

# Intellectual Property & Antitrust

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# Japan

Yusuke Nakano and Koya Uemura

Anderson Mōri & Tomotsune

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## Intellectual property

### 1 Intellectual property law

Under what legislation are intellectual property rights granted? Are there restrictions on how IP rights may be exercised, licensed or transferred? Do the rights exceed the minimum required by the WTO Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs)?

Intellectual property rights are granted under:

- the Patent Act (No. 121 of 1959);
- the Utility Model Act (No. 123 of 1959);
- the Design Act (No. 125 of 1959);
- the Trademark Act (No. 127 of 1959);
- the Seeds and Seedlings Act (No. 83 of 1998);
- the Layout Design of Integrated Circuits Act (No. 43 of 1985);
- the Copyright Act (No. 48 of 1970); and
- the Unfair Competition Prevention Act (No. 47 of 1993).

For patent, utility model, design and trademark rights to be granted, registration at the Patent Office (PO) is required. For the registration of breeders' rights under the Seeds and Seedlings Act, registration at the Ministry of Agriculture, Forestry and Fisheries (MAFF) is required, and for the right to the layout design of integrated circuits, registration is required at the Software Information Centre as designated by the Ministry of Economy, Trade and Industry (METI). As for copyrights and trade secrets, no registration is required.

Licensing of IP rights generally becomes effective upon agreement between a licensor and a licensee, without registration with governmental authorities. However, the relevant Acts state that an exclusive licence of the registrable rights described above shall not become effective without registration with the competent authorities. In reality, many licensees refrain from registering exclusive licences to save registration costs. An exclusive licensee with registration may claim the licence against third parties (for example, an infringer), while an exclusive licensee without registration may only claim the licence against a licensor.

The transfer, waiver or restriction on disposability of the registrable rights must be registered with the relevant authorities. The creation, transfer, change, extinction or restriction on disposability of the registered exclusive rights must also be registered. Unless so registered, no such transfer, etc will be effective against third parties.

If two or more people share the registrable rights described above, the transfer or licensing of such rights requires the consent of all holders.

The protection of IP rights in Japan exceeds the minimum requirement by TRIPs.

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### 2 Responsible authorities

Which authorities are responsible for administering IP legislation?

The PO, an extra-ministerial bureau of the METI, is the responsible authority for administering the Patent Act, Utility Model Act, Design Act and Trademark Act. The MAFF is responsible for the Seeds and

Seedlings Act. The METI is responsible for the Layout Design of Integrated Circuits Act and the Unfair Competition Prevention Act. The Agency for Cultural Affairs, an extra-ministerial bureau of the Ministry of Education, Culture, Sports, Science and Technology, is responsible for the Copyright Act.

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### 3 Proceedings to enforce IP rights

What types of legal or administrative proceedings are available for enforcing IP rights?

In legal proceedings, civil lawsuits are available (see question 4). In administrative proceedings, the holders of a patent, utility model, design, trademark, copyright, or neighbouring or breeders' rights may request the customs director to initiate administrative proceedings to prohibit the importation of goods that they believe infringe their rights. If a person finds that a certain indication (such as trade names, registered or unregistered trademarks or packaging) or shape of goods to be imported are identical or similar to the indication of his or hers, that person may also make the same request (article 69-13, paragraph 1 of the Customs Act). When such goods are being imported, the customs director may confiscate and discard them, or may order an importer to reload them (article 69-11, paragraph 2).

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### 4 Remedies

What remedies are available to a party whose IP rights have been infringing?

Available civil remedies include compensation for damages, injunction and preliminary injunction. An injunction may include the destruction of the objects that have been created by the act of infringement, the removal of the machines and equipment used for the act of infringement, or other measures necessary to suspend and prevent the infringement. Administrative remedies are also available (see question 3). An infringer may be criminally punished, but in some cases only if the holder of relevant rights files a criminal complaint with the investigative authorities in a timely manner.

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### 5 IP legislation and competition

Does IP legislation make any specific mention of competition or contain provisions on the anti-competitive or similar abuse of IP rights?

