

Introduction of Commitment Procedure under the Japan Anti-Monopoly Act from December 30, 2018

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The Commitment Procedure is set to be introduced under the Japan Anti-Monopoly Act on December 30, 2018. “Commitment procedures” refer to procedures by which a competition authority and an investigated company may agree to resolve an alleged violation. This new authority would give the JFTC the ability to negotiate with companies to settle antitrust cases. The concept the JFTC’s Commitment Procedure is borrowed from the EU Commitment Procedure. It is equivalent to consent decree or consent order in the United States.

A bill to introduce a Commitment Procedure into the Japan Fair Trade Commission (the “JFTC”)’s procedures was passed as long ago as June 29, 2018. This bill was enacted in accordance with the Trans-Pacific Partnership Agreement (“TPP”) and the so-called “TPP 11,” which was signed by 11 countries on March 8, 2018. The Commitment Procedure is to become enforceable when TPP 11 becomes effective for Japan, i.e., 60 days after at least six member countries have given notice to the Depository of the Agreement, New Zealand, that their domestic legal requirements for ratification have been met. Six member countries, including Japan, gave notice by October 30, 2018; TPP 11, therefore will become effective on December 30, 2018.

Under current JFTC procedures, the JFTC has no choice but to issue a surcharge when it finds conduct that violates a prohibition that is subject to a surcharge (e.g., abuse of superior bargaining position). In other words, the JFTC has no discretion not to impose surcharge even when they believe a company has already ceased and will not resume the offending conduct. The introduction of a commitment procedure would give the JFTC new flexibility, with the JFTC and the investigated company given the freedom to agree to resolve the case without a cease-and-desist order or surcharge order by the JFTC.

The Diet has already passed amendments to the Anti-Monopoly Act (the “AMA”) and the new JFTC rules to implement the commitment procedures. On July 11, 2018, the JFTC issued a draft of the Guidelines Concerning the Commitment Procedures (the “Guidelines”) and sought comments from the public. On September 26, 2018, the JFTC issued finalized Guidelines.¹ No substantial revisions were made between the draft and the finalized Guidelines.

The purpose of the Guidelines is to clarify the concept of the commitment procedures and to ensure transparency of enforcement and predictability for businesses.

The JFTC may notify a suspected company that it will proceed with the Commitment Procedures when the JFTC finds it necessary do so from the perspective of promoting fair and free competition. The Guidelines clarify that (i) hardcore cartels, including bid-rigging and price fixing, (ii) recidivism (a second violation within

¹ An official English translation of the Guidelines is not available as of November 12, 2018.

ten years of the first), or (iii) a malicious and substantial violation that should be subject to criminal penalties, should not be resolved using the Commitment Procedure. In practice, the commitment procedure will apparently be used for single firm conduct (e.g., abuse of superior bargaining position).

Since 2017, the JFTC closed five investigations without taking legal action under situations where the suspected companies voluntarily proposed remedies to the JFTC.² It is said that these are similar to what might occur under the new Commitment Procedure. Those suspected of illegal conduct were all not subjected to surcharge orders. After the Commitment Procedure is introduced, the types of conduct subject to surcharge orders, such as abuse of superior bargaining position, would be subject to an agreed resolution under the new JFTC Commitment Procedure.

Under the Commitment Procedure, a suspected company will voluntarily plan its remedies. If and when the JFTC approves those company-proposed remedies, the JFTC will not issue either a cease-and-desist order or a surcharge order. The JFTC's approval of the remedies does not mean that they have identified a violation.

The Guidelines provide examples of possible remedies, including (i) confirmation to cease suspicious conduct, (ii) notification to customers and users, (iii) maintenance of compliance program, (iv) revisions to problematic terms and conditions with customers, (v) divestiture of business, (vi) financial restitution for alleged victims, and/or (vii) periodical report of remedies to the JFTC.

The JFTC will seek opinion from the public on proposed remedies, if and when the JFTC thinks necessary. It is not clear from the Guidelines when it finds it necessary to do so. The time period for seeking opinions in general will be 30 days.

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