NAGASHIMA OHNO & TSUNEMATSU
長島·大野·常松 法律事務所

NO&T Japan Legal Update

September, 2017 No.11

This issue covers the following topics:

■ Antitrust/Competition

The Japan Fair Trade Commission's proposed 'commitment procedure': a more flexible approach to investigations of potential anti-competitive behavior?

I. Introduction

In December 2016, Japan's legislature passed new legislation which introduced a proposed voluntary procedure designed to enable the swift resolution of potential cases of anti-competitive conduct under investigation by the Japan Fair Trade Commission (the 'JFTC').

Pursuant to this so-called 'commitment procedure', if a company subject to a JFTC investigation offers a 'commitment' (in other words, an undertaking) to address concerns expressed to the company by the regulator in the regulator's preliminary assessment of the behavior in question, the JFTC has the discretion to accept such commitment. This would result in the regulator closing the investigation without concluding whether there has been a violation of the Japanese Antimonopoly Act.

The new legislation was originally part of the parcel of reforms to be introduced in Japan as required by the Trans-Pacific Partnership ('TPP') agreement. As things currently stand, the new legislation (and the commitment procedure itself) will only come into effect if and when the TPP agreement is executed. However, due to the dumping of the TPP by the Trump administration, many stakeholders now argue that the commitment procedure should be brought into effect notwithstanding whether or not the TPP ever materializes.

II. Recent Developments in JFTC Investigations of Anti-competitive Conduct

Regardless of the fact that the new commitment procedure has yet to come into effect, it seems that the JFTC has in any event become more inclined to resolve cases by way of informal settlement rather than through a formal legal mechanism.

The most recent example of this is the JFTC's widely publicized investigation into Amazon Japan. The JFTC was investigating Amazon Japan in relation to allegations that the so-called most-favored nation ('MFN') clause imposed on sellers on Amazon's e-commerce marketplace, Amazon Marketplace, ran afoul of the Antimonopoly Act. The MFN clause required sellers on Amazon's e-commerce platform to offer their items at the same price or a lower price than they did on any competing e-commerce

Authors in this Issue

■ **Antitrust/Competition**

Yusuke Kaeriyama
Partner
+81-3-6889-7332
yusuke_kaeriyama@noandt.com

■ **General Corporate/Mergers and Acquisitions (M&A)**

Kazuya Ogawa
Partner
+81-3-6889-7353
kazuya_ogawa@noandt.com

marketplace.

The JFTC's concern was that these clauses could potentially distort fair competition among e-commerce platformers. In response to such allegation, Amazon Japan committed to remove the MFN clause from its contracts with sellers on its e-commerce platform and not to reinstate such a clause in the future.

In addition, Amazon notified the change in its contracts to all of its relevant employees who deal with sellers on its e-commerce platform and pledged to make annual reports to the JFTC on its compliance with these commitments over the next three years. The JFTC concluded that these commitments were sufficient to eradicate suspicions of an anti-trust violation and closed the investigation without concluding whether or not there had been an infringement of the Antimonopoly Act.

Another example of a less legally formalistic approach by the JFTC is the manner by which the JFTC handles the investigation of 'abuses of a superior bargaining position.' Under the Antimonopoly Act, small and medium-sized enterprises receive special protection from abuses of a superior bargaining position by their commercial counterparties. The Antimonopoly Act does this by prohibiting a firm with a superior bargaining position from unjustly taking advantage of such position to, in effect, force the counterparty to accept a transaction on unreasonable terms.

This type of violation may result in a substantial administrative fine. However, as the meaning of 'superior bargaining position' and 'unreasonable' in these circumstances is by no means settled, experience shows that a firm that is fined for this type of violation almost certainly disputes the JFTC's findings.

This means that the JFTC may face an uphill-battle to persuade a court that its findings are fair and reasonable. Against this background, in an increasing number of cases, the JFTC issues a warning to the company in question. This results in the company voluntarily ceasing the conduct suspected of violating the Antimonopoly Act. The regulator then closes the investigation without formally determining whether there was a violation of the Antimonopoly Act and without fining the business in question.

III. Comment

In recent years, it appears that the JFTC has become more prepared to engage in dialogue with an enterprise that is under investigation rather than immediately take a more formalistic approach. In the event that the commitments procedure comes into force, there are certainly various advantages to a company if it can end an investigation quickly by offering certain commitments to address the JFTC's concern.

