Amendment in line with international practices

Changes to anti-monopoly law in Japan have brought it more in line with international practice and will encourage foreign companies to cooperate, say Yoshinori Ono and Yoshihiro Sakano of Nishimura & Asahi

The June 2009 amendment to the Act Concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade of Japan, or the Antimonopoly Act (AMA) comes into force on January 1 2010, except for a portion concerning the regulation of mergers which comes into force on January 31. The principal changes to the law are (a) revisions to the administrative fines (which the AMA refers to as surcharges) levied for prohibited cartel activities, monopolies and unfair trade practices and (b) revisions to merger control regulations. The basic intent of the amendment can be characterised as strengthening the enforcement of the AMA and harmonising such enforcement with other foreign jurisdictions.

Surcharge system and criminal penalty

Response to international cartel cases

The Japan Fair Trade Commission (JFTC) has recently been expanding its enforcement of AMA by applying it to international cartel cases. For instance, the JFTC has investigated the Marine Hose Case (which the JFTC started investigating in May 2007) and the High-voltage Power Transmission Cable Case (initiated in January 2009). In order to bring the AMA in line with international standard practices among competition authorities and to strengthen enforcement, the amendment has (a) newly adopted a "joint leniency" procedure, (b) extended the statute of limitations, (c) enlarged the scope of the conduct that is subject to the surcharge, and (d) increased the maximum criminal penalty from three years imprisonment to five years.

> **"The members of a cartel that voluntarily report on such a cartel may be granted an exemption"**

Surcharge for cartel and leniency system

Under the AMA, the JFTC must order the following surcharge to the business entities that committed cartel, bid-rigging or other anti-competitive activities in conjunction with their competitors (such activities are referred to collectively here as a cartel): 10% of the sales amount of the products or services provided during the period of time that a cartel is active (up to a maximum of three years). The percentage is replaced with 3% for retail businesses and 2% for wholesale businesses.

However, the members of a cartel that voluntarily report on such a cartel to the JFTC may be granted an exemption (the leniency system). The number of parties that can receive leniency has been increased from three to five (by the amendment; provided that the fourth and fifth appli-

cant reports facts and materials that are unknown to the JFTC. The percentage of the exemption is determined according to the order of filing an application with the JFTC:

First: 100%
Second: 50%
Third through fifth: 30%

However, parties that file applications for leniency after the JFTC has initiated an investigation of the cartel shall be limited to an exemption of 30%. Also, once an investigation has been initiated, only three parties may receive leniency. So, for example, if the JFTC initiates an investigation after one participant has filed an application for leniency, only three additional participants would be permitted to receive exemptions of 30%.

Joint leniency application

In line with the regulations in the US and the EU, the amendment now permits two or more participants in a cartel of the same company group to jointly file a leniency application and receive the same exemption from the surcharge. Such members of a company group will be regarded as one party in their application for exemptions from surcharge when determining the order of filing (first through fifth). In this context, a company group shall consist of the parent company and the subsidiaries of the subject company and each of the other subsidiaries. A parent company is defined as a company that holds the majority voting rights of the subject company and the subsidiary is defined as a company in which the subject company holds the majority voting rights. (This definition of a company group is different from the new merger control regulations, where a company group is defined by a substantial controlling power. See below.) All group companies that file a joint application must be fully responsive to the JFTC and comply with its requests for any joint applicant to be granted an exemption.

"If several companies in the same group applied for leniency, the JFTC could not always get enough information"

Prior to the amendment, a separate application for leniency needed to be filed by each entity, even if they were affiliated companies of the same company group. Consequently, in a case where several companies within the same company group participated in a cartel and applied for leniency, the JFTC could not always get enough information to conduct an adequate investigation. This is because affiliated companies participating in a Cartel typically have similar information and if each affiliate is separately counted when determining the order of filing, fewer other cartel members would be permitted to seek leniency. As a result, the JFTC could not obtain information from several independent parties, though it is important and useful for the investigation. For example, if three affiliated companies filed an application for leniency, no other member of the cartel would have been permitted to file an application for leniency because the affiliates were deemed to be the first, second and third applicants. The joint application has been introduced to avoid this problem.

Extension of the statute of limitations

The amendment increases the period of the statute of limitations for the cease-and-desist

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order and the order for surcharge regarding a cartel issued by the JFTC from three years to five from the date on which a violation ended. Prior to the amendment, the JFTC was not permitted to levy surcharges for violations of the AMA if three years had passed since the date on which the violation ended. Due to this limitation, in some cases, the JFTC was not able to participate in investigations in liaison with the competition authorities in the US and EU.

