

# Bill to amend the Japan Anti-Monopoly Act and introduction of Attorney-Client Privilege to the Japan Fair Trade Commission's Procedure

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The Cabinet of Japan submitted a bill (the “Bill”) to amend the Anti-Monopoly Act (the “AMA”) to the Diet on March 12, 2019. The Bill includes amendments to (i) the method for surcharge calculations, (ii) the leniency system and (iii) criminal penalties for obstruction of investigations by the Japan Fair Trade Commission (the “JFTC”). Further, introduction of quasi-“attorney-client privilege” has been proposed.<sup>1</sup>

## Amendments to method for surcharge calculations

The Bill related to the method of surcharge calculations includes various amendments, including changes to (a) the base period for surcharge calculation, (b) the statute of limitation, (c) presumptions regarding turnover in certain circumstances, and (d) factors related to unjust enrichment.

Under the current AMA, the maximum period that can be used as a basis for surcharge calculations is three years. The Bill proposes to extend it to 10 years.

Currently, the JFTC can issue a surcharge payment order for the violating conduct back to five years from the date of the order, however, the Bill proposes to extend it to seven years.<sup>2</sup>

Currently, the JFTC must prove the company's relevant turnover during the period in question in order to calculate the surcharge amount under the AMA. The Bill proposes to allow the JFTC to make presumptions about relevant turnover to some extent in a case where such relevant turnover cannot be established.

Under the current AMA, only the turnover of the company accused of violations can be used for calculation of the surcharge. However, the turnover of certain subsidiaries and/or group companies would be used for calculation of the surcharge under the certain circumstances, including when they were instructed by the parent company.

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<sup>1</sup> The JFTC Press Release (March 12, 2019) in Japanese is available at <https://www.jftc.go.jp/houdou/pressrelease/2019/mar/190312.html>

<sup>2</sup> Cease-and-desist order is also subject to this amendment under the Bill.

## Amendment to the leniency system

Under the current leniency system, up to five companies can be awarded leniency. Under the Bill, a limit for the number of companies to be awarded leniency will be abolished. In addition, the JFTC may award additional reductions in fines to leniency applicants of up to 40% depending upon their level of cooperation.

### Proposed Leniency under the Bill

| Initiation of Investigation | Ranking              | Reduction | Additional Reduction in accordance with Cooperation |
|-----------------------------|----------------------|-----------|---|
| Before                      | 1st                  | Immunity  | N/A   |
|                             | 2nd                  | 20%       | + Up to 40%   |
|                             | 3rd-5th              | 10%       |   |
|                             | 6th                  | 5%        |   |
| After                       | Up to 3 companies(*) | 10%       | + Up to 20%   |
|                             | Others               | 5%        |   |

(\*) This category is applicable only when the applicant's ranking is 5th or above, including the applicants before the initiation of the investigation.

## Criminal penalties for obstruction of JFTC investigation

The Bill proposes to increase criminal penalties for obstruction of JFTC investigation, including to increasing criminal fines for a company obstructing a JFTC dawn raid in an amount up to JPY 200 million (currently JPY 3 million).

## Introduction of quasi-“Attorney-Client Privilege”

Under current Japanese law, Attorney-Client Privilege or Legal Professional Privilege are not recognized. Therefore, the JFTC can seize corporate documents, including those which could have been protected under the Attorney-Client Privilege or Legal Professional Privilege in the jurisdiction where such a privilege is recognized. The JFTC proposes to introduce a procedure where the JFTC would respect certain communication between an attorney and a client in connection with unreasonable restraint of trade (e.g., cartels and bid-rigging) allegation. Accordingly, as a matter of JFTC procedures, the JFTC would not seize or use such documents to prove conduct that violates the law.

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