

March 2022

The latest discussions on Economic Security Legislation in Japan

Taku Matsumoto / Daichi Goto

1. Outline

On February 25, 2022, the Cabinet approved the Economic Security Promotion Bill.

The Kishida Cabinet, which has included economic security in its top priority, has organized the expert advisory panel on economic security legislation (the “Expert Advisory Panel”)¹ in late November 2021 for the formulation of an economic security bill, which is to be submitted to the ordinary session of the Diet in 2022. The Expert Advisory Panel released its Opinions regarding Economic Security Legislation (the “Opinions”), on February 1, 2022, and these Opinions are likely to be the basis of the Economic Security Promotion Bill.

The following has been outlined in the Opinions.

2. Background

On the development of the following circumstances, the Expert Advisory Panel has cited the recent trend in emergence of new risks to public safety and security as one of the grounds for the growing need to rethink economic policy in light of national security.

- (i) Increasing vulnerability of Japan to supply shocks of certain items including essential products such as semiconductors and medical products, due to changes in the international specialization resulting from the economic growth of emerging countries and the deepening of global value chains
- (ii) Imminent threats of cyberattacks and a grave impact of the semiconductor shortage, with the digitization and complication of industrial infrastructure

¹ https://www.cas.go.jp/jp/seisaku/keizai_anzen_hosyohousei/index.html

(iii) Growing pursuit of national interests in terms of national security by economic measures on a global level, due to the rapid development of security policy in the field of economy and technology (for example, by promoting research, development and use of advanced technologies as countermeasures against national security threats, and strengthening the prevention of technology leaks)

Based on the trends above, the Expert Advisory Panel believes that the legislation in the following four areas will be necessary in terms of economic security and has had discussions on each area at sector-specific meetings.

- Strengthening of the supply chains of important items and materials (related to (i) and (ii) above)
- Securing the safety and reliability of key infrastructures (related to (ii) above)
- Systems to develop and support key technologies by both public and private sectors (related to (iii) above)
- Prevention of data leakage of sensitive information of inventions by not disclosing such patent information

The Opinions have been prepared for each of the four areas based on such discussions (The Opinions on the following four areas are referred to as “Opinions (Strengthening Supply Chains)”, “Opinions (Safety and Reliability of Key Infrastructure)”, “Opinions (Promoting of key technologies by Public and Private)” and “Opinions (Non-Disclosure of Patent Application)”).

3. Outline on the Opinions

The outline on the Opinions in the four areas are as below.

(1) Summary of Opinions (Strengthening Supply Chains)

a. Core ideas

In order to mitigate the risks of being dependent on other countries for important supplies, the shortage of which may threaten people’s lives, daily life or economic activities in Japan and risks of supply chain disruptions, it is essential to build the framework to secure the stable supply of important items and materials by cooperation of public and private sectors. It is also important that such framework not interfere with free economic activities of private business operators and that such framework would be compatible with international regulations such as WTO’s rules.

b. Critical Items concerned (the “Critical Items”)

The Critical Items should be limited to items and materials which are essential for the lives of people or on which people’s lives and economic activities depend, taking into account (i) the irreplaceability and (ii) the severity of the impact in the event of a supply disruption. Upon provision of support and measures

under the framework, the degree of supply chain dependence on certain countries should also be noted including that of ingredients and necessary facilities to produce in addition to the Critical Items themselves.

c. Outline of Framework

The government will prepare and release the policy for consistently operating the overall framework and based on such policy, will specify Critical Items and, will prepare policies for each Critical Item in a flexible and prompt manner, taking into account the economic circumstances and characteristics of Critical Items.

As part of specific approach to the private sector, the government should make the framework to accept projects to secure the stable supply of Critical Items from private sector companies (not limited to the procurement of production facilities, but including diversification of suppliers, stockpile, development and improvement of production technologies and development of substitute products) and to provide support for plans that conform to the government's policies (support that matches the needs of such private sector business, including financial support and funding).

The framework should allow for potential measures to be taken by the government to call for international cooperation, national stockpile and for reduction of usage, for cases where measures taken by private sector business cannot sufficiently secure stable supply.

(2) Summary of Opinions (Safety and Reliability of Key Infrastructure)

a. Core ideas

With the acceleration of digital transformation (DX), all types of areas including key infrastructures have become potential targets of cyberattacks. Since it is difficult to eliminate risks after installing a system built-in the facilities, it is necessary to remove risks at the stage of installation of facilities by implementing prior assessment, in order to prevent cyberattacks to the key infrastructure and the resulting impact on people's lives. On the other hand, the framework should not cause excessive restrictions on economic activities of business operators of key infrastructure nor discriminate IT system engineering operators by their nationalities.

b. Eligible Key Infrastructure Business Operators (the "Eligible Business Operators")

The Eligible Business Operators shall be designated from operators in the following industry based on clear criteria, taking into account the size of business and the irreplaceability with other operators.

The Eligible Business Operators shall be those who work in the industry that, if the stable provision of such service is threatened, could (i) compromise the survival of people (without substitutability) or (ii) cause major and wide-ranging disruptions to people's lives or economic activities. Specifically, they

should include the service of energy, telecommunications, finance, transportation, and postal services.

c. Eligible Facilities (the “Eligible Facilities”)

The Eligible Facilities should be limited to the facilities owned by Eligible Business Operators that would cause a major impact on the stable provision of services if they stop functioning or malfunction. Eligible Facilities include systems that handle information directly related with the stable provision of such services.

d. Outline of Prior Assessment

Regarding Eligible Business Operators, it is possible to set up the framework of the procedures of applications of plans of the function of facilities, suppliers and supply chains upon installation of Eligible Facilities (however, the burden on business operators shall be taken into consideration with regard to the content and method of application).