	Manufacturer, etc.	Retailer	Wholesaler
(a) Cartel, bid-rigging or other anti-competitive activities	10% (4%)	3% (1.2%)	2% (1%)
(b) Monopoly by control	10%	3%	2%
(c) Monopoly by exclusion	6%	2%	1%
(d) Concerted refusal to trade, discriminatory pricing, unjustly low price sales; and resale price restrictions	3%	2%	1%
(e) Abuse of superior bargaining position	1%		

*Percentages in parentheses are applicable to small and medium-sized enterprises.
*Surcharges (a) through (d) are calculated by multiplying the sales of goods or services concerned by the indicated surcharge rate ((a) to (d)). Surcharge (e) is calculated by multiplying the amounts of transactions with trade partner(s) that suffered abuse by the indicated surcharge rate (1%).

Expansion of the scope of activities

Prior to the amendment, surcharges were levied upon companies that engaged in (a) cartels or (b) monopolising a market by way of controlling other business entities (monopoly by control). In addition to those types, this amendment expands types of conduct to (c) monopolising a market by way of excluding other business entities from the market (monopoly by exclusion), (d) certain types of unfair trade practices and (e) abuse of a superior bargaining position.

First, monopoly by exclusion. The JFTC issued a guideline on October 28 2009 with respect to monopolies by exclusion. This indicates that surcharges will be levied on any company that has committed activities that would (i) exclude other business entities such that it is difficult for them to continue their business or for new participants to start businesses and (ii) result in a substantial restraint of competition in a market (exclusionary conduct). The guideline also stipulates four typical activities that could be deemed exclusionary conduct when considered together with an examination of various factors such as market conditions, market positions of the company and its competitors, the length of time that the exclusionary conduct was engaged in and its characteristics:

(a) setting the price of a product below its cost;

(b) setting trading conditions that prohibit or restrict other parties from trading with a competitor;

(c) tie-in trade; and

(d) unreasonable refusal to supply products that are essential to the buyer's business, unreasonable restrictions on the quantities or contents of such product to be supplied and unreasonable discrimination when setting conditions of or implementing the supply of such products.

In addition, the JFTC announced that it would focus its efforts on investigations of Exclusionary Conduct by parties with market shares greater than 50% and that has a large effect on the lives of Japanese citizens.

Second, unfair trade practices. Conduct that falls under any of the following types of unfair trade practices may result in surcharges being levied by the JFTC for a second offence of the same type of infringement within 10 years:

(i) concerted refusal to trade;

(ii) discriminatory pricing;

(iii) unjustly low price sales; and

(iv) resale pricing restrictions.

And lastly, abuse of a superior bargaining position. In contrast with the above, this conduct may result in surcharges being levied by the JFTC for an initial offence. In other words, a company may be subject to surcharges without warning if the JFTC makes an initial finding that the company regularly used its dominant bargaining position unjustly in light of normal business practices. Specifically, a party is subject to surcharge if it uses its dominant bargaining position unjustifiably in light of normal trading customs and:

(i) causes the other party in regular transactions to purchase goods or services other than those pertaining to the transaction;

(ii) causes the other party in regular transactions to provide money, services or other economic benefits; or

(iii) establishes or changes trade terms or implements a trade in a way that is disadvantageous to the other party.

The rates of surcharge for the foregoing conduct are as above.

Bigger surcharges for cartel leaders

The amendment increases the surcharge rates applicable to companies that lead the cartel to 150% of the regular rates as described above. A company is deemed to be a leader of a cartel if it originated the illegal scheme and requested other firms to participate or to continue to participate in the cartel.

Strengthened criminal penalties

Participating in a cartel is also a criminal offence under the AMA, punishable by imprisonment or fine. With the amendment, the maximum period of imprisonment has been increased from three years to five. As a result, the statute of limitations for prosecution under the Criminal Procedural Code is also increased from three years to five. This amendment is important because, for the first time, it indicates the possibility of actual

imprisonment of corporate management personnel for violating the cartel prohibitions. Such actual imprisonment has never occurred before in Japan.

Revision of merger control regulations

Prior notification for share acquisitions

The amendment establishes a new requirement that companies that acquire other companies through the acquisition of shares must provide a prior notification to the JFTC 30 days before the share acquisition. Specifically, prior notification is required if (a) the total domestic sales of the acquirer (and its company group) exceed ¥20 billion ($225 million), (b) the total domestic sales of the target (and its subsidiaries) exceed ¥5 billion, and (c) the voting ratio in the target held by the acquirer (and its affiliates company group) after the proposed acquisition will exceed 20% or 50%. (Therefore, notification is required for both an increase from 15% to 21% and from 45% to 51%.)

This requirement is in line with the prior notice requirements for mergers and other types of business combinations under the existing AMA. This change brings Japanese notice requirements in line with those of the US and the EU. Prior to the amendment, the JFTC's efforts to investigate business acquisition cases involving share acquisitions were compromised because filings were not made until after the transaction had closed. For example, in the case of BHP Billiton's proposed bid for shares of Rio Tinto between November 2007 and November 2008, BHP Billiton made filings with the competition authorities in the EU, the US, Canada, Australia and South Africa through its prior notification systems, but did not make a filing with the JFTC. After this amendment, it is expected that JFTC will be able to conduct investigations on international merger cases more effectively in cooperation with the foreign competition authorities.

