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Fresh amendments

Yusuke Nakano and Etsuko Hara of Anderson Mōri & Tomotsune outline details of amendments to the Antimonopoly Act

A draft amendment to the Japanese competition law, the Act on the Prohibition of Private Monopolisation and Maintenance of Fair Trade (AMA)(Bill), was submitted to the Japanese Diet by the Cabinet on March 11 2008. The AMA was drastically amended in 2005 in order to strengthen enforcement power, by increasing the calculation rate for surcharges, introducing a leniency programme and amending the hearing procedure, among other things. The supplemental provision for the 2005 amendment mandated that study be conducted on the ideal system for surcharges, necessary procedures to eliminate infringements, hearing procedures and others. A study group was established under the Cabinet Office for this purpose, and these issues were continuously discussed. The Bill was prepared based on such discussions. In addition, regarding merger control, the Bill separately reflects discussions on aligning Japanese merger controls with those of other countries, including those set down in EU regulations.

Due to current political turbulence in Japan, whether or not the Bill will pass the Diet without material changes, and the effective date of the amendments, are uncertain. If the Bill passes the Diet without material changes, the effective date of most of the amendment provisions to the AMA will be as designated by Cabinet Order, which will be within 15 months from the date of promulgation.

The main points

Changes to surcharges and cease-and-desist orders (CDOs)

- Expansion of types of conduct subject to surcharges.
- Increase in surcharge rate for companies who played leading roles in cartels, among other things.

- Change to the leniency programme: an increase in the number of applications and the introduction of joint applications.
- Extension of the statute of limitation for CDOs and surcharge payment orders.

Changes to merger control

- Introduction of a prior notification obligation for stock acquisitions.
- Amendment of the filing thresholds for business combinations.

Others

- Exchange of information with foreign competition authorities.
- Restriction of access to case records.
- Amendment of procedures for document production orders by courts before which an application for injunction is pending.

Changes to surcharges and CDOs

The Bill expands the activities that would be subject to surcharges.

Private monopolisation

The AMA prohibits two types of private monopolisation: (i) the exclusionary type; and (ii) the control type. The 2005 amendments already subject the control type to surcharges. The Bill will subject the exclusionary type to surcharges.

The surcharge rate will be 6% (2% in cases involving retail business and 1% in cases involving wholesale business), which will be multiplied by the amount of relevant sales of goods or services during the relevant period (three years maximum).

Recently, the Japan Fair Trade Commission (JFTC) has been targeting infringements of the exclusionary type much more strongly than in the past. Under the Bill, surcharges could be very large if the infringing entrepreneur holds a

dominant position in the market. As such, this amendment would have a significant impact on private monopolisation. An alleged infringer often has good arguments to establish justifiable reasons for their exclusionary activities, and this amendment involving surcharges would further strengthen their incentive to argue.

Unfair trade practices (UTPs)

UTPs are prohibited (Article 19 and Article 2, Paragraph 9 of the AMA) and 16 categories of activities are specified as UTPs under the Designation of Unfair Trade Practices (JFTC Public Notice 15 of June 18 1982, Designation). Under the current AMA, a UTP can be subject to a CDO, but not to a surcharge.

However, because of the necessity to strengthen enforcement against UTPs, the Bill subjects five categories of UTPs to surcharges: (i) concerted refusal to trade; (ii) discriminatory pricing; (iii) unjust low price sales; (iv) resale price restriction; and (v) abuse of dominant bargaining position, the definitions of which will be included in the AMA, rather than the Designation, after the amendments.

Regarding (i) to (iv), a surcharge will be imposed if the relevant activity in the same category is repeated within a 10-year period. The surcharge rate will be 3% (2% in cases involving retail business and 1% in cases involving wholesale business), which will be multiplied by the amount of relevant sales of goods or services during the relevant period (three years maximum).

On the other hand, a surcharge in connection with the abuse of dominant bargaining position will be imposed, even in connection with a first infringement, as long as it is considered to be a continuous activity. The surcharge rate will be 1% regardless of the type of business.

It is important to note that the JFTC does not have discretion regarding whether or not to impose surcharges, but it will impose surcharges if the requirements are met. This could have a mixed impact on enforcement in practice because, though overall enforcement would be much stronger with surcharges, when considering the significance of the result, the JFTC may need to narrowly interpret the scope or use administrative guidance rather than taking formal action. This will be especially true in connection with the abuse of dominant bargaining position. Therefore, though the amendments may strengthen enforcement powers in relation to UTPs, they may actually result in a reduction of the number of infringements.

