

Client Alert

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New Act on the promotion of Japan's economic security enacted

On May 11, 2022, the Diet of Japan approved the "Act on the promotion of national security through integrated economic measures"¹ ("Act"). Key features of the Act include the establishment of (i) a system to ensure stable supplies of critical materials, (ii) a system to ensure stable provision of services using critical infrastructure, (iii) a system that supports the development of critical technologies and (iv) a secret patent system. The Act will enter into force on or before February 18, 2023.²

Overview of the new Act

Purpose of the Act and establishment of a basic policy

The Act consists of seven chapters with 99 articles and several supplementary provisions. Its purpose is "to promote economic measures related to ensuring national security comprehensively and effectively" by establishing the four systems explained below "as economic measures to ensure national security." It also mandates the formulation of "a basic policy relating to the promotion of national security through integrated economic measures."³ Please note that the Act cautiously avoids using the term "economic security" and instead declares as its purpose the promotion of economic measures aimed at ensuring national security.

The Act requires the government to approve a basic policy ("Basic Policy") on foundational matters related to the implementation of integrated economic measures and publish it without delay.⁴ The Prime Minister, if necessary, may require the submission of documents providing information, explanations and opinions to the heads of the relevant ministries/agencies.⁵ The Prime Minister may require reporting on implemented measures.⁶ Additionally, the Act includes a provision stating that regulatory measures shall be taken under the Act "to the extent reasonably necessary to ensure national security in light of their impact on economic activities."⁷

¹ The text of the Act (in Japanese only) can be found here:
<https://www.cas.go.jp/jp/houan/208.html>

² Except for certain provisions identified in Article 1 of Supplementary Provisions, which provisions will enter into force on or before a different date between November 18, 2022 and May 18, 2024).

³ Article 1 of the Act.

⁴ Article 2 of the Act.

⁵ Article 3(1) of the Act.

⁶ Article 3(2) of the Act.

⁷ Article 5 of the Act.



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System ensuring stable supplies of critical materials

The Act establishes several support measures that aim to ensure stable supplies of materials that significantly affect the existence, ordinary lives and economic activities of the Japanese public.⁸

First, the government will solicit expert opinions and formulate basic guidelines on ensuring stable supplies of specified critical materials ("stable supply guidelines") based on the basic policy. The government is then required to publish the stable supply guidelines without delay after cabinet approval is granted. Under the Act, "specified critical materials" are defined as "materials indispensable to the existence and relied upon for the lives and economic activities of the Japanese public that are procured, or manufactured from raw materials procured, largely from foreign countries, and with regard to which the government acknowledges that ensuring a stable supply is particularly necessary to prevent the impairment of national security by external activities."⁹ Although a cabinet ordinance will further specify each "specified critical material," an expert meeting on the Act cited pharmaceutical products and semiconductors as examples. One important point to note is that "raw materials, components, facilities, equipment, devices and programs" ("raw materials, etc.") are excluded from the definition of "specified critical materials" under the Act, and thus the specifications will be made at a product level. Having said this, the support measures cover both products and raw materials, etc.

After the designation of "specified critical materials" by cabinet ordinance, the ministers responsible for these materials will formulate implementation policies to ensure stable supplies of them.¹⁰ It is expected that specific support measures and their duration will be included in the implementation policies.¹¹

An individual or a company that intends to secure stable supplies of specified critical materials or raw materials, etc. may prepare a "secure supply plan" that includes the building of new production facilities, diversification of supply sources, stockpiling, development of production technologies and/or development of alternative materials, etc. The secure supply plan must then be submitted to and certified by the responsible minister.¹² After certification, the individual or company will be eligible for various support measures, including (i) subsidies for the above activities,¹³ (ii) interest subsidies for financial institutions that grant loans to the individual or company,¹⁴ (iii) the provision of funds to specified financial institutions by the Japan Finance Corporation (so-called "two-step loans"),¹⁵ (iv) the purchase of shares of a company newly established by a small or medium-sized enterprise ("SME") that will engage in the above activities,¹⁶ and (v) granting credit insurance to SMEs.¹⁷

⁸ Articles 6 to 48 of the Act.

⁹ Article 7 of the Act.

¹⁰ Article 8 of the Act.

¹¹ Article 8(2)(ii) and (iii) of the Act.

¹² Article 9 of the Act.

¹³ Article 31(3)(i) of the Act.

¹⁴ Article 31(3)(ii) of the Act.

¹⁵ Articles 14 to 19 of the Act.

¹⁶ Article 27 of the Act.

¹⁷ Article 28 of the Act.



