

Legal Updates & News

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Japanese Diet Considers Bill to Amend Japan's Anti-Monopoly Act

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On February 27, 2009, a Bill^[1] to extend and amend Japan's Anti-Monopoly Act (the "AMA") was submitted to the Japanese Diet. The proposed amendments would have broad impacts on competition law in Japan and potentially would have significant effects on businesses operating in Japan. In particular, the Bill would amend the AMA to:

- Permit the Japan Fair Trade Commission ("JFTC") to levy potentially significant administrative fines for certain types of single-firm vertical practices
- Impose significantly heavier penalties on cartels, including increased fines and longer terms of imprisonment
- Revise substantially the form and process of Japan's pre-merger notification requirements
- Reform rules concerning the JFTC's handling of sensitive business information, including the rules regarding exchange of information with foreign competition enforcement agencies

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We anticipate that the Diet will likely pass the Bill in the next few months because the views of the ruling party and the other parties in Diet are reasonably well aligned on the principal points. Under the Bill, changes to the AMA will be effective within one year of its passage on a date specified by a Cabinet order.

1. New Administrative Fines (*Kachokin*) for Unilateral Conduct

The AMA prohibits two types of unilateral conduct: "private monopolization" and "unfair trade practices." Private monopolization includes conduct, either individually or in combination with other firms, that excludes or forecloses competition from other firms or controls the operations of a competitive firm. Unfair trade practices include unilateral conduct that tends to impede fair competition, such as a refusal to deal or abuse of a superior bargaining position, as well as actions that might be considered concerted conduct in other jurisdictions, such as resale price maintenance.

Under the current AMA, unilateral conduct generally is not subject to potential administrative fine. (The private monopolization offense of control of the business conduct of another firm has, in theory, been subject to potential administrative fine since 2005, but that provision has never been used.)

Under the Bill, exclusionary unilateral conduct and unfair trade practices would, for the first time, be subject to potential administrative fines, and the Bill sets forth the specific fines proposed for those categories of conduct:

- *Private Monopolization.* The bill would permit for the first time the imposition of administrative fines for exclusionary conduct – a type of private monopolization and one of the JFTC’s most active areas of enforcement. Under the Bill, the administrative fines for exclusionary conduct would be 6% of sales for firms other than wholesalers and retailers, 3% for retailers, and 1% for wholesalers.
- *Unfair Trade Practices.* The Bill would also permit imposition of administrative fines for certain types of unfair trade practices. The abuse of superior bargaining position would be subject to a fine of 1% of affected sales. Other conduct (including concerted refusal to deal, discriminatory pricing, unjust low pricing sales and resale price maintenance) would be subject to fines for the second offence within a ten year period. The fines in that case would be 3% of sales for firms other than wholesalers and retailers, 2% for retailers and 1% for wholesalers. [2]

2. Enhancement Cartel Enforcement

The Bill would enhance the “carrot and stick” approach to international cartel enforcement by increasing potential penalties for cartel and bid rigging behavior, while at the same time expanding modestly the availability of leniency for companies that self-report cartel behavior.

- *Increased Penalties.* Under the Bill, firms that play a leading role in cartels may be subject to a 50% enhancement of the current 10% maximum administrative fine (3% for retailers and 2% for wholesalers), thus permitting maximum fines of up to 15% of affected sales for firms other than retailers and wholesalers (and 4.5% for retailers and 3% for wholesalers).

Individuals who engage in cartel or bid rigging behavior would face increased penalties of up to five years of imprisonment (an increase from the current three-year maximum). To date, all criminal convictions under the AMA have resulted in a suspended sentence. However, under the Japanese Criminal Code, suspended sentences are not available for a term of imprisonment exceeding three years. Accordingly, the proposed increase in criminal penalties is particularly significant, as it may cause individual violators to face actual imprisonment.

- *Adjustments to Leniency Program.* The Bill would expand the leniency program to increase from three to five the maximum number of companies that are able to qualify for some degree of corporate leniency. In addition, the Bill would permit for the first time joint applications for leniency by two or more corporate affiliates within the same overall parent company. Under the current AMA, each company is treated as a separate entity – even two or more commonly controlled corporate affiliates.

3. Adjustments to Japan’s Pre-merger Notification System

The Bill proposes a number of significant changes to the procedures and reporting requirements of Japan’s pre-merger notification system. The Bill does not contain any revisions to the legal standards pursuant to which the JFTC evaluates proposed transactions.

- Pre-Closing Filings Required for Certain Acquisitions of Voting Securities

Under the current AMA notification structure, corporate transactions involving the acquisition of voting securities require only a post-closing filing. The Bill would change this structure and, for the first time, require a pre-close filing when the acquisition would cause the purchaser to hold more than 20% or 50% of the voting securities of the target. The Bill would also impose a 30-day waiting period, bringing Japan's review structure more into conformity with the reporting requirements and waiting periods in the United States and Europe.

- Revising Notification Thresholds

The Bill would alter in a number of ways the revenue thresholds that trigger a notification obligation under the AMA. First, only domestic revenue will be counted, regardless of whether the party is a foreign or domestic entity. Second, the current revenue thresholds of 1 billion yen for the target company and 10 billion yen for the acquirer will increase to 5 billion yen and 20 billion yen respectively.^[3] Finally, the Bill will include a number of exceptions to the filing rules, including transactions that involve a corporate split or an acquisition of businesses/fixed assets.

The rules defining thresholds for "domestic sales" or "group companies" are largely delegated to the Cabinet Order and are not available at this point. Accordingly, the scope and implications of these changes remains somewhat uncertain.

4. Revisions to JFTC's Rules Regarding the Handling of Confidential Business Information

The Bill includes two proposed revisions to the AMA that would simultaneously (a) provide the JFTC with greater flexibility to share investigative information with antitrust enforcement authorities in other countries, and (b) restrict the existing ability of interested parties and private litigants to access the JFTC's investigative case files and permit redaction of trade secret information.

- Disclosure of Information to Foreign Enforcement Authorities

The Bill authorizes the JFTC to disclose investigative information to foreign competition agencies, unless the JFTC concludes that doing so would be likely to harm the interests of Japan. Any such disclosure would be conditioned on reciprocity, confidentiality, and an assurance that exchanged information will not be used for criminal prosecution in the foreign jurisdiction.

This development is particularly significant for companies doing business in Japan because Japanese law does not recognize the attorney-client privilege. It is therefore possible that information provided by the JFTC to a foreign agency could include attorney-client privileged information that would otherwise have been protected from direct discovery by the privilege doctrine in the country of that receiving agency.

- Refinement of Rules Concerning Disclosure of Case Record

Under the AMA, interested parties may request a copy of the case record from the JFTC hearing (called a "*shimpan*" hearing), and use that information to pursue a civil action against a company. The Bill would continue to permit this type of discovery, but would explicitly permit the JFTC to redact information for "reasonable grounds," including protecting against the disclosure of trade secrets.

Footnotes

[1] The Bill to Partially Amend the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade.

[2] The other categories of unfair trade practices such as tying arrangement and interference of competitors transactions would likely be unchanged.

[3] The Bill will also require that sales revenue be tallied on a consolidated basis for the acquirer. The AMA currently requires the acquirer (and its direct parent and subsidiaries in Japan, if any) to aggregate assets (not sales revenue) on a non-consolidated basis.