"Companies must now provide a prior notification to the JFTC 30 days before the share acquisition"

New threshold tests

The amendment replaces the asset-based threshold tests with domestic sales threshold tests for prior notification requirements for all types of business combinations.

Furthermore, the amendment calculates the threshold based upon the total domestic sales of the "Company Group". The Company Group refers to a group of companies and partnerships comprising an ultimate parent company of the acquirer and all subsidiaries (companies and partnerships) that are directly or indirectly controlled by the ultimate parent. "Control" means that a company has more than 50% of shares or has control over the decision of finance and business policy of the other company and partnership. Domestic sales means the total sales of products and services provided in Japan, including exports to Japan. The method for calculating (i) the "total domestic sales" of a Company Group, and (ii) the domestic sales of the target company and its subsidiaries is specified in the rules of the JFTC.

In addition, the amendment simplified the ratios of voting rights that trigger the share acquisition notification requirement from three tiers (10%, 25% and 50%) to two (20% and 50%).

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Share acquisitions	
(i) Acquiring company: Total domestic sales of its Company Group (CG) exceed ¥20 billion.	**(ii) Target company:** Total domestic sales of the target company and its subsidiaries exceed ¥5 billion.
(iii) The ratio of voting rights held by the CG will exceed 20% or 50%.	
Merger	
One company: Total domestic sales of its CG exceed ¥20 billion.	**Another company:** Total domestic sales of its CG exceed ¥5 billion.
Business transfer	
Business to be transferred: Domestic sales of the business exceed ¥3 billion.	**Acquiring company:** Total domestic sales of its CG exceed ¥20 billion.

The prior notification thresholds for major types of business combinations are as in the above table.

It is expected that more notifications will be necessary for international mergers and acquisitions among foreign companies due to this portion of the amendment. Prior to the amendment, share acquisitions among foreign companies did not require a notice to be filed with the JFTC unless (a) the assets of the foreign acquirer exceeded ¥10 billion and (b) the domestic sales of the foreign target company exceeded ¥1 billion. However, only the sales of branch offices or direct subsidiaries of the foreign target company were included in counting the domestic sales. It did not include any export sales to Japan or the domestic sales of any Japanese subsidiary that is a "grandchild" company of the foreign parent. (A "grandchild" is, for example, a Japanese subsidiary of a Singapore subsidiary which is a subsidiary of a US parent.) Thus, there were very few cases where foreign share acquisitions required JFTC notification.

In contrast, under the amended AMA, domestic sales include exports to Japan and the sales of Japanese grandchild companies. The JFTC must be notified if the total of the domestic sales of a target company and its subsidiaries exceeds ¥5 billion and the total domestic sales of an acquirer and its Company Group exceed ¥20 billion.

Review process following notification

The JFTC will review the prior notification for the proposed transactions (through share acquisitions, mergers, business transfers, and so on) during the 30-day waiting period following the date that it receives notice. During such period, the parties shall not effect the transaction. If the JFTC asks the applicant to submit reports, information, or other materials during the 30-day period, then the JFTC's review period will be extended up to the later of (i) 120 days from the date that its receives notice, and (ii) 90 days from the date of receipt of all requested materials. If the JFTC considers that the proposed transaction is in violation of the AMA, the JFTC will send a prior notice of the cease-and-desist order to the applicant before the end of the waiting period so that the applicant may provide counter arguments and evidence with the JFTC.

It has been standard practice to consult with the JFTC at an early stage of a transaction before the filing of the official prior notification. Such consultation is generally recommended to reduce the risk of violating the AMA and take measures to resolve the potential AMA issues in consultation with the JFTC, especially where the projected market share after the transaction is high.

When acquiring a public company through a tender offer for its shares, an acquirer must follow procedures established under the Financial Instruments and Exchange Act (FIEA). Under the FIEA, such an acquirer may withdraw its tender offer if, before the end of the tender offer period (a maximum of 60 business days), (i) the JFTC orders the acquirer to cease due to a violation of the AMA or (ii) the period during which the JFTC can send a prior notice of a cease-and-desist order to the acquirer (prior notice period) has not lapsed; provided, however, that the acquirer states clearly on the tender offer notification to the relevant financial bureau (a) necessity of the prior notification to the JFTC, (b) the prior notification date, (c) the expected end of the waiting period, and (d) the status or resolution of the prior consultations with the JFTC. In addition, the acquirer must submit a written confirmation to the relevant financial bureau if (i) the acquirer has obtained the JFTC's clearance as a result of a prior consultation or (ii) the prior notice period lapses when the acquirer makes the tender offer without the JFTC's clearance.

If a hostile takeover is being planned, it can be very difficult to gather the information necessary to prepare prior notification to the JFTC because cooperation of the target company cannot be expected. If approached, the JFTC's practice is to allow informal prior consultation with the acquirer for hostile takeovers. According to the AMA, the JFTC may request and order the target company to submit information necessary in order for the JFTC to examine such transactions. This method may be available if the acquirer is ready to disclose its takeover plan to the target company.