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Amendments to the Antimonopoly Act

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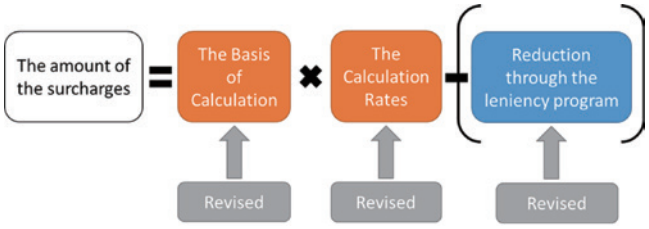
I. Introduction

The amendments to the Antimonopoly Act[1] will take effect on December 25, 2020 (when amended, the "Amended Antimonopoly Act"). While the amendments cover a wide range of aspects, this article will highlight some of the key that will result from the amendments.

II. Revision of the Surcharge System

Basically, as illustrated below,[2] the amount of surcharges in cases of unreasonable restraint of trade is calculated by multiplying the amount of sales of goods or services subject to a cartel ("Basis of Calculation") with the predetermined calculation rates ("Calculation Rates"). This amount may be reduced through the leniency program.



A. Amendments to the Basis of Calculation

a. Extension of the calculation period

Under the current Antimonopoly Act, the surcharge is calculated for up to three years prior to the date of termination of the infringement. Under the Amended Antimonopoly Act, the calculation period will be extended to cover up to the past 10 years from the date the Japan Fair Trade Commission ("JFTC") starts its investigation.[3]

Due to the extension of the calculation period, the amount of sales and other information to be used to calculate the Basis of Calculation may likely no longer be available because of the disposal of the relevant documents. Thus, a provision will be introduced under the Amended Antimonopoly Act to allow the JFTC to estimate the Basis of Calculation when the enterprise fails to respond to its request for a report of the facts or submission of materials.[4]

The statute of limitation will also be extended from 5 years to 7 years.[5]

1. Shiteki dokusen no kinshi oyobi kousei torihiki no kakuho ni kansuru horitsu [Act on Prohibition of Private Monopolization and Maintenance of Fair Trade], Act No. 54 of April 14, 1947, as amended by Act No. 45 of June 19, 2019.
2. Source: JFTC, "The Outline of the Antimonopoly Act Amendment," at https://www.jftc.go.jp/en/pressreleases/yearly-2019/June/190619071.pdf, p. 2.
3. The Amended Antimonopoly Act, art. 2-2, paras. 13 and 14, and art. 18-2, para. 1.
4. *Id.*, art. 7-2, para. 3, art. 7-9, paras. 3 and 4, art. 8-3, and art. 20-7.
5. *Id.*, art. 7, para. 2, art. 7-8, para. 6, art. 7-9, para. 4, art. 8-2, para. 2, art. 8-3, art. 20, para. 2, and art. 20-7.

b. Additional points to the Basis of Calculation

The following points will be added to the Basis of Calculation:

- The amount of sales of certain enterprises that belong to the same group as the violators, and receive instructions or information therefrom.[6]
- The amount of sales of the business related to goods or services that are the subject of the infringement.[7]
- The financial gains received for not supplying goods or services that are the subject of the infringement.[8]

B. Amendments to the Calculation Rates

The calculation rates by type of business and the reduced calculation rates for an early withdrawal from the infringement will be abolished.

The calculation rates for small-to-medium-sized enterprises will only be available for enterprises deemed to be substantially a small-to-medium ("SME") enterprise.[9] For example, an SME whose parent company is a large company (i.e., not an SME) cannot benefit from the calculation rates for SMEs.

Moreover, the scope of application of the increased calculation rates for repeated infringements will be revised.[10] The Amended Antimonopoly Act will also subject the act of requiring another to obstruct the investigation to increased calculation rates.[11]

III. Revision of the Leniency Program

A. Background

In Japan, surcharge reduction and exemption through the leniency program was introduced in 2006. The Japanese leniency program has been actively used by enterprises. It has become part of the established practice in dealing with cartels and bid rigging, and has contributed to the investigations of the JFTC. However, surcharge reduction and exemption through the leniency program under the current Antimonopoly Act has a limitation on the number of applicants. In addition, the reduction rate is uniformly set based on the order of the application, and the rate does not reflect the degree of cooperation given by the applicant in a JFTC investigation.