The Intellectual Property Basic Act (No. 122 of 2002) (IPBA) refers to competition. Article 10 (consideration of promotion of competition) of the IPBA stipulates that, in promoting measures regarding the protection and use of intellectual property, ensuring fair use and the public interest shall be taken into consideration, and the promotion of fair and free competition shall also be considered. However, because this is just a general statement about the relationship between IP rights and competition, specific interpretation of IP law or competition law is unlikely to be affected by this provision.

## 6 Remedies for deceptive practices

With respect to trademarks, do competition or consumer protection laws provide remedies for deceptive practices in addition to traditional 'passing off' or trademark infringement cases?

Remedies against certain deceptive practices are provided for in the Unfair Competition Prevention Act (UCA) with respect to trademarks. Where the UCA is applicable, the person whose business interest is damaged may invoke its provisions regarding injunction rights and compensation for damages, in addition to remedies under civil law. Certain acts of this type also give rise to criminal liability.

## 7 Technological protection measures and digital rights management

With respect to copyright protection, is WIPO protection of technological protection measures and digital rights management enforced in your jurisdiction? Does legislation or case law limit the ability of manufacturers to incorporate TPM or DRM protection limiting the platforms on which content can be played? Could TPM or DRM protection be challenged under the competition laws?

Yes. Both TPMs and DRMs are enforced in Japan under the Copyright Act (CA). Regarding the protection of TPMs, a person who assigns, leases or develops devices or programs that are solely designed to circumvent TPMs or who on a regular basis circumvents TPMs upon the request of the general public may be sentenced to a maximum of three years' imprisonment or a fine of ¥3 million, or both (article 120-2, items 1 and 2 of the CA). A person who intends to privately copy those copyrighted works that are protected by TPMs must obtain the consent of a copyright holder, which is an exception to the general rule that private copying is permitted without the copyright holder's consent (article 30, paragraph 1, item 2). Regarding the protection of DRMs, intentionally attaching false information as DRMs, or removing or altering DRMs, is deemed infringement of copyright (article 113, paragraph 3), and a person who commits such an act with the intention of making a profit may be sentenced to a maximum of three years' imprisonment or a fine of ¥3 million, or both (article 120-2, item 3).

No legislation or case law limits the ability of manufacturers to incorporate TPM or DRM protection limiting the platforms on which the content can be played. TPM or DRM protection is not generally considered anti-competitive, and we understand that mere employment of TPM or DRM would not be challenged under competition laws.

## 8 Industry standards

What consideration has been given in legislation or case law to the impact of the adoption of proprietary technologies in industry standards?

Neither legislation nor case law has given special consideration to the impact of proprietary technologies in industry standards. There is no compulsory licensing of technologies in industry standards; however, the Guidelines for the Use of Intellectual Property under the Anti-Monopoly Act (IP Guidelines, 2007) published by the Japan Fair Trade Commission (JFTC) do provide such consideration, and stipulate that refusal of a licence can be deemed a violation of the Act concerning the Prohibition of Private Monopolisation and Maintenance of Fair Trade (No. 54 of 1947) (Anti-Monopoly Act, AMA) under certain circumstances.

One such example of a violation is where many companies are jointly developing a standard for certain products, and one of the companies has its technology adopted in the standard by inappropriate measures (such as misrepresentation of possible terms and conditions of a licence of such technology after it is adopted in the standard); after it successfully has the technology adopted, it then refuses to license the technology to other companies. Such refusal of a licence may constitute private monopolisation or an unfair trade practice. On the other hand, it seems logical to understand from the IP Guidelines that mere refusal to license technologies cannot be a

violation of the AMA, even if such technologies have been adopted in certain standards, unless the owner of such technologies has employed inappropriate measures in doing so.

## Competition

### 9 Competition legislation

What legislation sets out competition law?

The AMA sets out the basic rules of competition law. Broadly, the AMA prohibits three types of activity:

- private monopolisation (activities to exclude or control the business activities of other entrepreneurs);
- unreasonable restraint of trade (activities to restrict or conduct business activities mutually with other entrepreneurs in such a manner as to fix, maintain or increase prices, limit production or products, or other similar matters); and
- unfair trade practices (boycott, unjust price discrimination, predatory pricing, resale price maintenance, abuse of a dominant bargaining position and other practices designated as such by the JFTC).