Moreover, where the minister responsible for a specified critical material has difficulty ensuring a stable supply of it through the above measures, the minister may designate the material a "specified critical material requiring special measures" and take necessary measures, including stockpiling.¹⁸ The minister may then transfer, lend or otherwise make these materials available at prices lower than current market prices where the minister finds it particularly necessary. The minister may do so where prices for the relevant materials have increased significantly as a result of existing or prospective supply shortages caused by external actions.¹⁹ The minister may also require other ministers to investigate the imposition of anti-dumping duties, countervailing duties or safeguard measures where the minister finds sufficient evidence of material/serious injury to Japanese industry caused by the importation of subsidized or dumped foreign products or increased importation of these products as a result of unforeseen developments.²⁰

The minister may further request that an individual or entity, including a company under the minister's jurisdiction, submit a report or other documentation regarding the status of the production, importation, sale, procurement or storage of the specified critical material or raw material, etc.²¹ The individual or entity receiving the request is required to make its best efforts to respond.²² According to several media reports, under the original Act, a criminal penalty in the form of a fine not exceeding JPY 300,000 (approximately USD 2,500) could be imposed on an individual or entity that failed to respond. However, due to opposition from ruling party lawmakers and industry groups, the penalty was removed and the obligation reduced to the making of best efforts.

Most provisions under this chapter will come into effect within nine months of the official publication of the Act (May 18, 2022).²³

System ensuring stable provision of services using critical infrastructure

Articles 49 to 59 of the Act provide a preliminary review system for the introduction of critical equipment into critical infrastructure or the entrustment of maintenance or management of critical equipment modeled on the US²⁴ and German²⁵ systems. This is one of the main pillars of the new Act.

The government first formulates basic guidelines relating to ensuring the stable provision of specified social infrastructure services ("stable provision guidelines"). The government is then required to publish the stable provision guidelines without delay after cabinet approval is granted.²⁶ The ministers

¹⁸ Article 44 of the Act.

¹⁹ Article 44(8) of the Act.

²⁰ Article 30 of the Act.

²¹ Article 48(1) of the Act.

²² Article 48(2) of the Act.

²³ Except for some provisions (Supplementary Provisions, Article 1).

²⁴ 15 CFR Part 7

²⁵ IT Security Act 2.0

²⁶ Article 49 of the Act.



responsible for "specified social infrastructure businesses"²⁷ will designate individuals meeting criteria established by ministerial order as "specified social infrastructure business operators." Specified social infrastructure business operators are those who engage in a specified social infrastructure business where the discontinuation or the degradation of the functions of their "specified critical equipment"²⁸ would endanger stable provision of specified social infrastructure services and thereby impair national security and public safety.²⁹ Specified social infrastructure businesses operate in sectors already designated under the Act.³⁰ It is expected that specified social infrastructure business operators will be limited to those whose operations exceed a certain threshold (eg, number of users, domestic market share, etc.) and lack substitutability (eg, due to geography, the particularities of the business, etc.).

A specified social infrastructure business operator is required to file a plan with the minister with jurisdiction over its business prior to introducing specified critical equipment from other business operators or entrusting maintenance or management of critical equipment to other business operators.³¹ The business operator must then refrain from introducing or entrusting maintenance or management of the critical equipment until 30 days have passed from the day on which the minister receives the plan.³² The minister may extend this period to up to four months from the day on which the minister receives the plan.³³ The minister may then issue a recommendation that the filer modify the substance of or discontinue the plan where the minister finds that the specified critical equipment is likely to be used as a means of "specified obstructive conduct"^{34,35} If the recipient of the recommendation fails to comply with it without a legitimate reason, the minister may order the modification or discontinuation of the plan.³⁶ A person that has introduced or entrusted the maintenance or management of specified critical equipment without filing, after making a false filing or in violation of a modification or discontinuation order will be punished by imprisonment for not more than two years and/or a fine of not more than JPY one million.³⁷ Overall, although the scheme resembles the review of inward direct investment under the Foreign Exchange and Foreign Trade Act, the penalties are slightly lighter because, in principle, infrastructure business operators are free to introduce equipment and choose suppliers. The new regulations have been introduced strictly for economic security reasons.

The Act is ambiguous on the important matter of how and from what perspective the government will conduct these reviews. However, a report from a council meeting that discussed the contents of the draft Act states that

²⁷ To be designated by a cabinet ordinance as businesses that provide specified social infrastructure services basic to public life and economic activity, interference with which could impair national security and public safety.

²⁸ Equipment, facilities, devices or programs used by specified social infrastructure businesses and designated by ministerial order.

