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Japanese Diet Approves Bill to Amend the Anti-Monopoly Act

On June 3, 2009, the Japanese Diet approved amendments to the Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (the “Amended Act”). The amendments modify the leniency program for cartel behavior, expand the range of conduct subject to penalty under the Anti-Monopoly Act and increase some of those penalties, and both update and expand the pre-merger notification regime. The Amended Act is scheduled to be promulgated on June 10, 2009 and will enter into force on a day provided by the Japanese Cabinet within one year of June 10. The Japan Fair Trade Commission (“JFTC”) is also expected to issue guidelines further clarifying the amendments.

I. MODIFICATIONS TO THE LENIENCY PROGRAM

The leniency program related to anti-competitive cartels is modified in two significant ways, both designed to increase participation in the program and reduce the incidence of cartel behavior.

First, members of a corporate group may now submit a joint leniency application. Under the old law, each member of a corporate family was required to submit its own application. Because only three companies could benefit from the program’s reduction in penalties (the first-in reporter before the initiation of an investigation receiving a 100% reduction, second 50%, and third 30%), it was possible for some members of a corporate family to benefit while others were subject to the full fine. Moreover, because a single corporate group often had its subsidiaries apply for leniency at the same time, its companies could take each of the three leniency positions. This reduced the incentives for other companies to participate. The Amended Act removes this disincentive and brings the leniency program more in line with U.S. and EC practice.

Second, where the first two leniency applications are made prior to the initiation of the JFTC’s investigation into the cartel, under the Amended Act, the JFTC will allow up to five companies to benefit from the leniency program. As before, the company that is first to report will receive full immunity, the second will receive a 50% reduction, and the third will receive a 30% reduction. Under the new rule, the fourth and fifth participants also will receive 30% reductions.

II. PENALTIES FOR VIOLATION OF THE ANTI-MONOPOLY ACT

In order to increase the deterrent effect of the law, the following changes increase or expand the scope of its penalty provisions.

A. INCREASE IN MAXIMUM JAIL TERM FOR CARTELS AND BID-RIGGING

The maximum jail term was increased from three years to five. The increase brings the penalty for collusion closer to the jail term imposed for penalties for other white-collar crimes in Japan and the potential jail terms provided under U.S. law.

B. EXPANSION OF RANGE OF CONDUCT SUBJECT TO PENALTY

Under the existing law, only cartels and “controlling” acts of a monopolist are subject to an order for the violator to pay a surcharge. The Amended Act requires the payment of a surcharge for both “exclusionary” conduct by a monopolist and certain unfair trade practices.¹ Applicable surcharges are set out in the table below. To calculate the penalty, multiply the surcharge by the amount of the applicable turnover.

	Act	Manufacturer	Wholesaler	Retailer
Existing Law	Unreasonable restraint of trade	10%	2%	3%
	“Controlling” act of private monopolization	10%	2%	3%
Amended Law	“Exclusionary” act of private monopolization	6%	1%	2%
	Concerted refusals to trade, discriminatory pricing, unjust low sales prices, resale price restrictions	3%	1%	2%
	Abuse of a superior bargaining position	1%		

¹ It is our understanding that the JFTC intends to publish guidelines regarding exclusionary conduct. The unfair trade practices are concerted refusals to trade, discriminatory pricing, unjust low sales prices, resale price restrictions, and abuse of a superior bargaining position.

C. INCREASED SURCHARGE RATE FOR CARTEL RINGLEADERS

Under the current act, certain repeat violations will result in a 50% increase in the relevant surcharge. The Amended Act extends the 50% increase to a violator that either: (i) originated the illegal scheme and requested other firms to participate in or not cease from the infringement; or (ii) continuously set prices or allocated trade partners in response to conspirator's request. This amendment brings Japan in line with other jurisdictions and is intended to increase the deterrent effect of the Amended Act.

D. EXTENSION OF THE STATUTE OF LIMITATIONS APPLICABLE TO ADMINISTRATIVE ORDERS

The Amended Act extends from three years to five the applicable statute of limitations for the issuance of cease-and-desist orders and orders for the payment of a surcharge. Previously, the JFTC was required to issue its surcharge and/or cease-and-desist order within three years of a cartel's conclusion. In practice, this meant that the JFTC could not bring an enforcement action against a cartel that ended more than two years prior to the opening of its investigation because it takes several months to conduct the investigation. The new rule allows the JFTC to investigate a cartel that ended up to four years before it is uncovered, which obviously increases the number of cartels subject to prosecution.

