How detailed does the applicant have to describe his inability to come forward with the necessary information at the moment?²¹¹ For sure, without much more clarity on this aspect, undertakings may be dissuaded from approaching the Commission.

8.3.3. Some Conceptual Problems

When construing the leniency programs, the competition authorities systematically rejected the possibility of obtaining immunity for firms that coerced other firms to participate²¹². Only the United States Leniency Policy does the same for firms that at the origin of the cartel²¹³. A system allowing for the opposite would enable these firms to withhold any kind of relevant evidence from the other cartel participants and, when the objectives of the cartel are achieved, they would be the only ones who could apply for leniency²¹⁴. The 1993 Leniency Policy excludes three types of corporations, a coercer, a leader or an originator²¹⁵. In the 2006 Leniency Notice, only a coercer is excluded, and this only for immunity²¹⁶. This is in sharp contrast with the earliest versions of the Leniency Notice. Besides the coercer, the 1996 Leniency Notice also rejected immunity for the instigator or an undertaking with a determining role in the

²¹⁰ See Sandhu, *supra* note 12, at 151

²¹¹ See *id.* at 152

²¹² See European Commission (2006), *supra* note 12, at point 13; Department of Justice (1993), *supra* note 81, ¶ A, 6 and ¶ B, 7

²¹³ See Department of Justice (1993), *supra* note 81, ¶ A, 6 and ¶ B, 7

²¹⁴ See Bigoni, Fridolfson, Le Coq and Spagnolo *supra* note 50, at 20-1; See also Leslie, *supra* note 137, at 478

²¹⁵ See Department of Justice (1993), *supra* note 81, ¶ A, 6 and ¶ B, 7

²¹⁶ See European Commission (2006), *supra* note 12, at point 13

illegal activity²¹⁷.

The 1996 Leniency Notice has been criticized for the inherently ambiguous concepts and potentially overbroad. Rarely is it possible to give a clear-cut answer to whom the initiator of an undertaking is. This is especially the case in a cartel of two or three undertakings. Besides, playing a determining role in an illegal cartel could be explained as any cartel participant who has not been coerced to participate²¹⁸. In order to eliminate subjectivity, the Commission has erased any reference to these two concepts in its Leniency Notice in 2002 and kept it so in the 2006 version²¹⁹.

The United States took a different approach²²⁰. Rather than revising its 1993 Leniency Policy, the DOJ has clarified the concepts of leader and originator. The 1993 Leniency Policy only disqualifies *the* leader or *the* originator from immunity, meaning that in cases with more than one leader or more than one originator the disqualifier does not apply²²¹. Whether this clarification is satisfying, is doubtful, especially reading the words of Hammond in relation to the changes made in the EU Leniency Notice:

Fortunately, the EC's new program narrows the class of cartel participants which would be ineligible under the program and makes it easier for companies to predict with certainty whether they qualify for full immunity.

²¹⁷ See European Commission (1996), *supra* note 11, at ¶ B, e

²¹⁸ See Arp and Swaak, *supra* note 181, at 61

²¹⁹ See European Commission (2002), *supra* note 8, at 11 (c); European Commission (2006), *supra* note 12, at point 13

²²⁰ See Arp and Swaak, *supra* note 181, at 61

²²¹ Gary R. Spratling, *The Corporate Leniency Policy: Answers to Recurring Question* (Speech presented at the ABA Antitrust Section 1998 Spring Meeting, 1 April 1998), available at <http://www.usdoj.gov/atr/public/speeches/1626.htm> (last visited 8 August 2008); Scott D. Hammond, *A Review of Recent cases and Development in the Antitrust Division's Criminal Enforcement Program* (Speech presented at The 2002 Antitrust Conference: Antitrust Issues In Today's Economy, 7 March 2002), available at <http://www.usdoj.gov/atr/public/speeches/10862.htm> (last visited 8 August 2008) (Hammond (2002))

The revised program does not exclude from full immunity those cartel participants that played an instigating or determining role, rather it simply requires that the leniency applicant not have taken steps “to coerce other undertakings to participate in the infringement.” This change eliminates the uncertainty that existed in the old program and creates a greater opportunity for companies to qualify for full immunity²²².

Shortly, the above-mentioned concepts inject elements of uncertainty in the strategic game. The calculation about whether to apply for leniency will be aggravated. Each firm has to assess whether their activity would fall outside the category of cartel participants excluded for immunity in the respective leniency programs²²³.