The advantages include (i) the matter being resolved without the regulator finding whether an infringement has occurred (ii) no fine will be issued (iii) the company will not need to allocate substantial resources to defend itself against the investigation (iv) the company will no longer be exposed to the reputational risk of a drawn out investigation and (v) the risk of subsequent private litigation will likely be reduced.

Even before the commitments procedure comes into force, a company subject to a JFTC investigation would be well advised to keep a good working relationship with the relevant JFTC officers and consider whether seeking a negotiated settlement of the investigation would be in the company's best interests. If it is, and notwithstanding that the commitments procedure has yet to become law, in practice the JFTC may still be amenable to accepting a proposal containing undertakings in order to informally resolve the issues in question despite the absence of the formal commitments procedure.

Recent Publications

- ***The International Comparative Legal Guide to: Competition Litigation 2018 Japan***
  (Global Legal Group Limited, September 2017)
  by Eriko Watanabe and Koki Yanagisawa (co-author)
- ***Multinationals Fear Japan Reports Could Spur Outside Audits***
  (Bloomberg BNA Tax & Accounting News (online))
  by Yushi Hegawa (comment)
- ***Extradition and antitrust law: Businessmen involved in global cartels extradited to foreign countries***
  (Concurrences No.3 2017)
  by Yoshitoshi Imoto (co-author)
- ***ASA Reference Series The Reasons Why Switzerland is a Favourite Arbitration Venue (Japanese Versions)***
  (Swiss Arbitration Association (online))
  by Daisuke Ikukawa (Translator)
- ***Enforcement of amended personal information protection regime***
  (International Law Office Online Newsletter "IT & Internet-Japan")
  by Peter Gordon Armstrong and Daisuke Fukamizu (co-author)
- ***Getting the Deal Through - Loans & Secured Financing 2018 Japan***
  (Law Business Research Ltd, August 2017)
  by Masayuki Fukuda
- ***Getting the Deal Through - Appeals 2017 Japan***
  (Law Business Research Ltd, August 2017)
  by Hironobu Tsukamoto and Eriko Ogata (co-author)
- ***Energy Market Reform and Surveillance Commission in Japan***
  (The ICER Chronicle Edition 7, August 2017)
  by Yutaro Fujimoto (co-author)

■ General Corporate/Mergers and Acquisitions (M&A)

Increased Screening of Inward Direct Investment into Japan: New Rules Seek to Bolster National Security

I. Introduction

In May 2017, an amendment to the Foreign Exchange and Foreign Trade Act (the 'Revised Act') was enacted. Amid growing concerns in Japan over the outflow to overseas countries of Japanese technologies and goods that may potentially harm Japan's national security, the Revised Act makes two changes to the regulations concerning inward direct investment into Japan with the objective of protecting Japan's national security.

First, the Revised Act bolsters the inward direct investment screening regime by adding a requirement that a transfer of shares between foreign investors in non-listed Japanese companies in certain business sectors requires the submission of a prior notification subsequent to which the government shall screen the proposed investment to ascertain whether it is highly likely to harm national security. Secondly, the Revised Act introduces new administrative measures that can be imposed on a foreign investor who has made an illegal inward direct investment.

The relevant government orders and public notices set out the detail of the Revised Act as well as set the effective date of the Revised Act as October 1, 2017.

II. So-called 'Specified Acquisitions'

(i) Prior Notification

The Revised Act introduces a new concept of 'Specified Acquisition.' A Specified Acquisition is an acquisition of shares or equity interests held by a foreign investor in a non-listed Japanese company. The effect of this new concept in the Revised Act is to expand the circumstances in which prior notification to the Japanese government of share or equity interest acquisitions by foreign investors is required.

Foreign investors are required to submit such prior notification to the Bank of Japan before making a Specified Acquisition from another foreign investor in relation to a business involved in certain industry sectors designated by public notice as being relevant to national security. Subject to certain exceptions, these sectors include weapons manufacturing, aircraft and aerospace industries and the nuclear sector.

This prior notification requirement applies when the non-listed company (or its subsidiary) whose shares or equity interests are to be acquired by a foreign investor has business interests within the aforementioned designated industries.

