



Amendment to Japanese Anti-Monopoly Act

The Japanese Diet has today passed an important amendment bill to the Japanese Anti-Monopoly Act to strengthen cartel regulation and modify the merger control rules. The changes will increase the availability of leniency in cartel situations and will introduce stricter rules for surcharges (administrative fines) and criminal sanctions. As regards mergers, the amendment will require pre-closing notification to the Japan Fair Trade Commission (JFTC) for share acquisitions which, together with other changes, will be likely to result in more foreign-to-foreign transactions needing to be notified in Japan.

The 2005 amendment to the Japanese Anti-Monopoly Act (the AMA) significantly strengthened the cartel regulation, in particular by increasing the level of surcharges and introducing a leniency programme.

The new amendment bill (the Amendment) that was passed in the Japanese Diet today will reinforce the surcharge rules, including in particular in relation to unilateral conduct in monopolisation/dominance investigations. The Amendment has also introduced a pre-closing notification regime (including a 30-day waiting period) for share acquisitions, which are currently only subject to post-closing notification. The new rules adopt a group company approach for notification thresholds, which will lead to more foreign-to-foreign transactions needing to be notified.

Proposals by various industry bodies and academics to reform the appeals process were not included in the Amendment and were left for future discussion.

The Amendment will come into effect within a year, at a date to be announced by the Cabinet Ordinance.

Cartel/dominance

New rules for surcharges (cartels, dominance)

Changes to the leniency rules (cartels)

Under the current rules, a leniency application in relation to a cartel investigation is assessed on an entity-by-entity basis, rather than on a group company basis. As a result, a multinational company group cannot protect

all of its subsidiaries involved in a cartel under a single leniency position so that even if that group company is 'first in' (giving rise to the possibility of a 100 per cent surcharge reduction), some of its subsidiaries may still be liable to a surcharge once the 50 per cent and 30 per cent reduction leniency positions have been taken by other subsidiaries. Since all three leniency positions currently available (100 per cent, 50 per cent and 30 per cent) can theoretically all be awarded to a single company group, incentives for other group companies to apply for leniency of surcharge reduction can be reduced.

The Amendment will allow a single joint leniency application by multiple entities within the same company group provided such entities are under a parent-subsidiary relationship. In addition, where a leniency application is made before the JFTC starts an investigation, the Amendment will allow five companies (rather than three) to benefit from a leniency position (one 100 per cent immunity, one 50 per cent reduction, and three 30 per cent reduction positions).

Aggravated surcharge rate for ringleaders (cartels)

The current rules for cartels and certain types of private monopolisation provide for an increase in the surcharge calculation rate by 50 per cent over the original rate (for example, from 10 per cent to 15 per cent of the relevant turnover) in cases of repeat violations within 10 years of the previous violation. The Amendment will extend this 50 per cent uplift to situations where the company is a 'ringleader' of the cartel. Further, when the company is both a ringleader of the cartel and a repeat offender,

the new rules provide that the original calculation rate is doubled (for example, from 10 per cent to 20 per cent of the relevant turnover). The new rules are compatible with the treatment of ringleaders and repeat offenders in the US.

Longer time limitation for surcharge (cartels, private monopolisation)

Currently, the JFTC cannot take measures (surcharge or cease-and-desist order) where a cartel finished more than three years ago. These rules mean that it is possible that some international cartels have escaped investigation by the JFTC (even if they were investigated in other jurisdictions), including in cases where a cartel was uncovered just two years previously (the JFTC normally needs between 10 months and one year to complete an investigation and, therefore, the lapse of two years before the start of investigation effectively means that the JFTC has lost the power to challenge the case). The Amendment increases the time limitation to five years, which will enable the JFTC to commence an investigation into a cartel that finished more than four years ago and to charge a surcharge calculated on the basis of full three-year turnover (the current rules that the basis for surcharge calculation is limited up to three-year turnover will remain).

Broader scope of surcharges against unilateral conduct

Regulation against unilateral conduct has also been strengthened. The existing rules only allow the imposition of surcharge against unreasonable restriction of trade (cartels) and ‘controlling’ type private monopolisation based on up to 10 per cent of the relevant turnover. The Amendment extends the scope of conduct subject to a surcharge to include ‘exclusionary’ type private monopolisation and certain types of unfair trade practices. The surcharge calculation rate is lower for such newly added conduct (see below for more details).

Succession of surcharges (cartels, private monopolisation)

The Amendment closes existing loopholes created by post-investigation demergers or transfers of those aspects of the business involved in the alleged cartel activity, by introducing new rules allowing the JFTC to impose surcharges in such succession situations.