It should be noted that while private monopolisation and unreasonable restraint of trade require the level of restriction on competition to be substantial, the tendency to impede competition would be considered sufficient for the purpose of unfair trade practices. It can be said that private monopolisation corresponds approximately to the abuse of dominant position under EU competition law, and unreasonable restraint of trade includes almost all illegal cartels.

Other important acts with aspects of competition law include the Act against Unjustifiable Premiums and Misleading Representations (No. 134 of 1962), which prevents unjustifiable premiums and representations regarding the trade of goods and services, and the UCA, which provides for measures to prohibit unfair competition and special rules regarding compensation for damages.

### 10 IP rights in competition legislation

Does the competition legislation make specific mention of IP rights?

Article 21 of the AMA provides that the AMA shall not apply to such acts recognisable as the exercise of rights under the CA, Patent Act, Utility Model Act, Design Act or Trademark Act. However, holders of IP rights should not rely on this provision without careful consideration of competition law, as this provision is quite general.

### 11 Review and investigation of competitive effect

Which authorities may review or investigate the competitive effect of conduct related to IP rights?

The JFTC, an independent administrative committee responsible for competition-related matters, has general jurisdiction to review and investigate the competitive effects of certain conduct, including those related to IP rights. The courts may review the competitive effect of business practices, if civil or criminal lawsuits filed with the court contain issues involving an effect on competition. The Tokyo High Court is the court of first instance to review the JFTC's decisions upon an appeal filed by a respondent. The court may revoke the JFTC's decision only if the facts on which the decision is based are not supported by substantial evidence, or the decision violates the law.

### 12 Competition-related remedies for private parties

Do private parties have competition-related remedies if they suffer harm from the exercise, licensing or transfer of IP rights?

Yes, private parties have recourse to competition-related remedies. In addition to remedies available under civil law, the AMA provides for two types of remedies for private parties. One is the right to seek an injunction. Broadly speaking, if a person suffers, or is likely to suffer,

extreme harm from unfair trade practices by another, he or she can petition the court to issue an injunction order (AMA, article 24). However, as the AMA requires the harm to be 'extreme', this injunction has never been issued since its introduction in 2001, and possibly will not be of much practical importance. The other remedy is a claim for damages under AMA, article 25, whereby a defendant may not be discharged even if his or her act was not intentional or negligent, which is contrary to general rules under civil law (AMA, article 25). However, this claim is not always useful because it may not be made unless the JFTC's formal finding of violation becomes final and conclusive.

### 13 Competition guidelines

Has the competition authority issued guidelines or other statements regarding the overlap of competition law and IP?

The JFTC has issued three guidelines and one report regarding the overlap of competition law and IP rights.

The IP Guidelines discuss how to analyse legal issues arising from interaction of competition law and IP rights.

The Guidelines concerning Joint Research and Development under the Anti-Monopoly Act (1993) provide that joint research activity itself is normally lawful if the total market share of participants is not more than 20 per cent, but further provides that whether or not covenants ancillary to joint research activities are lawful shall be determined by taking various relevant facts into consideration, not limited to the total market share.

The Guidelines on Standardisation and Patent Pool Arrangements (2005) specify the circumstances where the formation of patent pools or licensing for standardisation through patent pools may give rise to antitrust concerns.

Views on Software Licensing Agreements, etc under the Anti-Monopoly Act (2002) – which is an interim report, not guidelines – covers various issues arising from software licensing agreements, including abusive conduct by developers of operating systems software and restrictive covenants in software licensing agreements.

### 14 Exemptions from competition law

Are there aspects or uses of IP rights that are specifically exempt from the application of competition law?

Generally not, except that resale price maintenance of 'copyrighted works' between entrepreneurs is exempt from the AMA (article 23, paragraph 4). The JFTC's interpretation is that 'copyrighted works' include only the following six items: books, magazines, newspapers, music records, music tapes and music compact discs. DVDs, for example, are not exempt.

### 15 Copyright exhaustion

Does your jurisdiction have a doctrine of, or akin to, 'copyright exhaustion' (EU) or 'first sale' (US)? If so, how does that doctrine interact with competition laws, for example with regard to efforts to contract out of the doctrine, to control pricing of products sold downstream and to prevent 'grey marketing'?