8.4. Short and Clear Conditions in Japan

8.4.1. *Conditioned Leniency*

Immunity from or reduction of the surcharge does not come for free. The Japanese Leniency Program has several conditions attached to lenient treatment. Depending on the degree of leniency desired, the entrepreneur needs to come forward in a certain order and independently from any other entrepreneur. At the time of coming forward, he needs to submit reports and other materials regarding the illegal cartel activity. Once the activity has been reported and the investigation has started, the applicant has to stop the illegal conduct and provide additional assistance in the form of information upon the request of the JFTC. None of the information provided may turn out to be false. Further, the applicant may not have coerced others entrepreneurs to participate or prevented an entrepreneur to cease such a conduct²²⁴.

²²² Hammond (2002), *supra* note 220

²²³ See Arp and Swaak, *supra* note 181, at 63

²²⁴ See *supra* Paragraph 2

The US and EU experience in mind, it is obvious that similar issues may arise in relation to the Japanese Leniency Program. In relation to information, the AML only requires reports and other materials. Besides the fact that they have to be related to the illegal cartel activity and they should not be false, the AML is silent about the required information. Even the need that this information needs to be unknown to the JFTC is not stipulated. The AML seems to be ambiguous about the rules governing the order in which the applicants have submitted their leniency application. Unlike the US and similar to the EU, the AML has avoided reference to any language in relation to the ringleader or the originator.

8.4.2. *Reports and Materials as Information*

The AML requires the applicant to submit true reports and materials in relation to the illegal activity. By formulating the information request in this way, the EU Leniency Notice with its complex design has not been followed. Nothing in the AML refers to enabling a dawn raid, finding an infringement or significant added value. However, due to the explicit reference to reports and materials, the Japanese Leniency Programs seems to have a broader scope of requirements than the US 1993 Leniency Policy. The latter only requires reporting, which then has been explained as offering a good cartel story. If the Japanese Leniency Program requires more than this good cartel story, the question of what is necessary to submit, remains.

A start of the answer is given in the *Rules on Reporting and Submission of Materials Regarding Immunity from or Reduction of Surcharges* (Leniency Rules)²²⁵. The Leniency Rules determine that in a pre-investigation stage two reports have to be submitted²²⁶. The first report to be submitted is a summary

²²⁵ See *supra* text accompanying note 24

²²⁶ See Art.1 and 3 Leniency Rules. The fact that reports have to be submitted is distinct

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 participant, the geographical reach, and the influence on the price. Other types of infringements may need some infringement specific information, such as the contract-awarding agency in case of bid-rigging²²⁷.

The second report, for which the JFTC determines a deadline after submitting the first report, is more extensive²²⁸. Besides repeating the content of the first report, information in relation to the individual involved in the illegal cartel activity has to be provided. This information extends beyond the individuals of the applicant to the individuals of the entrepreneurs participating in the cartel. As a last point, the second report expects the applicant to state the material it has in relation to the illegal cartel activity²²⁹. Being again vague, the instructions for completing the second report indicate that these materials should offer proof of the statements made in relation to the existence of the cartel and the involvement of the individuals. The materials can be memorandums of meetings, correspondence with other entrepreneurs or written reports in relation to the cartel activity²³⁰. It is sufficient that these materials contain information

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; Barlingen and Barennes, *supra* note 165, at 9-10; Van Barlingen, *supra* note 89, at 19-20; Arp and Swaak, *supra* note 181, at 63-64; Cf. Uesugi (2005b), *supra* note 73, 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 be made with whistleblowing)

²²⁷ See Form No. 1 and Instructions for Completing this Form, attached to the Leniency Rules, *supra* text accompanying note 24

²²⁸ See Art. 2 Leniency Rules; See also TAKASHI KANAI, NOBORU KAWAHAMA, AND FUMIO SENSUI, *DOKUSEN KINSHI HOU [ANTIMONOPOLY LAW]* 450 (2nd ed., 2006) (noting that the deadline is usually two weeks)

²²⁹ See Form No. 2 and Instructions for Completing this Form, attached to the Leniency Rules, *supra* text accompanying note 24

²³⁰ See *id.*

sufficient to start investigations and not to proof an infringement²³¹.

The reports are quite clear in their outset. The reports aim at obtaining information in relation to the existence of the cartel and the cartel participants. Any information that can be the start of proof for both elements, will enable a cartel participant to apply for leniency. This can be done irrespective of whether the JFTC already has information in this regard. All this applies to the post-investigation stage as well, even though this stage has only one document to report²³². Hence, unlike in the United States and in the European Union, an applicant in Japan does not have to engage in a distorted poker game. Even when the JFTC has a good hand before the applicant applies, nothing seems to prevent that an applicant still can win the game. The Japanese Leniency Program embraces a basic idea of banning all discretion regarding information.