Under the Amended Antimonopoly Act, the limitation on the number of applicants that can avail of a surcharge reduction before the start of the investigation will be abolished[12] and the reduction rate will depend on the degree of cooperation given in an investigation.[13]

B. Reduction Rate under the current Antimonopoly Act

The reduction rate is currently available as follows:[14]

	Order of Application	Reduction Rate based on Degree of Cooperation
Before the Investigation Start Date	1st	100%
	2nd	50%
	3rd-5th	30%
	6th and after in order of application	
After the Investigation Start Date	Up to 3*	30%
	Other than the above	

*An applicant can obtain the reduction rate on the condition that the total number of applicants (including applicants who apply before the investigation start date) is five or less.

6. *Id.*, art. 7-2, para. 1, items 1 and 2, art. 7-9, para. 1, item 1, art. 7-9, para. 2, and art. 8-3.
7. *Id.*, art. 7-2, para. 1, item 3, art. 7-9, para. 1, item 2, and art. 8-3.
8. *Id.*, art. 7-2, para. 1, item 4, art. 7-9, para. 1, item 3, and art. 8-3.
9. *Id.*, art. 7-2, para. 2.
10. *Id.*, art. 7-3, para. 1, items 1, 2 and 3.
11. *Id.*, art. 7-3, para. 2, item 3(c) and (d).
12. *Id.*, art. 7-4.
13. *Id.*, art. 7-5.
14. Supra at note 2, p. 3.

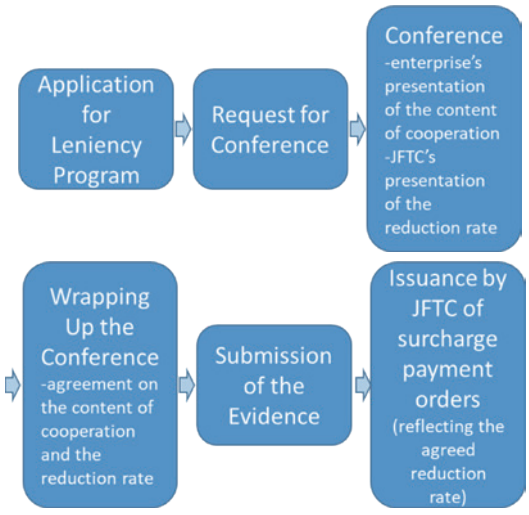
C. Reduction Rate under the Amended Antimonopoly Act

The reduction rate that may be availed of under the Amended Antimonopoly Act is as follows:[15]

	Order of Application	Reduction Rate based on Order of Application	Reduction Rate based on Degree of Cooperation
Before the Investigation Start Date	1st	100%	
	2nd	20%	+up to 40%
	3rd-5th	10%	
	6th and after in order of application	5%	
After the Investigation Start Date	Up to 3*	10%	+up to 20%
	Other than the above	5%	

*An applicant can obtain the reduction rate on the condition that the total number of applicants (including the applicants who apply before the investigation start date) is five or less.

The specific reduction rate will be determined by the agreement between the JFTC and the applicant after having a conference as outlined below.[16]



IV. Partial Introduction of an Attorney-Client Privilege

The Amended Antimonopoly Act will introduce a so-called attorney-client privilege that has not previously been recognized in Japan. In particular, it will create a system that will prevent investigators from accessing objects that contain confidential communications between an enterprise and an attorney about legal advice if certain conditions are met pursuant to the prescribed procedure (the "Privileged Treatment").[17]

However, the scope of the Privileged Treatment is significantly narrower than that granted in the United States, the European Union and other countries, with the following limitations:

- The Privileged Treatment is designed to cover the JFTC's administrative investigation[18] (i.e., the procedures taken to investigate alleged antitrust cases that are potentially subject to administrative measures, such as cease and desist orders and surcharge payment orders) but not the compulsory investigation procedures (i.e., the procedures taken to investigate alleged antitrust cases that are potentially subject to prosecution that could result in the imposition of criminal punishment).
- The Privileged Treatment is designed to protect objects that record the contents of confidential communications between the attorney and the enterprise about legal advice on the alleged act of violation, which is the subject of the leniency program.[19] Communications relating to any private monopolization or unfair trade practices are not covered by the Privileged Treatment.

