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# **Outline of the Amendment to the Japanese Antimonopoly Law**

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**The Japan Fair Trade Commission**

## Outline of the Amendment to the Japanese Antimonopoly Law

### The Japan Fair Trade Commission<sup>1</sup>

#### I. INTRODUCTION

On June 3, 2009, the bill to amend the Act concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (Antimonopoly Act) was approved and established at the 171<sup>st</sup> ordinary session of the Diet. The Act was promulgated as Act No. 51 of June 10 of the same year.

The major points of the amendment are: 1) expansion of types of conduct subject to surcharge payment orders and other revisions concerning surcharges, which are aimed at enhancing deterrence against violations and at strengthening the enforcement power of the Japan Fair Trade Commission (“JFTC”); 2) introduction of the prior notification system of share acquisitions, review of the notification threshold, and other revisions concerning regulations on business combinations, which are designed to ensure the effectiveness and international harmonization of regulations; and 3) increase in maximum jail terms for cartels and bid-rigging to enhance deterrence for individuals.

#### II. REVIEWS OF THE SURCHARGE SYSTEM, ETC.

##### *A) Introduction of Surcharges against Exclusionary Types of Private Monopolization*

Like unreasonable restraint of trade and private monopolization achieved by controlling the activity of other company, private monopolization achieved by excluding the activity of the other company is conduct that substantially restrains competition. Re-entry of an excluded entrepreneur cannot be expected in many cases, and the impact of this kind of conduct on the competitive environment is substantial. Consequently, the exclusionary types of private monopolization become subject to surcharge payment orders (paragraph (4) of Article 7-2).

Surcharges payment orders in Japan are a non-discretionary administrative measure. When conduct constitutes private types of monopolization or certain types of unfair trade practices, it is mandatory to pay a surcharge, the amount of which is calculated based on a predetermined calculation method. It is impossible for the entrepreneur involved to negotiate the amount with the JFTC. The surcharge against exclusionary types of private monopolization is basically calculated by multiplying the amount of sales of the relevant products or services during the calculation period by six percent. The surcharge rate is three percent if the violating entrepreneur engages in a

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<sup>1</sup> For further questions visit the JFTC website at <http://www.jftc.go.jp/e-page/aboutjftc/index.html> or email us at [atnlnldiv@jftc.go.jp](mailto:atnlnldiv@jftc.go.jp).

retail business, and two percent if the violating entrepreneur engages in a wholesale business.

***B) Introduction of Surcharge against Unfair Trade Practices***

Five types of violations included in the unfair trade practices that are currently provided in the public notice of the Fair Trade Commission (General Designation):

1. Concerted refusal to trade (paragraph (1) of the General Designation),
2. Discriminatory consideration (paragraph (3)),
3. Unfair price cutting (paragraph (6)),
4. Resale price restriction (paragraph (12)), and
5. Abuse of dominant bargaining position (paragraph (14))

have become subject to surcharge payment orders on the condition that the requirements shall be provided by law (items of paragraph (9) of Article 2, and Article 20-2 to 20-6 inclusive). The details of the requirements of these five types of violations that became statutory, except resale price restriction, were modified slightly from those provided in the General Designation. This means that statutory types of unfair trade practices and types of unfair trade practices provided in the General Designation will co-exist, and conducts that do not fall under the statutory types of violations may violate the General Designation.

Of the five types of unfair trade practices, concerted refusal to trade, unfair price cutting, discriminatory consideration, and resale price restriction become subject to surcharge payment orders when the same statutory type of violation is repeated within ten years. The amount of the surcharge is calculated by multiplying the amount of sales of the relevant products or services during the calculation period by three percent for manufacturers, two percent for retailers, and one percent for wholesalers.

Abuse of dominant bargaining position becomes subject to surcharge payment orders when it is a continuous offence. The amount of the surcharge shall be calculated by multiplying the amount of transactions with the counterparty in the violation during the calculation period by one percent. The rate is not differentiated by the size of the entrepreneurs or business type.

***C) Extra Rate of Surcharges against Entrepreneurs Who Played Leading Roles***

It has been provided that entrepreneurs who play leading roles, such as “organizers,” in bid rigging, cartels, and other unreasonable restraint of trade shall be subject to surcharge payment orders that are 50 percent larger than normal amounts. When an entrepreneur playing the leading role also meets the requirements for the additional rate of surcharge amount calculation applied for repeated violations

(paragraph (7) of Article 7-2), the rate is increased by 100 percent from the normal rate (paragraph (9) of Article 7-2). In addition, the reduction of surcharge amount due to early renouncement does not apply to an entrepreneur playing the leading role even when that entrepreneur withdrew from the violation at an early stage (proviso of paragraph (6) of Article 7-2).

#### ***D) Increase of the Number of Leniency Applicants***

The current leniency program provides that up to three parties are eligible to apply for surcharge reduction or immunity. The number has been increased to five parties (paragraph (1) of Article 7-2). The amount of the surcharge is reduced by 30 percent for the fourth and fifth applicants. After the investigation has started, however, applications for surcharge reduction are accepted from up to only three parties. The provision of information not previously obtained by the JFTC is required for fourth and fifth applicants and for any violators that file an application after the JFTC has started an investigation.