²⁹ Article 50(1) of the Act.

³⁰ The electricity, gas, oil, water, railway, trucking, overseas shipping, aviation, airports, telecommunications, broadcasting, mail, finance and credit card sectors.

³¹ Article 52(1) of the Act.

³² Article 52(3) of the Act.

³³ Article 52(4) of the Act.

³⁴ Conduct originating overseas that obstructs the stable provision of specified social infrastructure services.

³⁵ Article 52(6) of the Act.

³⁶ Article 52(10) of the Act.

³⁷ Article 92(1) of the Act.



these judgments will be based on information regarding suppliers, outsourcing contractors, equipment supply chains and subcontractors. This recognizes the limitations of specifying equipment critical to national security in advance. The council meeting report also points out that, in order to ensure predictability for business operators, the government should establish guidelines that describe the basic policies and criteria for the reviews as clearly as possible.

The provisions regarding the designation of specified social infrastructure business operators will come into effect within one year and six months of the official publication of the Act (May 18, 2022). The review-related provisions will come into effect within one year and nine months of official publication.³⁸ Please note that Article 52(1) will not apply to a business operator until six months have passed from the day on which it is designated a specified social infrastructure business operator.³⁹

System supporting the development of critical technologies

Articles 60 to 64 establish a system that supports the development of critical technologies.

The government first formulates basic guidelines concerning promotion of the development of specified critical technologies and the appropriate use of outcomes ("technical development guidelines"). The government is then required to publish the technical development guidelines without delay after cabinet approval is granted.⁴⁰ Specified critical technologies are defined as "technologies that may be critical to the maintenance of future public life and economic activity, where unjustifiable use of said technologies, information used in their development or failure to stably use them due to external action resulting from dependence on goods or services that make use of such technologies obtained from a foreign country could impair national security and public safety."⁴¹ Specifically, the government currently considers space, marine, quantum and AI technologies to be "specified critical technologies."

The ministers responsible for the provision of government resources for the development of specified critical technologies are required to establish and appoint members to a council for each project with the approval of a representative of the project based on the technical development guidelines.⁴² Members of the council are obliged to make efforts to provide necessary documents, explanations and opinions, etc.⁴³ They also have a duty to maintain secrecy similar to that of public officials.⁴⁴ Any council member who divulges secrets in violation of this duty will be punished by imprisonment with labor for not more than one year or a fine of not more than JPY 500,000 (approx. USD 3,890).⁴⁵ The council members will determine how the research outcomes will be handled. Council members are permitted

³⁸ Supplementary Provisions, Article 1(iii) and (iv)

³⁹ Article 53(1) of the Act.

⁴⁰ Article 60 of the Act.

⁴¹ Article 61 of the Act.

⁴² Article 62(4) of the Act.

⁴³ Article 62(6) of the Act.

⁴⁴ Article 62(7) of the Act.

⁴⁵ Article 95(1)(i) of the Act.



to acquire intellectual property rights, including patent rights, under the four conditions found in Article 17 of the Industrial Technology Enhancement Act.

In addition, the Act contains a provision establishing a new think tank to conduct necessary research and study in order to promote the development of specified critical technologies and the appropriate use of research outcomes.⁴⁶ It is expected that the think tank will be established in FY 2023.

The provisions of this chapter will come into effect within nine months of the official publication of the Act (May 18, 2022) (Supplementary Article 1).

Secret patent system

Articles 65 to 85 establish a so-called "secret patent system" similar to those in use in most other G20 countries.⁴⁷ As explained below, Japan's new system suspends patent examinations. It consists of two-stage examinations by the Japan Patent Office (JPO) and the Cabinet Office.

The government first solicits expert opinions and formulates basic guidelines concerning the non-disclosure of patent applications ("non-disclosure guidelines"). The government is then required to publish the non-disclosure guidelines without delay after cabinet approval is granted.⁴⁸

The JPO conducts the initial examination when reviewing patent applications by determining whether they fall within a technological area in which inventions, if made public, would likely impair national security and public safety because of external action ("specified technological areas"). The JPO then sends the relevant patent applications, if any, to the Cabinet Office within three months of their submission.⁴⁹ Applicants may ask the JPO to send their applications to the Cabinet Office.⁵⁰ Because the JPO reviews around 300,000 applications every year, it will not conduct a detailed review and will instead simply flag applications that may fall within a specified technological area and therefore require further review. Although the specific technological areas will be designated by a cabinet ordinance, it is expected that only a limited number of dual-use technologies, in addition to single-use technologies such as nuclear arms and weapons, will be designated. Submission of patent applications that fall within the specified technological areas in foreign countries is prohibited (Article 78(1)), and inventors may apply for a prior determination as to whether their inventions fall within such technological areas by paying a fee of JPY 25,000 yen (approx. USD 200).⁵¹

When conducting the second examination ("security examination"), the Cabinet Office considers several elements, such as (i) whether an invention, if made public, would likely impair national security and public safety because of external action and (ii) potential impacts on the development of industries if the invention is designated ("security designations").⁵² During the

⁴⁶ Article 64 of the Act.