15. *Id.*
16. *Id.*, p. 4.
17. Kouseitorihikiiinkai no shinsa ni kansuru kisoku [Rules on Investigations by the Fair Trade Commission], art. 23-2, para. 5.
18. *Id.*, art. 23-2, para. 1.
19. *Id.*, art. 23-2, para. 1, and art. 23-3, para. 1, item 1.

Attorneys who can avail of the Privileged Treatment are those who are engaged in the legal practice independently from the enterprise. In general, an attorney who is an employee of the enterprise (e.g., an in-house Attorney) is not considered an attorney independently engaged in the legal practice. On top of that, foreign lawyers are not included in the scope of "attorneys." Nevertheless, although communications between foreign lawyers and the enterprise are not subject to the Privileged Treatment, the guidelines on the treatment of objects that record confidential communications between an enterprise and an attorney indicate that the JFTC shall not issue a submission order with respect to objects that record the contents of confidential communications between the enterprise and a foreign lawyer about legal advice relating to foreign competition actions to be taken in relation to foreign competition laws, unless such objects contain primary materials or fact finding materials, or are otherwise considered necessary for the JFTC investigation of the relevant case. The JFTC's actions on this matter will likely attract attention in the future.

Back to List of Articles

New Financial Service Intermediary Business License

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I. Introduction

To enhance the convenience and protection of customers of financial intermediary services, a new financial service intermediary business license system has been created by the recent amendment of the Act on Sales, etc., of Financial Instruments. The law will be renamed the Act on Provision of Financial Services (the "Act") and the amendments are expected to take effect by the end of 2021.

By obtaining the new license, service providers will be entitled to provide customers a wide range of financial intermediary services flexibly and in harmony with their own business models.

II. Background – Issues under the Existing Regulations on Financial Intermediary Services

Currently, the financial intermediary business is regulated by different laws, depending on the industry, or type of financial intermediary services provided. In particular, for the banking intermediary business, a bank agency service license is required under the Banking Act, while for the insurance intermediary business, insurance agents or brokers must be registered under the Insurance Business Act. As to the security intermediary business, registration of the financial instrument intermediary service is required under the Financial Instruments Exchange Act. Lastly, those engaged in multiple types of financial intermediary businesses, which cut across these different industries, must comply with all of the above requirements and the regulations imposed by each applicable law.

Moreover, existing regulations feature a so-called affiliation system. Except for insurance brokers, a financial intermediary service provider must belong to a financial institution that provides financial instruments (i.e., bank, insurance company or a securities company). The financial institution is obligated to instruct and supervise the service provider and will be necessarily liable for any damages to customers caused by such service provider in the operation of its business. From the standpoint of the service provider, it has to subject itself to the strong control and oversight of the financial institution, which reduces the flexibility of its service structure and makes it practically difficult for it to obtain multiple licenses to conduct multiple types of financial intermediary businesses.

The vertical and fragmented license system for the financial service intermediary business has become an issue that has risen to the surface because it has prevented Fintech startups from conducting new businesses. For example, some Fintech startups have been providing bookkeeping or household accounting apps that collect the financial personal information of customers. They now want to recommend a variety of financial instruments that may be suitable for their customers based on an artificial intelligence (AI)-based analysis of their financial information as a new digital platform business. However, the current legal framework makes it difficult for them to pursue the new business.

III. Features of the New License System

The new financial service intermediary business license will entitle the service provider to mediate financial transactions in different industries between their customers and the different financial institutions. Obtaining just one license through the registration process can create and optimize the use of convenient one-stop shops for a variety of financial services.

The new license system will not adopt the affiliation system. The relationship between the financial intermediary service providers and financial institutions will not be of vertical control but that of an independent and horizontal alliance, which will give service providers an opportunity to customize their services flexibly to fit their own business models.