#### ***E) Introduction of Joint Application System for Group Enterprises***

In principle, applications for a surcharge reduction or immunity shall be made by a single party on its own. Because of the revisions, however, joint applications by entrepreneurs from the same group of enterprises will be permitted when certain requirements have been met (paragraph (13) of Article 7-2). When a joint application has been made by multiple entrepreneurs who meet the requirements, the same leniency position is assigned to each of the entrepreneurs, and reduction or immunity becomes applicable in accordance with the leniency position. However, all of the parties who have made a joint application are disqualified from surcharge reduction or immunity if any one of them meets the disqualifying provisions of leniency program, such as: 1) a false report; 2) a failure to submit a required report, etc.; and 3) forcing other entrepreneurs to engage in violations (paragraph (17) of Article 7-2).

### **III. ADMINISTRATIVE MEASURES AGAINST BUSINESS SUCCESSORS**

Prior to the amendment, there was no provision for issuing cease and desist orders to an entrepreneur who—through a merger, company split, or business transfer—took over a business involved in a violation, (after the violation had ended). Nor was there any provision for issuing a surcharge payment order to a business successor who took over a business related to a violation through a process other than a merger. Therefore, a provision has been established to enable the issuing of cease and desist orders and surcharge payment orders to business successors (items (ii) to (iv) inclusive of paragraph (2) of Article 7 and paragraph (25) of Article 7-2).

### **IV. EXTENSION OF STATUTE OF LIMITATION OF CEASES AND DESIST ORDER**

## AND SURCHARGE PAYMENT ORDER

The period in which a cease and desist order and surcharge payment order may be issued after a violation has terminated (statute of limitation) has been extended from three years to five years (paragraph (2) of Article 7 and paragraph (27) of Article 7-2).

## V. REVIEWS OF REGULATIONS ON BUSINESS COMBINATIONS

### *A) Introduction of the Prior Notification System of Share Acquisitions*

Under the current Act, the acquisition of shares of a company is reported after the transaction. Because of the revisions, it will now be mandatory to make prior notification of a share acquisition plan to the JFTC, as in cases of other business combinations such as a merger (paragraph (2) of Article 10). Thereby, provisions for prior notifications of joint share transfers were also introduced (paragraphs (2) and (3) of Article 15-3).

### *B) Procedure for Prior Notification*

Notification of a share acquisition plan is required when the entire corporate group to which the acquiring company belongs intends to acquire more than 20 percent and more than 50 percent of the voting rights of all the shareholders of the share-issuing company. As in the case of a merger, the company intending to acquire the shares subject to the notification may not acquire the shares until the expiration of a 30-day period after the notification was accepted (the waiting period), and if the JFTC issues a cease and desist order, advance notice of the cease and desist order is made within the waiting period. The waiting period is extended when the JFTC has requested submission of additional materials, etc. (paragraph (9) of Article 10).

### *C) Reviews of Notification Thresholds, etc. (paragraph (2) of Article 10, paragraph (2) and other sections of Article 15, paragraph (2) of Article 15-2, paragraph (3) of the same Article, and paragraph (2) of Article 16)*

Notification of a business combination such as a merger and share acquisition is mandatory only when the business combination exceeds a particular scale. The notification standard was reviewed as follows.

First, domestic sales were adopted as the criteria for the basis for measurement; and then reviews were made of the standards for the scale of companies involved that incurs a notification requirement, in terms of share acquisitions, mergers, joint incorporation-type company splits, absorption-type splits, business transfers, etc. For example, notification is required in a share acquisition where total domestic sales of the corporate group to which the acquiring company belongs exceeds 20 billion yen and the combined amount of sales of the share issuing company and its subsidiary(s) exceeds 5 billion yen. In a merger, notification is required when the total domestic sales of the corporate group to which a merging company belongs exceeds 20 billion yen and the

total domestic sales of the corporate group to which another merging company belongs exceeds 5 billion yen. When all parties involved in a merger, company split, joint share transfer, or a business transfer, etc. belong to the same corporate group, those parties are exempted from the obligation to make the notification.

## **VI. INCREASE IN MAXIMUM JAIL TERM FOR CARTELS AND BID-RIGGING**

The maximum jail term for unreasonable restraint of trade (cartels, bid-rigging, etc.) has been increased from 3 years to 5 years (paragraph (1) of Article 89).

## **VII. OTHER REVISIONS (CIVIL SUITS, CRIMINAL PENALTIES, PROVISION OF INFORMATION, ETC.)**

- Regarding the injunction suit provided in Article 24 of the Antimonopoly Act, a special provision that permits the court to order submission of a document unless there are reasonable grounds for refusing to do so (Article 83-4) and a provision that allows the judge to issue a confidentiality order to the related parties who touch upon trade secrets (Article 83-5) were introduced.
- Regarding interested persons' right to access and copy records of the case in question, a provision that allows the JFTC to restrict access to the case records, if reasonable grounds were established (Article 70-15) was introduced.
- A new provision was established to stipulate the conditions to be satisfied when the JFTC exchanges information with foreign competition authorities (Article 43-2).
- The trade association notification system has been abolished (paragraphs (2) to (5) inclusive of Article 8 of the Antimonopoly Act prior to the revisions).
- The amount of fines for violations of the obligation of confidentiality by members or staff of the Fair Trade Commission (Article 39) has been increased to not more than one million yen (Article 93).