Yes. The CA explicitly lays down a doctrine of exhaustion (article 26-2, paragraph 2). The Layout Design of Integrated Circuits Act (article 12, paragraph 3) and the Seeds and Seedlings Act (article 21, paragraph 4) have similar provisions. Notably, the CA specifically refers to 'international exhaustion', but the certain import of records lawfully sold outside of Japan for the purpose of resale in Japan is deemed copyright infringement (article 113, paragraph 5).

In practice, the doctrine of exhaustion has been disputed mainly with respect to patents and trademarks, particularly in the field of parallel import (or 'grey market'). Regardless of the lack of specific provision on the exhaustion doctrine in the Patent Act and Trademark Act, domestic exhaustion has been taken for granted. As to international exhaustion, the courts have recognised the doctrine and rejected claims of injunction by patent holders or trademark holders

(or their licensees) against parallel importers that import genuine products (regarding patents, *BBS Kraftfahrzeugtechnik v Racimex Japan*, see question 32; regarding trademark, *NMC v Shriro Trading* in 1970).

### 16 Import control

To what extent can an IP rights holder prevent 'grey-market' or unauthorised importation or distribution of its products?

As explained in question 15, an IP rights holder cannot prevent a 'grey market' by exercising his or her IP rights against parallel importers. Moreover, the Guidelines concerning Distribution Systems and Business Practices under the Anti-Monopoly Act (Distribution Guidelines 1991) stipulate that it may be a violation of the AMA for an authorised general agent of imported products or a foreign manufacturer (who may or may not be an IP rights holder) of the products, in order to maintain the price of the authorised products:

- to prevent foreign distributors from selling products to the grey market;
- to prevent domestic distributors from handling products imported through the grey market;
- to prevent wholesalers from selling the products to retailers handling products imported through the grey market;
- to defame by stating that products imported through the grey market are not genuine products;
- to buy up the products imported through the grey market; and
- to prevent newspapers or other media from carrying advertisements of parallel importers.

The Distribution Guidelines also stipulate that it would be a violation of the AMA for an authorised general agent, in order to maintain the price of the authorised products, to refuse, or have distributors refuse, to repair products imported through the grey market or to supply repair parts for products imported through the grey market when it is extremely difficult for persons or companies other than an authorised general agent or a retailer to repair the products or procure repair parts for the products.

### 17 Competent authority jurisdiction

Are there circumstances in which the competition authority may have its jurisdiction ousted by, or will defer to, an IP-related authority, or vice versa?

There are no circumstances where either the JFTC or the IP-related authorities will defer to the other.

### Merger review

#### 18 Powers of competition authority

Does the competition authority have the same powers with respect to reviewing mergers involving IP rights as it does with respect to any other merger?

Yes. The JFTC has the same powers with respect to reviewing mergers involving IP rights as in any other mergers.

#### 19 Analysis of the competitive impact of a merger involving IP rights

Does the competition authority's analysis of the competitive impact of a merger involving IP rights differ from a traditional analysis in which IP rights are not involved? If so, how?

The standard for review by the JFTC of the competitive impact of mergers is always the same (whether or not it 'may be substantially to restrain competition'), irrespective of whether the mergers involve IP rights. Practically, such test is whether the party after a merger can increase the price at its own will, and the most important factor is the Herfindahl-Hirschman Index before and after the merger. IP rights are one of the other relevant factors.

**20 Challenge of a merger**

In what circumstances might the competition authority challenge a merger involving the transfer or concentration of IP rights?

For a general analysis, see question 19. We understand that the JFTC has never challenged a merger solely because the parties have IP rights resulting in a strong competitive edge where the results of calculation of the Herfindahl-Hirschman Index do not raise significant concern.

**21 Remedies to alleviate anti-competitive effect**

What remedies are available to alleviate the anti-competitive effect of a merger involving IP rights?

The JFTC may order any measures necessary to eliminate acts in violation of the provisions regarding mergers (AMA, article 17-2, paragraph 1). Therefore, theoretically, mandatory licences may be ordered as a remedy. However, most parties to mergers go through preliminary (and unofficial) consultation with the JFTC. Therefore, the JFTC's mandatory corrective measures have rarely been taken.

