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English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 3 on Co-operation and Enforcement

USE OF MARKERS IN LENIENCY PROGRAMS

-- Japan --

16 December 2014

This document reproduces a written contribution from Japan submitted for Item III of the 120th meeting of the Working Party No. 3 on Co-operation and Enforcement on 16 December 2014.

*More documents related to this discussion can be found at:
<http://www.oecd.org/daf/competition/markers-in-leniency-programmes.htm>*

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OVERVIEW OF THE MARKER SYSTEM UNDER THE LENIENCY PROGRAM IN JAPAN

1. Introduction

1. The marker system has been incorporated into the leniency program in Japan since the program was initiated in 2005 when the Antimonopoly Act was amended. By that time, it had been recognized in other countries that the marker system was effective, so the marker system was planned to be adopted from the beginning in the design of the leniency program in Japan. As Japan's leniency program is based on the non-discretionary surcharge system with a fixed rate for calculation, it results in a somewhat rigid system, which in turn affects the marker system.

2. This contribution paper first explains the characteristics of Japan's leniency program and then provides an overview, the characteristics and past experiences of the marker system.

2. Characteristics of Japan's Leniency Program

3. Japan's leniency program is linked to the surcharge payment order, which is an administrative sanction. Surcharges are payable by entrepreneurs engaged in cartels or bid rigging, etc. The amount of the surcharge is stipulated by the Antimonopoly Act as an amount equivalent to a certain ratio (10% in principle) of the sales amount of goods or services subject to a violation for the period of implementation of the violative act (up to 3 years) (Paragraph 1, Article 7-2 of the Antimonopoly Act). The Japan Fair Trade Commission (JFTC) shall order the surcharge payment of an amount stipulated by the Antimonopoly Act. The JFTC does not have the discretion on whether or not to order payment or over the amount of the surcharge (ditto).

4. As Japan's leniency program is incorporated into the surcharge system that does not allow for discretion as described above, the leniency program defines the fixed reduction rates for surcharges and the fixed number of entrepreneurs entitled to use the program as follows: the reduction rates for surcharges are full immunity for the first applicant, a 50% reduction for the second applicant and a 30% reduction for the third to fifth applicants and applications after the investigation start date (up to three (3) entrepreneurs or, up to five (5) entrepreneurs including applicants before the investigation start date) according to the application order (Paragraphs 10 to 12, Article 7-2 of the Antimonopoly Act). In addition, the JFTC has no discretion to determine the reduction rate by taking into account the degree of cooperation from the applicants or the added value of the evidence submitted.

3. Japan's Marker System

3.1 Summary

5. The marker system is provided for in the Antimonopoly Act and the Fair Trade Commission Rule¹. Applicants transmit a form stating an outline of the violation to the JFTC by facsimile (using form No.1, Annex 1)². If the statements meet the requirements, marker status is granted³. Applicants may then obtain conditional leniency status by reporting the details of the violation and submitting any relevant materials (using form No.2, Annex 2; oral reporting is also permitted) by the deadline notified by the JFTC (the period from the JFTC's acceptance of form No.1 to the said deadline is the marker period)⁴. A marker will be granted to all applicants before the JFTC's investigation start date⁵; however, a marker will not be granted to applicants after the investigation start date⁶.

6. Though the marker period is not stipulated by the rule, the FAQ on the JFTC's homepage states that it is two weeks (ten business days) in principle. Meanwhile, for example in the case of international cartels etc. which require a significant amount of time for internal investigation, a longer period is granted. Once it is granted, the marker period will not be extended.

3.2 Purpose

7. The purpose of the adoption of the marker system is to encourage applications for leniency at an early stage. If marker status is granted upon the satisfaction of certain requirements even though entrepreneurs are yet to grasp the details of the cartel when initially becoming aware of the possibility of their involvement in a cartel, there will be an incentive to make immediate application for leniency, which may stimulate competition for leniency application.

¹ Rules on Reporting and Submission of Materials regarding Immunity from or Reduction of Surcharges (Fair Trade Commission Rule No.7 of 2005).