To compensate for the loss of the advantage of the affiliation system for customer protection, the Act will make special arrangements to prevent harm to customers, including limiting the range of available services, banning custodial services for customer assets, and preserving business security deposits. These regulations, however, might become obstacles to any entry into this business field.

With regard to regulating the conduct of service providers, an activity-based approach will be adopted. The applicable regulations on conduct will vary depending on the financial function and risk of each type of financial intermediary service to be provided.

As mentioned earlier, this license was mainly introduced to address the potential needs of Fintech industries, but service providers may make use of this license for face-to-face financial intermediary services, too.

IV. Scope of Business Operations

A "financial service intermediary business" is defined under the Act as the business of providing any banking intermediary services (i.e., intermediary services for deposits, loans or money transfers), insurance intermediary services, securities intermediary services (i.e., intermediary services in primary/secondary securities transactions or investment advisory/management transactions), or money lending intermediary services.[1]

The service provider may mediate financial transactions but not become an agent for the purpose of concluding such transactions, which means that the financial institution must reserve the final decision to make a contract, and the contract for any such financial transaction may not be done on the financial intermediary's platform.

The scope of financial services that may be provided by financial intermediaries will be limited to those that do not require complicated explanations to customers. The specific types of financial services to be allowed have not yet been announced officially, but the mediation of investment-type insurance contracts and deposit contracts (i.e., those that involve a risk of loss of the principal), including those denominated in foreign currencies as well as derivative transactions, and unlisted stocks and bonds purchase contracts will likely be excluded from the range of available financial intermediary services. If existing insurance agents wish to continue dealing with the above investment-type insurance contracts by using their specialized knowledge and experience, then they must keep their insurance agency registration and obtain the new financial service intermediary registration to provide financial services other than insurance-related services. Existing financial intermediaries may hold dual licenses, i.e., the new

1. The Act, art. 11.

license to provide financial intermediary services in addition to their existing ones.

V. Registration System

The license to carry out a financial service intermediary business can be obtained by registration with the Financial Services Agency ("FSA").[2] In applying for the registration, a service provider may choose one, some or all of the types of financial intermediary services that it intends to provide. Generally speaking, as the types of services intended to be provided by the service provider increases, the number of items to be reviewed by the FSA will also increase, in which case, scrutiny of the registration application will likely become stricter. As to registered service providers that want to change or add more types of services, they must change their registration. Service providers should thus carefully consider what types of financial intermediary services they will provide in the future, taking into account their business plan, expertise, time frame, etc., before submitting their registration application.

As mentioned earlier, existing intermediaries (e.g., bank agent) may apply for the new license. However, the services covered by their existing license(s) cannot be selected in their applications for registration as financial service intermediaries because of concerns that customers may get confused about the types of their licenses, which differ in terms of the scope of the services and the regulations applicable thereto. Thus, if an existing intermediary obtains registration for a financial service intermediary business that provides a financial intermediary service that is the same with an existing service, then it will lose its existing license or registration. It should thus refrain from selecting any financial intermediary service that is the same as that covered by an existing license.

VI. Financial Requirements

There are no capital or net asset requirements for the registration of a financial service intermediary business. However, in order to secure an amount that would be sufficient to compensate customers for any damages caused in the course of business operations, a certain amount of cash must be preserved as a business security deposit.[3] Customers will have a statutory lien on the security deposit for a preferential payment of their claims. As an alternative to the security deposit, guarantee contracts with banks and/or insurance contracts with insurance companies may be opted for instead. The required amount of deposit has not yet been announced. Theoretically, it will vary depending on the risk or scale of the business, so, it will probably be calculated based on the total revenue of the service provider for the past several years.

VII. Regulations on Conduct

The regulations on conduct applicable to the financial service intermediary business consist of (i) common regulations that apply regardless of the type of service provided, and (ii) regulations that apply specific to the type of service provided.

The following are the important common regulations under the Act that apply regardless of the type of service provided:

- Prohibition of name lending (Article 21)
- Fair and honest business operations (Article 24)
- Provision of information (Article 25)
- Measures concerning business operations including the fair treatment of customer information (Article 26)
- Ban on custodial services of customer assets (Article 27)

2. *Id.*, art. 12.
3. *Id.*, arts. 22 and 23.