The government will examine the application and if it is deemed that there is a high risk that the Eligible Facilities will be used for external attacks, issue a demand to change the plan or suspend the installation and an order to take necessary measures in the case of non-compliance. The criteria of such assessment should be defined as clearly as possible in advance.

(3) Summary of Opinions (Promoting of key technologies by Public and Private [Sectors?])

a. Core Ideas

Research and development of advanced technologies and the appropriate utilization of such technologies are essential for maintaining international presence.

b. Subject Technologies (the “Subject Technology”)

The Subject Technology is expected to include advanced technologies in the area of space engineering, marine engineering, quantum technology, artificial intelligence and biotechnology, which are essential for Japan to maintain the long-term presence in the international community.

c. Outline on the Framework

In order to narrow down and prioritize the Subject Technology, it is necessary to (i) formulate basic policies for research and development and to set up a flexible and long-term major financial support system, (ii) start a committee comprised of competent government agencies and ministries and private sector companies to formulate measures for collection of necessary information on specific research and development and promotion of deregulation, and (iii) set up a think tank for research and development to prioritize the Subject Technology.

(4) Summary of Opinions (Non-Disclosure of Patent Application)

a. Core Ideas

With regard to patent applications of inventions that are extremely of sensitive nature for the national security of Japan and should not be made public, it is necessary to (i) withhold the procedure for publication of such patent application until such circumstances are resolved, and (ii) impose measures on the applicant to protect the information of such invention. It is also necessary to (iii) impose an obligation to file such patent application firstly in Japan with respect to inventions of types subject to examination that fall under the category of the above-mentioned inventions.

b. Inventions subject to Non-Disclosure (the "Subject Inventions")

Subject Inventions should be designated on the basis of inventions of extremely sensitive nature in terms of national security from technologies that lead to development of nuclear weapons and single-use technologies that are only utilized for weapons.

Regarding dual-use technologies that could be used for purposes other than the above, the Subject Inventions should be limited to those for which there would be little impediment to technological innovation by designating them as Subject Inventions.

c. Assessment Procedures of Eligibility of Subject Inventions

Subject Inventions should be designated through two-stage examination after the JPO narrows down all patent applications by types of technologies and other criteria. At the first examination, the JPO conducts a regular examination in a short period of time. At the second examination, a newly established department in cooperation with competent authorities including the Ministry of Defense conducts an expert examination for each case, with the assistance of outside experts.

It should be considered to confirm the intention of the applicant before designating an invention as the Subject Invention and to provide such applicant with an opportunity to stop the application procedure.

d. Procedures after Designation as Subject Invention

Regarding inventions that are designated as Subject Inventions, the applicant should be required to take measures to protect the information including suspending the disclosure of such patent application.

Measures for information protection are expected to include restriction on the implementation of inventions by applicants (however, such measure should be limited to the implementation that may spread information such as cases where the content of the invention may be analyzed through products), prohibition of patent applications in other countries in principle, restriction on disclosure of the invention

to other companies, prohibition of withdrawal of patent applications after the designation as Subject Inventions in principle and obligation of strict management of information on such inventions.

While there should be no upper limit to the period of withholding the publication of patent applications and the duration of the above-mentioned measures, the system should be reviewed on a regular basis and terminated as soon as there is no need to protect such information. In order to ensure the effect of the above-mentioned measures, penalties should be provided for violations.

e. Restriction on International Patent Applications

While it is necessary to impose an obligation for inventions subject to two-stage examination for the eligibility for Subject Inventions to submit a patent application firstly in Japan, the extent of such obligation should be limited. In order to ensure the effect of such obligation, penalties should be provided for violations.

4. Conclusion

In the policy speech on January 17, 2022², Japanese Prime Minister Kishida has placed the economic security as “an urgent issue and an important pillar for the new capitalism” and commented that the government would “support the strengthening of supply chains by new laws, set up the framework of prior safety assessment for critical facilities and systems of key infrastructure including electricity, telecommunications and finance and establish the rule of non-disclosure of patent applications which are of sensitive nature for national security” and “invest in the facilities for factories of semiconductors and boost the investment by both public and private sectors in research and development of areas such as artificial intelligence, quantum technology, biotechnology, life science, optical transmission systems, space and marine engineering”.

The Economic Security Promotion Bill will be submitted to the ordinary session of the Diet in 2022. If the bill is enacted, it is likely that it will be promptly enforced. Accordingly, it will still be necessary to pay attention to the situation, especially for companies that engage in the business that may be directly or indirectly affected by legislation in the four areas above.

² https://www.kantei.go.jp/jp/101_kishida/statement/2022/0117shiseihoshin.html

- This newsletter is published as a general service to clients and friends and does not constitute legal advice. Should you wish to receive further information or advice, please contact the authors as follows.
- Authors:
Taku Matsumoto (taku.matsumoto@amt-law.com)
Daichi Goto (daichi.goto@amt-law.com)
- If you wish to unsubscribe from future publications, kindly contact us at [General Inquiry](#).
- Previous issues of our newsletters are available [here](#).