In the course of preliminary consultation, sometimes antitrust concerns are dealt with by the parties who promise to take certain measures to alleviate such concerns. Some of these remedies are IP-specific. The Guidelines to Application of the Anti-Monopoly Act Concerning Review of Business Combination (the Merger Guidelines) issued by the JFTC in 2004 provide that parties to business combinations may be able to alleviate antitrust concerns if they grant the licence of their patent to competitors or new entrants on fair terms and conditions. In one case, the JFTC refrained from objecting to a transfer of business on the understanding that the transferee would grant a licence to competitors upon their request (*In re Hoya and Nippon Sheet Glass*, 18 February 2004).

## Specific competition law violations

**22 Conspiracy**

Describe how the exercise, licensing, or transfer of IP rights can relate to cartel or conspiracy conduct.

The guidelines referred to in questions 8 and 13 introduce a number of useful examples. As to patent pools, because they have a pro-competitive effect, the 'rule of reason' test would be applied. Patent pools can constitute an unreasonable restraint of trade if members of the patent pools share the understanding that they have accepted common restrictions on trade conditions such as sales prices and sales areas, and such restrictions substantially restrict competition in a market, or if the members mutually restrict the area of research and development or prospective licensees of the IP rights.

Please note that patent pools may also be regarded as private monopolisation or unfair trade practices. For example, if members of patent pools refuse to grant a licence and effectively exclude competitors, such refusal may constitute private monopolisation.

It will not be considered as cartel conduct for competitors to jointly license their IP rights to a certain licensee. On the other hand, if competitors jointly refuse to license their IP rights, it may be considered as illegal cartel conduct.

**23 (Resale) price maintenance**

Describe how the exercise, licensing, or transfer of IP rights can relate to (resale) price maintenance.

If a licensor sets minimum resale prices for its licensees, such licensor's act is, in principle, considered to be an unfair trade practice (dealing on restrictive terms). Note that such vertical restraint is not generally regulated as an unreasonable restraint of trade in Japan.

**24 Exclusive dealing, tying and leveraging**

Describe how the exercise, licensing, or transfer of IP rights can relate to exclusive dealing, tying and leveraging.

An IP rights holder that restricts a licensee from manufacturing or using competing products or adopting competing technologies may be considered to have committed unfair trade practices (dealing on exclusive terms or dealing on restrictive terms), if such restriction results in an adverse effect on competition in a market. In particular, if such restriction is imposed after the expiration of the licensing agreement, it is highly likely that such restriction will constitute unfair trade practices.

An IP rights holder that obliges a licensee to obtain a package licence for more than one IP right may be considered to have committed unfair trade practices (tie-in sales), if such obligation may have an adverse effect on competition in a market. For instance, in 1998, the JFTC provided a recommendation decision to Microsoft that it should not tie its MS Word and Outlook software with its MS Excel software.

**25 Abuse of dominance**

Describe how the exercise, licensing, or transfer of IP rights can relate to abuse of dominance.

'Private monopolisation' under the AMA is similar to abuse of dominant market position under EU competition law. If an entrepreneur or a combination of entrepreneurs in a dominant position excludes or controls the business activities of other entrepreneurs and thereby causes a substantial restraint of competition, such abusive act will constitute a private monopolisation. In the *Paramount Bed* case, a dominant manufacturer of beds for medical use approached an official of the Tokyo metropolitan government and made it adopt a specification for beds that contained its IP rights by misrepresenting that the specification somehow could also be reasonably satisfied by its competitors, effectively excluding the business activities of its competitors. The JFTC held that Paramount Bed's activities constituted private monopolisation.

**26 Refusal to deal and essential facilities**

Describe how the exercise, licensing, or transfer of IP rights can relate to refusal to deal and refusal to grant access to essential facilities.

An entrepreneur's mere refusal to license IP rights is generally thought to be beyond the scope of the AMA unless the entrepreneur has purchased and collected IP rights or has employed inappropriate measures; no court judgment or JFTC decision has ever held a genuine unilateral refusal to license as being against the AMA. Moreover, no JFTC decision or court judgment has ever explicitly mentioned the essential facilities doctrine. Theoretically, however, if an IP rights holder singularly refuses to provide a licence to another entrepreneur and the entrepreneur faces difficulty in doing business because of the essential nature of the refused IP, the possibility that such refusal to license could constitute private monopolisation or unfair trade practices (other refusal to deal) cannot be ruled out.