Misleading representations

The bill subjects certain misleading representations to surcharges, unless the entrepreneur did not know without gross negligence that the representation was prohibited. The surcharge rate will be 3%, regardless of the category of business, which will be multiplied by the amount of relevant sales of goods or services

“After the amendment, domestic sales can include the sales amount accrued through direct importing to Japan, even without any presence in Japan”

Author biographies



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during the period from the date of such representation to when the effect of such misleading representation is considered to cease to exist (three years maximum).

It is suggested, separately from the Bill, that the supervision of misleading representations, which is governed by the Act Against Unjustifiable Premiums and Misleading Representations, will be transferred to the Consumer Agency to be newly established. Therefore, it is relatively difficult to predict how the amended law will be enforced.

Increase in surcharge rate for companies who played leading roles in cartels, among other things

The Bill increases the surcharge rates by 50% if the company plays a leading role in cartels or bid rigging, among other things. More specifically, the surcharge will be increased if including but not limited to:

- an entrepreneur has planned activity constituting an infringement and has requested another entrepreneur to participate in or continue their involvement in such activity and, as a result, the other entrepreneur participated, or continued to participate in, the infringement; or
- an entrepreneur, upon the request of another entrepreneur, continuously gave to the other entrepreneur directions concerning the price, amount of supply, amount of purchase, market share or counterparty of the transaction for the goods or services relevant to the infringement.

Under the current leniency programme, the entrepreneur who coerced another entrepreneur to commit the violation or who blocked another entrepreneur from discontinuing the violation, which the entrepreneur also committed, is not able to obtain immunity from, or reduction of, surcharges (Article 7-2, Paragraph 12, Item 3 of

the AMA). Together with this limitation, the proposed amendments further strengthen the sanction on entrepreneurs who play a leading role in the infringement.

Change to the leniency programme

Since the introduction of the leniency programme in 2005 (effective January 2006) and up to March 2008, 179 applications have been made for leniency. Considering the significant effect of the leniency programme, the Bill increases the number of leniency applicants that can obtain immunity or reduction of surcharges to a maximum of five, an increase from the current limit of three.

As a result, if an application is made before the Investigation Starting Date (the earliest date when on-site investigation or other compulsory investigative measures have been taken), the first applicant will obtain 100% immunity from the surcharges, the second applicant will obtain a 50% reduction and the third to fifth applicants will obtain reductions of 30%. If the application is made after the Investigation Starting Date, the reduction rate will be 30% across the board and only up to three applicants (up to five together with the applicant who applied before the Investigation Starting Date taken on any aspect of the alleged collective violation of all the cartelists) may obtain the reduction by filing an application after the investigation starting date.

In addition, the Bill also allows for a joint application to be made for leniency, which is not allowed under the current leniency programme. Practitioners have strongly objected to the fact that even if two companies in the same corporate group are involved in the same cartel and both make a leniency application they are not counted as having applied at the same time and thus have to prioritise the ranking between them. After the proposed amendment, a joint application by companies belonging to the same corporate

group will be permitted, and all the joint applicants will be assigned the same ranking regarding the order of the application.

Extension of the statute of limitation for the CDO and surcharge payment orders

Under the current AMA, a CDO and surcharge payment orders cannot be issued if three years have passed since the date of the discontinuation of the violation. However, this three-year statute of limitation period is relatively short compared to administrative orders under other Japanese laws (a maximum of seven years under the General Act on National Tax, for example), and there have been cases where CDOs and surcharge payment orders could not be issued because of the statute of limitation. In addition, it is shorter than the statute of limitations set by foreign authorities (a maximum of 10 years in the EU, for example). Based on this, the Bill extends the statute of limitation period to five years.

This amendment will be especially important in connection with international cartel cases involving foreign corporations, as the competition authorities of other jurisdictions often spend more than three years reaching a conclusion.

Changes to merger control

Introduction of a prior notification obligation for stock acquisitions

Under current Japanese merger controls, a stock acquisition requires, at most, a post-transaction report to be submitted to the JFTC. Stock acquisition is the only scheme that does not require prior notification.

However, under the Bill, stock acquisitions would be subject to a prior notification obligation if certain applicable threshold conditions are met (proposed Article 10, Paragraphs 2 to 10). Under the Bill, the acquirer may not acquire the stock in question until after the expiration of a 30-day waiting period, which commences from the date of acceptance of the prior notification by the JFTC, provided that the prior notification will not be required in cases that are designated in the JFTC's rules as those for which a prior notification is considered to be difficult.

A stock acquisition will require prior notification if the stockholding ratio after the transaction rises above 20% or 50%, which is a simplification of the current three-tier thresholds of 10%, 25% and 50%. Other filing thresholds for stock acquisitions will be amended together with other business combinations.

Under the current AMA, a pre-transaction notification could be avoided by using a stock acquisition scheme. However, after the amendments, such a method would not be possible.

Amendment to the thresholds for business combinations

The filing thresholds for business combinations including stock acquisitions, mergers, corporate splits and business transfers would be substantially amended as follows.