This basic idea is also reflected in the information required for subsequent leniency applications. Whereas the 1993 Leniency Policy demands information leading to a sustainable conviction and the 2006 Leniency Notice requests significant added value, the Japanese Leniency Program does not mention anything close to these provisions²³³. The JFTC lacks any discretion to in deciding whether to accept a leniency application or not. It is not able to assess the value of the information submitted. Therefore, it is quite possible that the first to submit has less valuable information than the second or the third applicant. One consequence of this lack of discretion is that a second applicant

²³¹ See TADASHI SHIRAISHI, DOKUSEN KINSHI HOU [ANTIMONOPOLY LAW] 490-1 (2006); Uesugi (2007), *supra* note 8, at 81; Cf. Ezaki, *supra* note 226, at 34-5 (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)

²³² See Form No. 3 and Instructions for Completing this Form, attached to the Leniency Rules, *supra* text accompanying note 24 (This one document basically combines the two documents from the pre-investigation stage, but in a different order.)

²³³ See Uesugi (2007), *supra* note 8, at 81

or even a third can never become the first applicant, unless the first applicant fails to submit its second report within the imposed deadline. In turn, this may discourage applicants when they know they are not the first²³⁴.

Reverting back to the data on the Japanese Leniency Program's cases, it was indeed pointed out that immunity was seldom followed by a reduction of 50% of the surcharge. Instead, the second and third entrepreneur usually enjoyed a 30% reduction of the surcharge in the post-investigation stage²³⁵. This tendency seems to confirm the fact that discouragement for applying as second or third in the pre-investigation stage may exist. However, there may be more at stake. If nothing allows the JFTC to assess the value of the information, cartel participants may be gambling on the fact that not all information is revealed. Full reporting is, unlike in the United States and the European Union, not obliged. This gives another incentive for cartel participants to start a waiting game until the JFTC starts its investigations. It is worth to wait until the moment there is no escape possible.

The waiting game of the other cartel participants may explain why the vast amount of applications, the JFTC received over 150 applications in two years, did not result in a tremendous growth of cases. The lack of nearly any requirement in relation to the amount of information²³⁶, combined with the clarity of the existing provisions, obviously results in many applications. However, not all these applications will have the necessary information to result in a case. If, due to the waiting game of the other cartel participants, no further information is given and the JFTC investigations are not successful, the leniency application will not result in a case.

²³⁴ See *id.* at 81

²³⁵ See *supra* Paragraph 4.2. and 5.2.

²³⁶ See Uesugi (2007), *supra* note 8, at 80 (indicating that there is a reasonably low level of information required to obtain immunity.)

8.4.3. *The Order of Application*

The order in which the leniency applications are submitted to the JFTC is not only important to determine the degree of leniency, but also to receive protection from criminal sanctions. Unlike in the United States, the applicant cannot just call the JFTC to place its marker. In Japan, a written application has to be faxed to the JFTC²³⁷. A fax prevents simultaneous applications and it enables to determine the order objectively²³⁸. The order in which the faxes arrive is the first step in securing the applicants' positions. Upon receipt of the fax, the applicant will receive a notice indicating the due receipt of the leniency application²³⁹. This receipt does not indicate that the position is safely secured. Neither is the notice of acceptance of the second report a guarantee²⁴⁰. The applicant will only be secured of his immunity or reduction when the JFTC order the other cartel participants to pay their surcharge²⁴¹.

The requirements attached to obtaining a marker in Japan are objective, something which could not be said about the 2006 Leniency Notice's marker system. Once the marker has been said, the JFTC does not have the ability to second-guess the position²⁴². Only the applicant is master of his position once the JFTC has conditionally accepted it. The applicant will have to submit, within the imposed deadline, the second report together with evidence enabling the JFTC to start investigations. Further, the applicant is required to cooperate further with the JFTC. A failure of the applicant to do so, has negative implications for his position²⁴³. Hence, once the applicant has a fairly good view on the possibility to obtain a certain position, it all depends on him to

²³⁷ See Art. 1 Leniency Rules

²³⁸ See Uesugi (2007), *supra* note 8, at 81

²³⁹ See Art. 2 Leniency Rules; See also UESUGI AND YAMADA, *supra* note 10, at 134

²⁴⁰ See Koma and Inoue, *supra* note 35, at 5

²⁴¹ See Inoue, *supra* note 16, at 115

²⁴² See Uesugi (2007), *supra* note 8, at 80 (referring that value of the information is not important)

²⁴³ See Art. 7-2 (12) AML

acquire that position and maintain it.