Tougher criminal charges for cartels

The Amendment will increase the upper limit for imprisonment from three to five years. In the past, no criminal indictment in Japan against individuals based on a cartel allegation has resulted in an actual jail term, with all imprisonment sentences having been accompanied by probation. However, a court cannot attach probation to an imprisonment sentence that is longer than three years, so the new upper limit is more likely to result in actual imprisonment of individuals.

Surcharge calculation rates

	Private monopolisation			
	Unreasonable restriction of trade	‘Controlling’	‘Exclusionary’	Unfair trade practice
Current law	10 per cent* of relevant turnover	10 per cent* of relevant turnover	None (cease-and-desist order only)	None (cease-and-desist order only)
Proposed amendment	10 per cent* of relevant turnover	10 per cent* of relevant turnover	6 per cent* of relevant turnover	<ul style="list-style-type: none"> □ Discriminatory pricing, predatory pricing, resale price maintenance (repeat offenders only): 3 per cent* of relevant turnover □ Continuous abusive conduct taking advantage of superior bargaining position: 1 per cent of relevant turnover

*Smaller percentages are applied for fines imposed on undertakings engaged in retail and wholesale businesses.

Merger control

New rules for merger control filing

Share acquisitions

Currently, a share acquisition is subject only to a post-closing notification. The Amendment introduces a pre-closing notification regime with a 30-day waiting period for share acquisitions, making them consistent with other forms of consolidations (statutory mergers/demergers and asset transfers) which are already subject to a pre-closing notification requirement. Thresholds are also raised and simplified (explained below).

Introduction of turnover-based thresholds and group company approach

The new rules apply turnover-based thresholds instead of the existing asset-based thresholds. In addition, the Amendment introduces a group company approach rather than the current entity-based approach.

Consolidation within the same company group will be exempted from the notification requirement under the new rules.

The following table summarises the existing and revised thresholds.

Existing and revised thresholds

	Current thresholds	New thresholds
Share acquisition	<ul style="list-style-type: none">□ Acquiring entity and its Japanese direct parent and subsidiaries have assets of over ¥10bn□ Acquiring entity alone has assets of over ¥2bn□ Target entity has assets (Japanese company) or Japanese turnover (foreign company) of over ¥1bn□ Acquiring entity's voting stake goes over either 10, 25 or 50 per cent	<ul style="list-style-type: none">□ Acquirer as a group has Japanese turnover* of over ¥20bn□ Target as a group has Japanese turnover* of over ¥5bn□ Crossing voting stake thresholds of either 20 or 50 per cent
Statutory merger**	<ul style="list-style-type: none">□ One of the parties (as an entity) and its Japanese direct parent and subsidiaries have assets (in case of foreign company: Japanese turnover) of over ¥10bn□ The other party (as an entity) and its Japanese direct parent and subsidiaries have assets (in case of foreign company: Japanese turnover) of over ¥1bn	<ul style="list-style-type: none">□ One of the parties as a group has Japanese turnover* of over ¥20bn□ The other party as a group has Japanese turnover* of over ¥5bn
Asset transfer	<ul style="list-style-type: none">□ Acquiring entity and its Japanese direct parent and subsidiaries have assets of over ¥10bn□ Target assets:<ul style="list-style-type: none">– are the entire business of a company with assets (for foreign company: Japanese turnover) of over ¥1bn; or– generates Japanese turnover of over ¥1bn	<ul style="list-style-type: none">□ Acquirer as a group has Japanese turnover* of over ¥20bn□ Target assets:<ul style="list-style-type: none">– are the entire business of a company with Japanese turnover* of over ¥3bn; or– generates Japanese turnover* of over ¥3bn

* Calculation rules to be elaborated in separate regulations.

** There are more detailed rules for demergers.

Impact

As a consequence, non-Japanese companies will need to be more conscious of the potential application of the rules to their proposed mergers and acquisitions, even where those transactions do not involve a Japanese entity. Particularly notable are the new rules for share acquisitions, which impose a suspension requirement, the violation of which could potentially be challenged with sanctions. Under the current notification regime, a number of foreign-to-foreign transactions may escape the filing requirement by using a special purpose vehicle or holding company without any substantial assets. However, the new rules adopt a group company approach, which will catch such transactions. On the other hand, the pre-notification regime and the turnover based filing thresholds are now more consistent with the rules applied in the EU and many other jurisdictions, which is to be welcomed.

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