Table

	Current threshold	Amended threshold
Acquiring corporation	(i) The total assets of the acquiring corporation exceed ¥2 billion (\$18.2 million); and (ii) the aggregate amount of total assets of the acquiring corporation, its parent corporation and its subsidiaries in Japan (sum of the total assets), exceeds ¥10 billion.	The aggregate amount of domestic sales of the corporations, which belong to the same combined business group as the acquiring corporation, exceeds ¥20 billion.
Target corporation	The total assets of the target corporation exceed ¥1 billion (in a case where the target corporation is a foreign corporation, where the turnover in Japan of the target corporation exceeds ¥1 billion).	The aggregate amount of domestic sales of the target corporation and its subsidiaries exceeds ¥2 billion.

Domestic sales

As you can see from the table, domestic sales, instead of total assets, will be used as a decisive factor in the new threshold. The same threshold will be used for transactions involving foreign corporations. The precise details of the calculation methods are yet to be determined by the JFTC.

It should be noted that the concept of turnover in Japan, which is used in determining whether or not a transaction targeting a foreign corporation is reportable, will no longer be used. Under the current threshold, turnover in Japan is calculated based on the sales amount booked in the profit-and-loss statement of the target corporation's Japanese branch offices and its direct Japanese subsidiaries' main and branch offices in Japan. Therefore, under the current threshold, the transaction does not require filing as long as the foreign target company does not have a subsidiary or a branch office in Japan. However, after the amendment, domestic sales can include the sales amount accrued through direct importing to Japan, even without any presence in Japan.

the AMA aligns Japanese merger control with the regulations of other countries, especially those contained in the EU regulations.

Under the current threshold, only a direct parent company and direct subsidiaries (both in Japan) are jointly considered in determining whether or not a filing is required. Moreover, whether a corporation is a subsidiary or not is only determined by the ratio of voting rights. Therefore, under such a scheme, filing can be avoided, at least arguably, by establishing an entity to avoid the existence of a direct relationship. The Bill deals with this problem.

Impact on practice

The amendments to the thresholds for merger control will have a significant impact on practice. First, it is certain that a substantially larger number of foreign-to-foreign stock acquisitions would need to be notified to the JFTC than the number under the current threshold. Second, in order to determine whether or not the transaction satisfies the threshold, especially in determining the scope of subsidiaries and the amount of domestic sales, it will be necessary to

beneficial to the performance of the duties of the foreign competition authority, if it is considered that the provision of information would not have an adverse impact on appropriate enforcement of the AMA or otherwise infringe the interests of Japan and if the JFTC can confirm the following points.

- Reciprocity: the foreign competition authority (counterpart) will be able to provide similar information to the JFTC.
- Confidentiality: in the foreign country, the information that will be provided by the JFTC as confidential information will be kept in confidence at the same level as in Japan.
- Purpose of use: the information provided by the JFTC will be used only for the purpose of the foreign competition authority performing its duties.

In addition, appropriate measures will be taken so that the information provided by the JFTC will not be used in any criminal procedures in foreign countries.

Restriction on access to case records

Persons who have an interest in the official hearing proceedings of the JFTC, in which the addressees of a JFTC's CDO challenge such an order, are entitled to access the case records and may request copies of such records. The Bill (proposed Article 70-15) places a limit on access to case records so that access to and requests for copies may be rejected by the JFTC if the JFTC considers that it would be detrimental to the interest of third parties or if there are other reasons for rejection. In addition, the JFTC may limit the purpose of using copies of the case records and may place other appropriate conditions on such use.

Amendment to procedures for document production orders by the courts before which an application for injunction is pending

The Bill states that courts may issue a document production order in litigation seeking the suspension or prevention of infringements of UTPs, unless there is a justifiable reason against such an order (proposed Article 83-4). In order to determine whether there is a justifiable reason, such as protection of business secrets, the court may request disclosure only to the court.

“The introduction of the combined business group in the AMA aligns Japanese merger control with the regulations of other countries”

Combined business group

In addition, the domestic sales of the combined business group will be used. The combined business group consists of all of the subsidiaries of the ultimate parent company. It should be noted that a corporation will be considered to be a subsidiary not only when more than 50% of the voting rights of a corporation is held by the other corporation but also if its management is substantially controlled by the other corporation. This concept of group companies is used in the threshold for merger control in various jurisdictions, and the introduction of the combined business group in

check in substance (whether a corporation is substantially controlled by the other corporation, for example), in addition to the formal check (whether more than 50% voting rights are held, for example).

Others

Exchange of information with foreign competition authorities

The Bill includes provisions regarding information exchange with foreign competition authorities (proposed Article 43-2). Information would be provided by the JFTC to a foreign competition authority if a provision is