

# Introduction of Commitment Procedure under the Japan Anti-Monopoly Act

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Legal procedures for the handling of antitrust cases continue to change in Japan. “Commitment procedures” refer to procedures by which a competition authority and an investigated company agree to resolve the case of alleged violation. On June 29, 2018, a bill that would introduce a “commitment procedure” into the Japan Fair Trade Commission (the “JFTC”) procedure was passed. This bill was enacted in accordance with the Trans-Pacific Partnership Agreement (“TPP”) and so-called TPP 11, which was signed by 11 countries (“TPP 11”) on March 8, 2018. The commitment procedure and the rules and regulations bringing it in to operation, will become effective when TPP 11 becomes effective for Japan, 60 days after at least six member countries have given notice to the Depository of the Agreement, New Zealand, that their domestic legal procedures are complete.

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 amendments to the Anti-Monopoly Act (the “AMA”) and new JFTC rules to implement the commitment procedures have already been passed. On July 11, 2018, the JFTC issued a draft of the Guidelines Concerning the Commitment Procedures, and opened the draft Guidelines to public comment. 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 draft Guidelines clarify that (i) hard core cartels, including bid-rigging and price fixing, (ii) recidivism (a second violation within 10 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).

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 draft Guidelines provide examples of possible remedies, which are quite similar to the actions required pursuant to a cease-and-desist order. In addition, the draft Guidelines mention making the victims whole as one example of a remedy.

The draft Guidelines say that the JFTC will disclose plans regarding remedies to the public to seek their opinion, when it finds it necessary to do so. The time period for seeking opinions in general will be 30 days. As mentioned above, the JFTC welcomes comments from the public on the draft Guidelines, and responses to the JFTC’s request for public comments are due by the deadline of August 10, 2018.

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