² The form shown on the Annex 1 is redacted from form No.1 and for reference only. For the original form No.1, please go to the web link below for the Japanese authentic version.

<http://www.jftc.go.jp/dk/seido/genmen/yosiki.files/newyosiki1.pdf>

³ The application order, if application is made at that point, may be checked by phone in advance (even anonymously), by providing an outline of the violation. However, a marker will not be granted at the point of such a phone call. It is necessary to send form No. 1 by facsimile.

⁴ The form shown on the Annex 2 is redacted from form No.2 and for reference only. For the original form No.2, please go to the web link below for the Japanese authentic version.

<http://www.jftc.go.jp/dk/seido/genmen/yosiki.files/newyosiki2.pdf>

⁵ The application time may be tracked by using a unique facsimile number, so the order of the granting of markers may be accurately determined among several applications for reduction or immunity made at the same time.

⁶ Applicants after the investigation start date are required to submit a report (using form No.3) and materials within 20 business days from the date of the dawn raids. The order among several applicants will be determined according to the order of the submission of form No.3. Accordingly, as the order may be secured by submitting form No.3, this process is similar to the grant of markers in some respects; however, (i) the period for the perfection of the marker is not established and (ii) the process does not require the subsequent submission of detailed reports, and thus it is understood that the marker system does not exist in the process after the investigation start date.

3.3 *Conditions for Obtaining a Marker*

8. To obtain a marker, it is necessary to report on the goods or services targeted by the violative act, the description of the said act and the time of the first implementation (and the time of termination if the act has been discontinued) (by transmitting form No.1 via facsimile) (Article 1 of the Rule). As for goods or services, it is necessary to identify them as clearly as possible to an identifiable extent at that point. As for the description of the said act, it is sufficient to provide details of the type of act (such as a price cartel or bid rigging) and the basic framework of the agreement (such as the names of the other entrepreneurs engaged in the violation, the geographical region targeted by the said act and the time of implementation of the price-raising) without providing the details of the violation such as the terms and conditions of the agreement.

3.4 *Grant of Marker and Period Thereof*

9. Upon satisfying the requirements for obtaining a marker as described above, a marker will be automatically granted. The JFTC shall notify the applicants which have fulfilled the requirements, of the deadline for the submission of the detailed reports in writing (Article 2 of the Rule). The marker period will expire when the said deadline is reached. Once it is granted, the marker period will not be extended.

3.5 *Conditional Grant of Leniency*

10. Applicants obtaining a marker shall report the details of the violation and submit relevant materials by the deadline described above (Article 3 of the Rule). In the reporting and submission of materials, it is necessary to identify the individuals directly involved in the violation, report on the detailed description of the said act (such as the specific terms and conditions of the agreement, the background of the formation of the agreement, the implementation of the said act) and submit any relevant evidence. Upon the fulfillment of these requirements, the status will be changed to conditional leniency. Upon failure to meet the deadline or insufficiency of reporting, the status will not be changed to conditional leniency, resulting in the loss of marker status.

3.6 *Confidentiality with Respect to a Marker*

11. Information regarding an application for leniency is subject to obligations of confidentiality, and thus information regarding a marker is also subject to these obligations. Accordingly, no special rules for confidentiality applicable to a marker are provided for. If it is necessary to exchange information with the foreign competition authorities at the marker stage, it must be confirmed whether or not an applicant consents to granting of a waiver of confidentiality and, upon consent to the waiver, information will be exchanged.

4. *Characteristics of Japan's Marker System*

12. Japan's marker system is almost identical to that of other countries. However, Japan's system is characterized by a relatively short marker period and the inability to extend the period. This is mainly because, among several reasons, the JFTC emphasizes conducting dawn raids at an early stage by demanding reports within a short period of time.

13. The longer the marker period is, the more likely it is that other entrepreneurs engaged in a violation may become aware of the application for leniency program, which may result in difficulty of conducting the investigation into the relevant case. While under the leniency program with high incentives for cooperation to the investigation by competition authorities or under the plea bargaining system, cooperation by the subsequent applicants, etc. would mitigate the above problems, incentives under Japan's leniency program are remarkably small because of the structure of the program that does not consider the degree of cooperation from the applicants and the added value of the evidence for determining

the reduction rates, etc. It can therefore be said that the importance of conducting on-site inspections at an early stage is higher for the JFTC.