III. MODIFICATIONS TO MERGER NOTIFICATION REGIME

While the filing thresholds are generally raised, the changes to the treatment of share acquisitions and the calculation of turnover will likely result in a greater number of transactions being subject to pre-closing scrutiny.

A. PRIOR NOTIFICATION OF SHARE ACQUISITIONS

Under the current act, the acquisition of shares did not require a pre-transaction filing with the JFTC. Instead, the parties could file the notification after the closing of the transaction. The Amended Act requires that share acquisitions meeting the filing thresholds be notified prior to closing and that the parties observe a mandatory thirty-day waiting period. Thus, the notification of share acquisitions is now consistent with the pre-transaction notification of other transactions, such as mergers or asset transfers. Violation of this pre-closing notification and waiting period requirement is sanctionable by a fine of up to 2 million JPY.

B. AMENDED NOTIFICATION THRESHOLDS

1. Total Sales in Japan

The Amended Act does away with the prior system of notification thresholds, which was largely based on an analysis of assets. In its place, the Amended Act introduces the concept of “total sales in Japan.” When calculating total sales in Japan, the JFTC will look to sales generated in business offices located in Japan as well as sales from imports to Japan. Details of the calculation method should come in later issued ministerial ordinances. This is a significant change in the method for calculating the relevant turnover and may result in a greater number of transactions meeting the filing threshold.

2. Corporate Group and Funds/Partnerships

The Amended Act employs a “corporate group” concept in the calculation of turnover. Potential filers must analyze the turnover of the entire corporate group, including all subsidiaries of the ultimate parent entity of the acquiring company. In addition, the Amended Act covers funds and partnerships. Funds and partnerships are included in the “corporate group”. Combining the corporate group approach with the changes to the method of calculating turnover, specifically the inclusion of import sales in Japan, will likely subject many more foreign-to-foreign transactions to oversight by the JFTC. For example, under the old rules, a foreign acquiring company without a direct parent or subsidiary in Japan was exempt from filing, while under the Amended Act, if the total sales in Japan by the corporate group of the foreign acquirer, whether made by a Japanese company or not, exceed the threshold a filing will be required.

3. Percentage of Shares Acquired

Under the current act, a filing is required when the acquiring party’s direct holdings in the target cross one of three thresholds, 10%, 25%, or 50% of the voting rights. The Amended Act simplifies the target thresholds to 20% and 50% of the voting rights held by the corporate group.

4. New Thresholds

Under the Amended Act, the filing thresholds are generally raised and vary depending on the type of transaction. Non-Japanese companies are subject to the same thresholds as Japanese companies.

Type of Transaction	New Rule
Share acquisition	Acquirer: Corporate group has total sales in Japan of over 20 billion JPY; voting rights held by corporate group cross 20% or 50% threshold
	Target: Target and its subsidiaries have total sales in Japan of over 5 billion JPY
Mergers	One party's corporate group has total sales in Japan of over 20 billion JPY
	Other party's corporate group has total sales in Japan of over 5 billion JPY
Asset transfers	Acquirer: Corporate group has total sales in Japan of over 20 billion JPY
	Acquired assets: Generate total sales in Japan of over 3 billion JPY or represent all of the assets of a company with total sales in Japan of over 3 billion JPY

C. EXPANDED EXEMPTION FOR INTRA-COMPANY TRANSACTIONS

The Amended Act exempts mergers, corporate divestitures, or transfers of business units among entities included in the same corporate group. The prior act exempted only transactions between a parent and its direct subsidiary or between companies with the same direct parent.

IV. CONCLUSIONS AND SUMMARY

The changes increase the reach and deterrent effect of the Amended Act, while also bringing it into line with other jurisdictions' antitrust laws.

- By extending the statute of limitations, the Amended Act should subject more alleged cartel behavior to investigation and possible sanction.
- The expanded surcharge regime also subjects more behavior to penalty.
- The Amended Act increases the deterrent effect of the law by increasing the maximum jail sentence for cartel behavior and the surcharge rate for cartel ringleaders.
- By introducing the concepts of total sales in Japan and the corporate group, the Amended Act will result in the JFTC receiving a greater number of merger notifications. Foreign companies will no longer be

able to rely on the their lack of assets in Japan or the lack of sales by a Japanese subsidiary.

- Subjecting share transfers to pre-transaction clearance will expand the number of transactions that the JFTC may review prior to closing.

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