The regulations specific to the type of service provided result from the application of existing laws with some modifications, including the Banking Act (e.g., provision of specific information), the Insurance Business Act (e.g., obligation to know and confirm customers' needs), and the Financial Instruments Exchange Act (e.g., suitability rule and ban on the use of insider information).

Considering current business practices in Japan, the most challenging obligation of financial service intermediaries is the provision of information under Article 25 of the Act. This is because, for the purpose of making economic and business incentives transparent, it includes the obligation to disclose the fees, remuneration and other consideration received by the financial service intermediaries from the financial institutions for the financial intermediary business if requested by a customer. Financial institutions must thus make careful decisions when outsourcing to financial service intermediaries the mediation of certain types of financial instruments with so-called hidden fees, including insurance or loan contracts, and must be ready to disclose the sales fees paid by them to such intermediaries.

Back to List of Articles

Regulation of Continuous Transactions by Foreign Companies in Japan

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I. Introduction

The Companies Act of Japan (the "Act") regulates the conduct of continuous transactions by foreign companies[1] in Japan. In particular, foreign companies that do not have any form of office in Japan, but intend to carry out transactions continuously in Japan by themselves must first appoint and register at least one resident representative in Japan.[2] Foreign companies are prohibited from engaging in continuous transactions before completing the registration process.[3] Certain disclosure and other obligations must also be observed by such foreign companies. This article discusses the requirements that must be met by foreign companies without offices in Japan.

II. Meaning of Continuous Transactions

There are no clear official guidelines as to what would constitute "continuous transactions." However, they may be understood to mean commercial transactions that are carried out pursuant to a specific plan, and are not incidental or isolated in nature.[4] To determine whether a certain transaction is a continuous one, the main issue would be whether the transaction is a part of a continuous business activity being carried out in Japan. Thus, the nature and other circumstances of the transaction must be examined. For instance, a mere fund raising activity done by the issuance of bonds by a foreign company to investors in Japan would not qualify as a continuous transaction. However, a two-year retail franchise contract could be considered a continuous transaction. The number of transactions is also one of the factors that should be considered albeit it is not a decisive one.

III. Appointment and Resignation of Representatives

To directly engage in continuous transactions without establishing a subsidiary or branch in Japan, Article 817 (1) of the Act requires a foreign company to specify one or more of its representatives in Japan and at least one of them must be a resident of Japan. Thus, a foreign company must appoint at least one resident representative in Japan.

1. A "foreign company" is broadly defined as any juridical person incorporated under the laws of a foreign country, or any other foreign organization that is similar to a Japanese stock company, general partnership company, limited partnership company or limited liability company (The Act, art. 2(i) and (ii)).
2. *Id.*, art. 817(1).
3. *Id.*, art. 818(1).
4. Minoru Tokumoto, Tikujo Kaisetsu Kaishaho 9-kan, Gaikoku Kaisha, Zassoku, Bassoku [A Commentary on the Companies Act Vol. 9-foreign company, minor regulations and penal regulations], Toshio Sakamaki and Misao Tatsuta, Chuokeizaisha, 2016, 11-12.

If all of its resident representative(s) intend to resign, then the foreign company must comply with a procedure that is meant to protect its creditors in Japan. It must give public notice to its creditors through the official gazette as well as individual notices to any known creditors informing them that they can state their objections, if any, within a certain period of at least a month. If any creditor raises an objection within the said period, then the foreign company must make a payment or provide a reasonable security to such creditor, or entrust property equivalent to such payment to a trust company or any other financial institution that is engaged in the trust business for the purpose of making the subject payment to such creditor, unless there is no risk of harm to such creditor from the resignation of the resident representative(s). After carrying out this procedure, the resignation of the resident representative(s) will become effective by completing the registration of such resignation.[5]

Since at least one representative must be a resident, the above procedure must also be observed if all of the resident representatives of the foreign company lose their status as residents in Japan.

