# New Bill: Enhancement of Fines under the Japan Anti-Monopoly Act

**July 2019**

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The bill to amend the Anti-Monopoly Act (the "AMA"), that includes the enhancement of a surcharge (*i.e.*, administrative fine), has passed on June 19, 2019.[1] It will be effective no later than from December 25, 2020. The surcharge (*i.e.*, administrative fine) will likely be increased.

The bill includes amendments to (1) calculation methods for base fines and (2) applicable percentage for calculating surcharge (*i.e.*, administrative fine). It also includes amendments to leniency system where the Japan Fair Trade Commission ("JFTC") will have certain discretion to award an additional discount for reduction of surcharge (*i.e.*, administrative fine) when a leniency applicant cooperates with the JFTC investigation. This article will focus on amendments to surcharge calculation.[2]

## (1) Calculation Methods for Base Fines

Currently, in a cartel case, the surcharge amount (*i.e.*, administrative fine) is calculated as base fine multiplied by a certain fixed percentage, in principle, ten percent. The base fine under the current AMA is calculated as violating company's relevant sales up to three years. The statute of limitation is five years, therefore the JFTC is not allowed to issue an order if violation conduct ceased more than five years ago at the time of issuance of an order.

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| **Base Fine (Relevant Turnover Up to 3 Years)** | X | **Fixed Percentage (10% in principle)** | = | **Surcharge Amount (*i.e.*, Administrative Fine)** |

### Expansion of Base Period[3]

After the bill becomes effective, the time period for relevant turnover subject to surcharge (*i.e.*, administrative fine) will be extended to ten years from the initiation of the JFTC investigation, which is three years under the current AMA. In addition, the statute of limitation will be extended to seven years, which is five years under the

1 The JFTC Press Release (June 19, 2019) in Japanese is available at https://www.jftc.go.jp/houdou/pressrelease/2019/jun/190619_1.html.

2 Please see our previous Client Alert "New Bill: Expansion for Leniency and Fines under the Japan Anti-Monopoly Act" at https://www.whitecase.com/publications/alert/new-bill-expansion-leniency-and-fines-under-japan-anti-monopoly-act

3 This amendment applies to private monopolization and unfair trade practice (*i.e.*, single firm conduct) as well as to unreasonable restraint of trade (*e.g.*, cartel).

current law. In other words, the JFTC will issue a surcharge payment order even if violation conduct ceased, but the last conduct took place within seven years from the date of issuance of an order.

Accordingly, the JFTC will be able to presume base fine under certain conditions, for example, when a violating company does not retain financial books properly and relevant turnover could not be found based on evidence. The JFTC plans to prepare JFTC rules to clarify when and how it would presume base fines.

### Enhancement of Base Fine

Under the current AMA, the amount of sales or purchase from the relevant goods or services ("Relevant Turnover") is used as base fine. After the bill becomes effective, the following types of turnover will also be considered to be base fine.

- Group companies' sales or purchase amount

  Under the current AMA, only sales or purchase amount of a violating company is subject to surcharge (*i.e.*, administrative fine). Under the new law, certain sales or purchase amount of group companies relevant to the products or services in the market where violation conduct took place will also be subject to the surcharge (*i.e.*, administrative fine). For example, when a parent company engages in a cartel with its competitors, sale of the parent company, as well as its subsidiary would be subject to surcharge (*i.e.*, administrative fine). Cabinet order will provide details for calculation methods.

- Kickback

  Financial benefit a violating company received in return of (i) not providing or (ii) not receiving products or services will be subject to surcharge (*i.e.*, administrative fine). For example, when Company X provides financial benefit to Company Y in return for not selling Product A by Company Y based on the agreement between them, the financial benefit paid from Company X to Company Y will be subject to surcharge (*i.e.*, administrative fine). In Japan, so-called "pay-for-delay" agreement or reverse payment, where a branded pharmaceutical manufacturer pays a generic pharmaceutical manufacturer for agreeing not to compete for a while, has not been an issue under Anti-Monopoly Act so far. Now, such financial benefit a branded pharmaceutical manufacturer pays will be subject to surcharge (*i.e.*, administrative fine) if and when such an agreement constitutes an unreasonable restraint of trade (*i.e.*, violation of the AMA).

- Consideration for Closely-Related Business

  Consideration for (i) manufacture, sale and/or management of products subject to violating conduct, or (ii) any other business closely related to the products or services subject to violating conduct ("Closely-Related Business"), will be subject to surcharge (*i.e.*, administrative fine), after the bill becomes effective. Cabinet Order will provide further definitions of the Closely-Related Business.

## (2) Percentage for Calculating Surcharge

There will be following changes in percentages for calculating surcharge (*i.e.*, administrative fine).

- Lower percentages for retailers and wholesalers will be abolished[4]

  Under the current AMA, a percentage for calculating surcharge varies depending on the category of the business (*i.e.*, manufacturer, retailer or wholesaler). For example, ten percent for a manufacturer, three percent for a retailer and two percent for a wholesaler is used for calculating surcharge (*i.e.*, administrative fine) — *see* above for a calculation method. The percentages for retailers and wholesalers will be abolished, and the percentage applicable for manufacturers under the current law will apply to retailers and wholesalers as well after the bill becomes effective.

- Discount rate for SMEs

  Discount rate applies to small and medium-sized companies ("SMEs") for cartel cases. For example, when a violating company is an SME, an amount of surcharge (*i.e.*, administrative fine) will be four percent of the relevant turnover, instead of ten percent. This discount rate applies even when a violating

4 This amendment applies to private monopolization and unfair trade practice (*i.e.*, single firm conduct) as well as to unreasonable restraint of trade (*e.g.*, cartel).

SME is a part of a large corporate group. After the bill becomes effective, the discount rate for SMEs applies only when there are no non-SMEs in a corporate group where a violating company belongs.

- Discount for Early Withdrawal

  Under the current AMA, a company who had ceased violation conduct no later than a month before an initiation of the JFTC investigation and such violation conduct continued for less than two years, is awarded a 20 percent discount from the surcharge amount. This discount will no longer be applicable after the bill becomes effective.

- Additional Surcharge

  Surcharge (*i.e.*, administrative fine) is increased by 50 percent under certain situations, including when a violation company is found to be a ringleader under the current AMA. The bill adds certain situations where a surcharge (*i.e.*, administrative fine) will be increased by 50 percent, including when a company requested a conspirator obstructing the JFTC investigation (*e.g.*, providing incorrect information to the JFTC).

  Under the current AMA, surcharge (*i.e.*, administrative fine) is increased by 50 percent for a repeated offense (*i.e.*, a company was penalized by a surcharge payment order in a previous case within ten years from an initiation of the JFTC investigation in a current case). The new bill will exclude a situation where a company ceases violating conduct (Conduct A) before an issuance of surcharge payment order for another violating conduct (Conduct B) that was already subjected to the JFTC investigation. In other words, surcharge for Conduct A is increased by 50 percent if the JFTC issued a surcharge payment order for Conduct B within ten years from the initiation of investigation for Conduct A, under the current AMA. However, under the new law, surcharge will not be increased if the company ceased Conduct A before a surcharge payment order for Conduct B is issued.[5]

  Lastly, after the bill becomes effective, (i) a 100 percent parent company of which a subsidiary received a surcharge payment order within ten years or (ii) a company who purchased a violating business within ten years will be considered to be a repeat offender, therefore a 50 percent surcharge increase will be applied when such a company is found to be a violator.

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5 This amendment will be effective on July 26, 2019.