5. The State of Operation

14. As described above, all applications for leniency program before the investigation start date will be granted a marker, so the same number of markers will be granted as the number of applications before the investigation start date. So far, the JFTC has received hundreds of applications before the investigation start date, among which no applicants lost their marker status except for through voluntary withdrawal by the applicants, etc.

6. Conclusion

15. About eight years have passed since the leniency program was introduced in Japan. The operation of the program to date has not revealed any issues with the marker system. It can be considered that the marker system is largely working in an effective manner.

ANNEX 1

FORM No.1: (Paper Size: JIS A4)

**WRITTEN REPORT
REGARDING IMMUNITY FROM OR REDUCTION OF SURCHARGES**

Date: _____ (Year) _____ (Month) _____ (day)

Submitted to:

Fair Trade Commission of Japan
(Fax number : +81-3-3581-5599)

Submitted by:

Name or Title of Entrepreneur:
Address or Location:
Name and Position Title of Representative: (Seal)
Name of Division for Contact:
Name and Position Title of Person in Charge:
Telephone Number:
Fax Number:

We hereby make a report pursuant to the provisions of item 1, Paragraph 10, Article 7-2 or item 1 through item 3, Paragraph 11 of the same Article of the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (hereinafter referred to as the “Antimonopoly Act”) (including cases where these articles shall apply *mutatis mutandis* to Article 8-3 of the Act).

Without justifiable reason, we shall not disclose to third parties the fact that we have made the following report.

1. Summary of the violation to be reported

1. Goods or Services Targeted by the Said Act

2. Description of the Said Act (1)
(2)

3. The Time of First Implementation (The Time of Termination) _____ (Year) _____ (Month) _____ (Day)
(until _____ [Year] _____ [Month] _____ [Day])

ANNEX 2

FORM No.2: (Paper Size: JIS A4)

**WRITTEN REPORT
REGARDING IMMUNITY FROM OR REDUCTION OF SURCHARGES**

Date: _____ (Year) _____ (Month) _____ (day)

Submitted to:

Fair Trade Commission of Japan

Submitted by:

Name or Title of Entrepreneur:

Address or Location:

Name and Position Title of Representative: (Seal)

Name of Division for Contact:

Name and Position Title of Person in Charge:

Telephone Number:

Fax Number:

We hereby make a report pursuant to the provisions of item 1, Paragraph 10, Article 7-2 or item 1 through item 3, Paragraph 11 of the same Article of the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (hereinafter referred to as the “Antimonopoly Act”) (including cases where these articles shall apply *mutatis mutandis* to Article 8-3 of the Act).

Without justifiable reason, we shall not disclose to third parties the fact that we have made the following report.

1. Summary of the violation to be reported

(1) Goods or Services Targeted by the Said Act

(2) Description of the Said Act	a
	b

(3) Name or Title and Address or Location of Other Entrepreneur(s) Participating in the Said Act

(4) The Time of First Implementation _____ (Year) _____ (Month) _____ (Day)
(The time of Termination) (until _____ [Year] _____ [Month] _____ [Day])

2. Position Titles and Names of Executives or Employees Who Have Involved in the Said Act at the Reporting Entrepreneur (Those of each reporting entrepreneur in case of reporting in joint names)

Name of Reporting Entrepreneur	Current Position Title And Division one belong to	Position Title at Time of Involvement and Division one belonged to (The Time of the Position)	Name

3. Names and others of Executives or Employees Who Have Involved in the Said Act at Other Entrepreneur(s) Participating in the Said Act

Name of Entrepreneur	Current Position Title and Division one belong to	Position Title at Time of Involvement and Division one belonged to (The Time of the Position)	Name

4. Other Matters for Consideration

5. Submission of Materials

We hereby submit the following materials.

No.	Title of Material	Description of Material's Content (Summary)	Notes