IV. Matters to be Registered

The following matters must be registered by the foreign company within three weeks from the appointment of the representative(s) at the Legal Affairs Bureau having jurisdiction over the place where each of its resident representatives or its sole resident representative lives in Japan:[6]

(i) its basic corporate information, including its business purpose(s), trade name, addresses of the head office and branch office(s), capital, shares, owner(s), governance structure, representative officer(s), and term of existence or grounds for dissolution;
(ii) the law governing its incorporation;
(iii) the name(s) and address(es) of its representative(s) in Japan; and
(iv) its method of giving public notice.

Changes to the matters registered must also be registered within three weeks from any such change.[7] For registrable matters that arise in a foreign country outside Japan, the registration period will be counted from the date notice thereof reached a representative of the foreign company in Japan.[8]

The failure to complete the required registration or to disclose matters required under the Act may subject the representative(s) of the foreign company to a civil fine of up to one million yen.[9]

V. Authority of the Representative

In general, a representative has the authority to perform all judicial and extrajudicial acts on behalf of the foreign company in connection with the latter's business in Japan. Thus, a foreign company will be held liable for any damage caused to any third party by its representative in Japan during the course of the performance by such representative of his/her duties.[10] The foreign company may limit the authority of such representative. However, any such limitation cannot be asserted against a third party in good faith (i.e., one with no knowledge of such limitation).[11]

5. The Act, art. 820.
6. *Id.*, arts. 933(1)(i) and (2), and 934(1).
7. *Id.*, arts. 915(1) and 933(4). *See also* art. 935(1) regarding the change of a representative's address.
8. *Id.*, art. 933(5).
9. *Id.*, art. 976(i) and (iii).
10. *Id.*, art. 817(2) and (4).

VI. Duty and Method of Giving Public Notices

After the registration process, the foreign company must promptly give public notice in Japan of a financial document that is equivalent to a balance sheet after it is approved by its shareholders in an annual shareholders' meeting or a similar approval procedure.[12]

There are three general ways of giving public notices in Japan, namely, publication in an official gazette (i.e., the *Kanpo*), publication in a daily newspaper, or an electronic public notice (e.g., webpage).[13]

A foreign company registered in Japan may give public notices based on the method stated in its articles of incorporation or other organizational document. If no notification method is stated in such document or otherwise selected by the foreign company, then its notices shall be published in the official gazette.[14]

If the foreign company wishes to publish its financial document by electronic public notice, it must keep such notice for five consecutive years following the date of approval of the financial document in an annual shareholders' meeting or a similar procedure.[15]

If a foreign company's representative in Japan fails to comply with the public notice requirements under the Act or does so improperly, then such representative may be subject to a civil fine of up to one million yen.[16]

VII. Noncompliance with Registration Requirements

The failure by a foreign company to comply with the registration requirements of the Act before engaging in continuous transactions will give rise to several consequences.

Under Article 818(2) of the Act, any person who carries out the subject continuous transactions on behalf of the foreign company will be liable, jointly and severally with the foreign company, to perform any obligation that has arisen from such transactions to the counterparty to such transactions. Such person may also be punished by a civil fine of an amount equivalent to the registration and license tax for the incorporation of a company.[17] These consequences usually fall upon the representative or other agent of the foreign company.

Moreover, if petitioned to do so by the Minister of Justice, a creditor or any other interested party, a Japanese court may order the foreign company to stop carrying out the continuous transactions in Japan based on certain grounds, including when the foreign company stops payment without justifiable grounds, or where its representative in Japan or any other person executing its business is continuously or repeatedly committing an act that goes beyond or abuses the authority of the foreign company as prescribed by laws and regulations, or violating criminal laws and regulations, despite receipt of a written warning from the Minister of Justice.[18]

11. *Id.*, art. 817(3).
12. *Id.*, art. 819(1).
13. *Id.*, art. 939(1).
14. *Id.*, art. 933(2)(vii) and 939(2).
15. *Id.*, art. 940(2).
16. *Id.*, art. 976(ii).
17. *Id.*, art. 979(2). This civil fine is distinct from that of up to one million yen under Article 976(i) of the Act for failing to complete the registration requirement.
18. *Id.*, art. 827(1).

VIII. Conclusion

In sum, foreign companies that are contemplating engaging directly in continuous transactions in Japan but without establishing offices in the country must appoint at least one resident representative, and observe and comply with the registration and other obligations under the Act.

Back to List of Articles