

New commitment procedure under Anti-monopoly Act

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- 🔍 **Introduction**
- 🔍 **Outline of commitment procedure**
- 🔍 **Notice of commitment procedure**
- 🔍 **Application for approval**
- 🔍 **Approval**
- 🔍 **Comment**

Introduction

A new commitment procedure was introduced to the Anti-monopoly Act (AMA) on 30 December 2018 and took effect on the same date. The procedure – which enables enterprises to voluntarily resolve suspected violations of the AMA with the Japan Fair Trade Commission (JFTC) – came into effect following the entry into force of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (also known as TPP11).

In addition to all future cases, the commitment procedure applies to investigations which had already been initiated prior to 30 December 2018.

If a commitment is approved, the conduct of the enterprise concerned will not be determined to be a violation of the AMA and the enterprise will not be subject to legal penalties.

The new procedure may lead to more active enforcement by the JFTC.

Outline of commitment procedure

The commitment procedure is as follows:

- Following the commencement of an investigation, the JFTC may issue a written notice of commitment procedure to the suspected enterprise.
- The enterprise which seeks to use the commitment procedure must submit an application to be approved by the JFTC within 60 days from the date of the notice of commitment procedure.
- The JFTC will either approve or reject the application.

Notice of commitment procedure

A notice of commitment procedure cannot be issued until an investigation has been initiated. Therefore, the commitment procedure cannot be used prior to the launch of an investigation.

The JFTC has made clear that it will not apply the commitment procedure in the case of:

- hardcore cartels, such as bid rigging and price fixing;
- repeated violations (ie, where the suspected enterprise has been subject to legal measures for a violation of the same provision of the AMA within 10 years); and

- vicious and serious suspected violations which are equivalent to criminal accusations.

Application for approval

The deadline for the application for approval (ie, within 60 days from the date of the notice of commitment procedure) cannot be extended as a matter of statute. When applying for approval of a commitment, the suspected enterprise must prepare and submit a commitment plan, which should include:

- details of the measures to be taken to eliminate the suspected violation (ie, elimination measures);
- the deadline for implementing the elimination measures; and
- the documents showing the feasibility and reliability of the elimination measures (ie, the commitment plan).

Approval

A commitment will be approved if the commitment plan is considered to be:

- sufficient to eliminate the suspected violation; and
- reliable (ie, expected to be implemented with high certainty).

In other words, an application will be rejected unless the JFTC is convinced that the commitment plan meets both of the above conditions.

The JFTC may seek third-party opinions if it deems this necessary.

Once a commitment has been approved, the JFTC will not impose any legal penalties with regard to the suspected violation unless the approval is revoked and, after further investigations, the JFTC finds that the suspected violation violates the AMA.

All approved commitments will be publicly announced.

Failure to implement measures in accordance with an approved commitment plan may result in the revocation of approval, in which case the JFTC will resume its investigation. No penalties apply for a failure to implement a commitment plan, unlike in some jurisdictions.

Comment

Benefits for suspected enterprises

If a commitment is approved, the suspected enterprise's conduct will not be determined to be a violation of the AMA and the JFTC will not impose legal penalties. As a result, it will be harder for potential plaintiffs to pursue civil liability compared with cases in which the JFTC finds that there has been a violation of the AMA and imposes legal penalties, in which case the enterprise in violation of the AMA will owe strict liability thereunder.

Further, given that the JFTC will not need to complete a full-scale investigation (ie, a detailed analysis of the impact on competition, a calculation of the administrative surcharge amount and the undertaking of strict procedure, such as a hearing), the commitment procedure will likely result in shorter investigations, which may result in reduced costs for suspected enterprises.

While there were cases prior to the introduction of the commitment procedure in which the JFTC terminated the investigation after the suspected enterprise proposed certain remedial measures, the introduction of the commitment procedure to the AMA has clarified the legal basis, procedure and effects of such measures.

JFTC enforcement actions

As of 31 March 2019, there had been no public announcement on an approved commitment.

The commitment procedure may lead to the JFTC enforcing the AMA more actively and effectively, as it will enable it to resolve cases without completing a full-scale investigation and proving a violation of the AMA, which may be disputed by the suspected enterprises, particularly in difficult unilateral conduct cases.

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