

Client Alert

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Proposal to amend the Antimonopoly Act

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1. Introduction

On March 12, 2019, the "Bill for Partial Amendment to the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade" was submitted to the Diet after the Cabinet approved, and passed by the Diet on June 19, 2019. The three pillars of this amendment are the revision of the calculation method of surcharges, the introduction of the system for reducing surcharges by investigative cooperation, and the introduction of the attorney-client privilege. Under the current system, it has been pointed out that it would be difficult to impose a surcharge if there were no domestic sales of the goods covered by the cartel, and that the investigative cooperation of leniency applicants would not be sufficiently obtained because the reduction and exemption rate of surcharge was fixed. Through the amendment, the calculation basis of surcharges was expanded, and the JFTC was given a certain discretion in the calculation of the surcharge and it was made easier to draw out the cooperation of applicants in the investigation. The privilege was granted to facilitate the consultation of attorneys to support the expansion of investigative cooperation. The date of enforcement of the amendment shall be the date specified by cabinet order within a period not exceeding one year and six months from the date of promulgation, except some provisions.

2. Revision of calculation method of surcharges

(1) Calculation basis

The first pillar of this amendment is the revision of the calculation method of surcharges, and rules are being developed and strengthened for both the calculation basis and the calculation rate. The following three major revisions were made to the calculation basis.

The first point is an extension of the calculation period, which is currently set for up to three years preceding the date on which business activities constituting unreasonable restraint of trade, etc. were discontinued. It is extended up to 10 years preceding the date of investigation, etc. by the JFTC. In addition, the statute of limitations, which is currently set as five years from the date on which violations end, is extended to seven years. In this relation, provisions for estimation of the basis of calculation of surcharges (sales amount, etc.) is established in cases where some sales amount is unknown due to the dispersal of materials, etc.

The second point is the addition of the calculation basis, and along with the sales amount of the target goods or services of the violating enterprise, the following items are newly added.



- Sales amount of the wholly owned subsidiary company, etc., which obtained instructions or information from the violating enterprise and supplied goods or services in accordance therewith
- Amount of consideration for services closely related to the relevant goods or services (subcontracting, etc.)
- Property benefits obtained in relation to the failure to supply the relevant goods or services (bid-rigging money, etc.)

The third point is the imposition of a surcharge on a subsidiary, etc. that has succeeded to a violative business. Currently, the surcharge is applied only to succession after the investigation start date, but after the revision, the surcharge is also applied to succession before the investigation start date.

(2) Calculation rate

Next, significant revisions is also made to the calculation rate. First, the calculation rate for the retail and wholesale industries was abolished, and the calculation rates will be unified to the basic calculation rate. In addition, the reduction of calculation rate for the enterprise who stopped violation by one month before the investigation start date is abolished, and subsidiaries of large enterprises will be excluded from the scope of application of the calculation rate for small and medium-sized enterprises.

Furthermore, the increased calculation rate is excluded from the scope of application of cases in which simultaneous violations are discontinued before the first surcharge payment order, etc. for the category of continuous violations. On the other hand, the increased calculation rate is applicable to those whose wholly owned subsidiaries have received the surcharge payment order, etc. within the past 10 years or to enterprises that have succeeded a business related to the violations from the violating enterprise. In addition, the category of leading roles will be newly included in the scope of application of the increased rate, which will be applied when they request other enterprises to conceal or disguise data at the time of an investigation conducted by the JFTC.

3. Introduction of the system for reducing surcharges by investigative cooperation

The second pillar of this revision is the introduction of the system for reducing surcharges by investigative cooperation. Under the current leniency system, the fixed reduction and exemption rate is determined according to the order of application, regardless of the degree to which the enterprise cooperated with the investigation conducted by the JFTC. On the other hand, this revision, in order to increase incentives to cooperate with investigations conducted by the JFTC, a system was introduced in which the JFTC reduces the amount of surcharges in cases where enterprises submit materials that contribute to unravelling the case. Under this system, the reduction is conducted based on the rate which changes according to the degree of cooperation as well as the fixed reduction and exemption rate according to the order of application. While the maximum number of applicants is limited to five under the current system, the maximum number of applicants will be abolished after the revision, and all



enterprises subject to the investigation will be given the opportunity to voluntarily cooperate with the investigation. The current system and the rate of reduction and exemption after the revision are shown in the table below.

Current system

Start of investigation	Order of application	Reduction and exemption rate according to the order of application
Before	1st place	Full Exemption
	2nd place	50%
	3rd to 5th place	30%
	6th place or below	
After	Up to three enterprises	30%
	below	

After the revision

Start of investigation	Order of application	Reduction and exemption rate according to the order of application	Reduction rate according to the degree of cooperation
Before	1st place	Full Exemption	
	2nd place	20%	+up to 40%
	3rd to 5th place	10%	
	6th place or below	5%	
After	Up to three enterprises	10%	+ up to 20%
	below	5%	

Under the revised system, after an leniency application has been made, the enterprise and the JFTC shall, after consulting each other, make an agreement on the content of the cooperation of the enterprise and the rate of reduction of the surcharge, the enterprise shall submit evidence based on the said agreement, and the JFTC shall issue an order for payment of the surcharge by applying the reduction rate. As for the extent of the deduction, guidelines will be developed on how to evaluate the content of the cooperation (e.g. evidence submitted voluntarily by the enterprise, etc.).

4. Introduction of the attorney-client privilege

The third pillar of this revision is the introduction of the attorney-client privilege system. This system will be introduced for the first time under Japanese law with a view to substantially protecting the confidentiality of legal opinions regarding consultations with outside attorneys and ensuring due process in order to make the new leniency system more functioning.

The documents to be subject to this system is to describe the content of confidential communications between enterprises and attorneys with respect to legal opinions on unreasonable restraint of trade, including written



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consultations between enterprises and attorneys, written responses from attorneys to enterprises, reports describing legal opinions based on internal investigations conducted by attorneys, and internal conference notes describing exchanges of legal opinions with an attorney at internal conference where such attorney attends. Furthermore, in order to be subject to this system, the following requirements must be fulfilled.

- (i) When issuing an order of submission, the enterprise requests to be handled under this system.
- (ii) Appropriate storage (e.g. name of document, place of storage, maintenance of confidentiality) is maintained.
- (iii) After the order of submission, within a specified time limit, submit a log containing the date and time of preparation, the name of the author and co-owners, the attributes of the document, and a summary for each document.
- (iv) If any materials not covered by this system are included, report the contents thereof.

Examining procedures are established as measures to prevent abuse, and documents that are requested to be handled under this system shall be ordered to submit by the investigator, sealed, and placed under the control of the examiner. The examiner shall confirm that the requirements described above (in particular (iii) and (iv)) are met, and the document confirmed to be subject to this system shall be promptly returned to the enterprise. However, the documents that cannot be confirmed to satisfy the requirements of this system shall be transferred under the control of the investigator.

The privilege will be set forth as rules and guidelines under Section 76(1) of the Antimonopoly Act.

5. Other

In addition, a reduction in the interest rate of surcharge in arrears, an increase in the maximum amount of fines for corporations, etc. committing offenses of obstruction of inspection, the establishment of procedures for collecting evidence on electromagnetic records in the criminal investigation procedures, and stipulating that an employee, etc. of an leniency applicant may prepare a memo after the hearing is completed, will also be included.

6. Conclusion

As described above, this amendment have a significant impact on the practice, including the revision of the calculation method of surcharges, introduction of the system for reducing the amount of surcharges by investigative cooperation, and the introduction of the attorney-client privilege. Therefore, it is necessary to pay close attention to future trends.

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