⁴⁷ In the G20, only Japan, Mexico and Argentina currently lack a secret patent system.

⁴⁸ Article 65 of the Act.

⁴⁹ Article 66(1) of the Act.

⁵⁰ Article 66(2) of the Act.

⁵¹ Article 79 of the Act.

⁵² Article 67(1) of the Act.



examination process, the Cabinet Office may ask for documents, information, explanations and/or other cooperation from the relevant government agencies or external institutions with special knowledge. The Cabinet Office in principle consults with the heads of the relevant ministries.⁵³ If the Cabinet Office decides to make a security designation, it issues a notice asking the applicant to submit documents describing the management conditions for the invention.⁵⁴ The applicant must submit the documents within 14 days of receiving the notice.⁵⁵ If the applicant fails to do so, the Cabinet Office will reject the application after granting the applicant an opportunity to explain.⁵⁶ If the Cabinet Office finds it appropriate to secure information regarding the invention, it designates the invention a "secured invention" and notifies the applicant and the JPO of the security designation.⁵⁷ Extension of the security designation period is reviewed every year.⁵⁸

Several restrictions apply to secured inventions. For example, (i) patent applications for secured inventions cannot be waived or withdrawn,⁵⁹ (ii) applicants must obtain the Cabinet Office's permission before working the inventions,⁶⁰ (iii) disclosure of the details of the inventions is prohibited,⁶¹ (iv) applicants are obliged to take necessary and appropriate measures to prevent leakage of information concerning the inventions,⁶² (v) other business operators are required to obtain the Cabinet Office's approval before handling information concerning the inventions,⁶³ and (vi) the submission of patent applications for the inventions in foreign countries is prohibited.⁶⁴ Applicants will be compensated for these restrictions in the form of payment for a "normally occurring loss" by the government.⁶⁵

The provisions of this chapter will come into effect within two years of the official publication of the Act (May 18, 2022), except for the provisions regarding the non-disclosure guidelines.⁶⁶

Key points for businesses

1. We suggest that businesses that manufacture or produce specified critical materials or raw materials used in them consider whether they will submit a plan and acquire certification. In making this decision, they should consider the burden of formulating the secure supply plan, conducting the related work and the reporting obligations. In general, companies should consider taking advantage of support measures in order to mitigate financial burdens or risks regarding potential projects that align with their business strategies. However,

⁵³ Article 67(6) of the Act.

⁵⁴ Article 67(9) of the Act.

⁵⁵ Article 67(10) of the Act.

⁵⁶ Article 67(4) of the Act.

⁵⁷ Article 70(1) and (2) of the Act.

⁵⁸ Article 70(3) of the Act.

⁵⁹ Article 72(1) of the Act.

⁶⁰ Article 73 of the Act.

⁶¹ Article 74(1) of the Act.

⁶² Article 75 of the Act.

⁶³ Article 76(1) of the Act.

⁶⁴ Article 78 of the Act.

⁶⁵ Article 80(1) of the Act.

⁶⁶ Supplementary Provisions, Article 1(v) of the Act.



they should carefully consider whether to apply for the support measures if a potential project does not necessarily align with their business strategies or if they would be required to change their business strategies in order to be eligible for the support measures.

2. Vendors and companies to whom maintenance or management of specified critical equipment is outsourced should prepare documents containing an overview of their specific businesses and component suppliers, etc., in advance in order to minimize the potential impact on their businesses. Moreover, companies that are designated specified social infrastructure business operators would be advised to introduce equipment within the permitted transition period of six months to the extent possible.
3. Companies should first clarify their areas of competition and areas of cooperation with regard to cutting-edge technologies, and they should actively participate in councils to develop specified critical technologies that fall within these areas.
4. Companies that have inventions that may fall within technological areas subject to the secret patent system need to carefully consider the costs of the restrictions before filing a patent application and decide whether to file it or treat an invention as a trade secret. Furthermore, companies unsure about whether their inventions fall within technological areas subject to the secret patent system are advised to use the prior determination system.