A cartel participant has to possibility to inquire into the possibility to get either immunity or reduction. The procedure is nothing compared to the European system of hypothetical applications and looks quite similar to the practice in the United States. Via a no-name procedure, usually via the phone, an entrepreneur can inquire with the JFTC on whether immunity is still available. Further, the entrepreneur can also consult with the JFTC on the qualifications for leniency and whether the entrepreneur fulfils these qualifications²⁴⁴. On an informal, non-binding, basis, the JFTC will provide the information or advice. This system allows, especially since there is a possibility for the second to apply, for abuses. Indeed, this system can be used to check whether there are entrepreneurs defecting the cartel without doing anything else if it did not happen²⁴⁵.

8.4.4. *Avoiding Conceptual Problems*

Japan joins the United States and the European Union by excluding coercing entrepreneurs from immunity. Unlike in the EU 2006 Leniency Notice, the Japanese Leniency Program also excludes these entrepreneurs from reduction. The Japanese Diet has explicitly stated that coercing should be understood in terms of intimidations and physical force. Organizing meetings or coordinating meetings could not be interpreted as coercing, allowing these entrepreneurs to apply for leniency²⁴⁶. By explicitly making these statements, the Japanese Diet

²⁴⁴ See KANAI, KAWAHAMA, AND SENSUI, *supra* note 228, at 449 footnote 72; UESUGI AND YAMADA, *supra* note 10, at 138; Uesugi (2007), *supra* note 8, at 80; Koma and Inoue, *supra* note 35, at 3; See also JFTC, The Japan Fair Trade Commission's View on New Rules of the Amended Antimonopoly Act – Comments Addressed to the Commission Regarding the Draft of its Rules and the Point of View of the Commission 15, available at http://www.jftc.go.jp/e-page/legislation/ama/view_on_newrules.pdf (last visited 8 August 2008) (stating that it is not necessary to regulate these prior consultations as they do not involve legal effects)

²⁴⁵ See *supra* text accompanying note 184

²⁴⁶ See SHIRAIISHI, *supra* note 231, at 500-1; Inoue, *supra* note 16, at 113; See also Akira Inoue,

prevents any confusion in relation to originators, ringleaders or firms with a determining role. The whole discussion as there existed in the EU, the 2006 Leniency Notice made an end to it, and still exists in United States is thus obsolete in a Japanese context.

9. CONCLUSION

Japan has, with the adoption of a leniency program, in 2005 caught up with an international trend in the enforcement of competition law. The rules went into effect in 2006 and have since then triggered over 150 applications. The JFTC has taken decision in a little over 20 cases. Compared to the early start of the leniency programs in the United States and the European Union, this start could at least be called successful. Despite this successful start, this paper has investigated whether the Japanese Leniency Program functions properly. The framework to assess this has been created by looking at the law and economics of a leniency program and the practical experiences in the United States and the European Union.

This analysis has revealed that the Japanese Leniency Program brings about, at least partially, the expected results in the pre-investigation stage. Full and automatic immunity in the pre-investigation stage is, just like the theories have predicted and the United States and the European Union experience have confirmed, an appropriate incentive to convince entrepreneurs to report illegal cartel activity. However, unlike in the European Union, the possibility of a reduction of surcharge in the pre-investigation stage is subsequently not used. The vast amount of subsequent applications situate in the post-investigation stage. Further research has revealed that a possible explanation for this

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evolution may situate in the conditions related to the information requirement.

These conditions do not negatively hamper the applications neither in the pre-investigation stage nor in the post-investigation stage. On the contrary, their simplicity and clearness are one of the reasons why many entrepreneurs make the initial decision to apply. However, once this decision has been made and implemented, the incentive for the next entrepreneurs to apply disappears. The chance that they still can become the first in line in the leniency program is limited. Further, the first applicant may not have revealed all the information about the cartel activity. Hence, we see a waiting game arrive once the first applicant has contacted JFTC.

Another element that does not advocate for the proper functioning of the Japanese Leniency Program is discretion in relation to the criminal sanctions. Even though a practical solution has been worked out to overcome this problem, the discretion still exists. The degree of discretion may well have been diminished for the first applicant, for the second and the third applicant not much seems to have changed. Hence, this could also contribute to the waiting game that has been found to occur after immunity is not available anymore to next applicants.