## Remedies

**27 Remedies for violations of competition law involving IP**

What sanctions or remedies can the competition authority or courts impose for violations of competition law involving IP?

In cases of violation of competition law involving IP, the JFTC may issue a cease-and-desist order to take any measures necessary to eliminate such violation. However, whether 'necessary measures' could include such drastic measures as compulsory licensing or divestiture of IP rights is unclear; to date, the JFTC has not ordered compulsory licensing or divestiture of IP rights. If the violation is private monopolisation whereby a violator controls other enterprises' business or

unreasonably restrains trade, the JFTC should impose a surcharge (a type of an administrative penalty) on the violators. In addition, when the 2009 amendment to the AMA becomes effective, if the violation is private monopolisation whereby a violator excludes other enterprises' business or certain types of unfair trade practices, the JFTC should impose a surcharge on the violators. Private parties who have been harmed by such acts of violation may seek an injunction or compensation for damages, or both.

#### 28 Competition law remedies specific to IP

Do special remedies exist under your competition laws that are specific to IP matters?

Article 100 of the AMA lays down special sanctions that are specific to IP matters. That is, when the court pronounces a criminal sentence on persons who committed private monopolisation or unreasonable restraint of trade, it may order that the patents exercised for the relevant offence be revoked. However, this sanction has never previously been declared.

#### 29 Remedies and sanctions

What competition remedies or sanctions have been imposed in the IP context?

The JFTC would typically order the violators to stop the violation, discard the relevant business policy, or both. For example, the JFTC ordered members of a patent pool and the company that was managing the pool to abandon their policy not to grant licences regarding the pooled patents to non-members (*In re Pachinko Patent Pool*, 6 August 1997).

#### 30 Scrutiny of settlement agreements

How will a settlement agreement terminating an IP infringement dispute be scrutinised from a competition perspective?

Even a settlement agreement terminating IP infringement litigation will be scrutinised in the same manner as any other agreement. For example, an agreement whereby a defendant agrees not to compete with respect to the patented product of a plaintiff may violate the AMA, especially if the plaintiff is 'influential' in the relevant market (ie, with a market share of not less than 10 per cent or a market position within the top three market players).

#### Update and trends

On 27 July 2009, the JFTC reportedly issued a pre-order notice (a notice of content of a cease-and-desist order the JFTC plans to issue, to give an addressee an opportunity to rebut) against Qualcomm Inc, a wireless chipmaker based in the United States; this stated that Qualcomm had been committing an unfair trade practice by forcing Japanese mobile phone manufacturers to accept a NAP clause in a licence agreement of technologies for the third-generation mobile phones since 2000. The JFTC rendered a similar decree against Microsoft in 2008 in which it held that Microsoft's previous practice to include a NAP clause in licence agreements with PC manufacturers had constituted an unfair trade practice. Qualcomm has announced that it would rebut the pre-order notice.

#### Economics and application of competition law

##### 31 Economics

What role has economics played in the application of competition law to cases involving IP rights?

Economics has so far played a very limited role in the application of competition law to specific cases by the JFTC. IP-related cases are no exception to this.

##### 32 Recent cases

Have there been any recent high-profile cases dealing with the intersection of competition law and IP rights?

On 1 July 1997, the Supreme Court held that parallel imports of genuine products did not infringe a patentee's right, unless the patentee had agreed with purchasers outside of Japan to exclude Japan from a territory for sale or use of the products and put a distinctive notice on the products of such agreements (*BBS Kraftfahrzeugtechnik v Racimex Japan*).

On 16 September 2008, the JFTC held that Microsoft had engaged in unfair trade practices (dealing on restrictive terms) by entering into agreements with PC manufacturers to license Windows OS. Such agreements included a 'non-assertion of patents' (NAP) clause, which required licensees to not assert patent infringement claims against Microsoft and other PC manufacturers. Microsoft did not challenge the decision and it became final and binding.

## ANDERSON MŌRI & TOMOTSUNE

Yusuke Nakano  
Koya Uemura

yusuke.nakano@amt-law.com  
koya.uemura@amt-law.com

Izumi Garden Tower  
6-1, Roppongi 1-chome, Minato-ku  
Tokyo 106-6036  
Japan

Tel: +81 3 6888 1000  
www.amt-law.com