(ii) Waiting Period and Examination

As is the case with the existing regulations regarding the prior notification for inward direct investment, foreign investors who have provided the prior notification for the Specified Acquisition in question may not complete the Specified Acquisition until a 30-day waiting period has elapsed from the date the notification has been received by the Bank of Japan.

The waiting period can be shortened if the Specified Acquisition is considered by the government to not in fact require an examination of the issue of whether it is highly likely to harm national security.

As is the case with the existing regulations regarding the prior notification for inward investment, the 30-day waiting period will usually in practice be shortened to two weeks. Further, according to the Ministry of Finance, the waiting period may, provided certain conditions are met, be shortened even further to five days for three categories of Specified Acquisition designated by the Bank of Japan. These are 'green field investments', 'roll-over' investments (which are in essence repeats of previous investments) and 'passive investments' (which are in essence investments for purely investment purposes). If the relevant minister deems it necessary to complete the examination, the waiting period for any Specified Acquisition may be extended by up to four months.

On August 2, 2017, the Ministry of Finance and certain other ministries announced that the following factors will be considered by the Ministry of Finance and the ministry having jurisdiction over the relevant business sector when examining a prior notification in relation to a Specified Acquisition:

(i) the maintenance of production and technology in industries related to national security such as

weapons manufacturing, aircraft and aerospace industries and the nuclear sector;

(ii) the prevention of the outflow to foreign countries of technologies crucial to national security;

(iii) the characteristics of the foreign investor, its affiliate, their business and financing plans and past investment activities; and

(iv) any other factors worthy of consideration.

(iii) Recommendations and Orders regarding Specified Acquisitions

As is the case in relation to inward indirect investment, if the Minister of Finance and the minister having jurisdiction over the relevant business determine that the Specified Acquisition in question is highly likely to harm national security, they may recommend that the foreign investor modify or discontinue the Specified Acquisition.

If the foreign investor notifies the Minister of Finance and the minister having jurisdiction over the relevant business of the investor's rejection of such recommendation or fails to notify them of its acceptance of such recommendation within ten days of being notified, then the Minister of Finance and the minister having jurisdiction over the relevant business may formally order the foreign investor to modify or discontinue the Specified Acquisition.

III. Administrative Measures

The Revised Act introduces new administrative measures that can be imposed on a foreign investor who has made an inward direct investment that is likely to harm national security and also on a Specified Acquisition that is highly likely to harm national security in violation of the Foreign Exchange and Foreign Trade Act. Such administrative measures include the forced sale of shares or equity interests acquired through such inward direct investment or Specified Acquisition.

IV. Other Amendment

A cabinet order enacted in July 2017 has revised the exemptions from the prior notification requirement for inward direct investment so as not to exempt from the prior notification requirement the acquisition by a foreign investor of shares or equity interests in a non-listed company through a merger or corporate split if such company (or its subsidiary) has business interests within the designated industries related to national security as mentioned above.

V. Effective Date and Transitional Measures

The effective date of the Revised Act and related cabinet and ministerial orders and public notices is October 1, 2017. Further, the prior notification requirement for Specified Acquisitions shall only apply to Specified Acquisitions which shall be completed on or after October 31, 2017.

VI. Comments

Before the enactment of the Revised Act, a transfer of shares or equity interests in non-listed companies between foreign investors and the acquisition of shares or equity interests in non-listed companies through a merger or corporate split were not included in the categories of transactions for which foreign investors were required to submit a prior notification.

From October 1, 2017 onwards, when a foreign investor is to acquire shares or equity interests in a non-listed company through a merger or corporate split or (from October 31, 2017 onwards) acquire shares or equity interests in a non-listed company from another foreign investor, such foreign investor has to consider whether such non-listed company or its subsidiary engages in any business relevant to national security which requires the submission of a prior notification.

NAGASHIMA OHNO & TSUNEMATSU www.noandt.com

JP Tower, 2-7-2 Marunouchi, Chiyoda-ku, Tokyo 100-7036, Japan
Tel: +81-3-6889-7000 (general) Fax: +81-3-6889-8000 (general) Email: info@noandt.com

Nagashima Ohno & Tsunematsu, having offices in Tokyo, New York, Singapore, Bangkok, Ho Chi Minh City, Hanoi and Shanghai, is widely known as a leading law firm and one of the foremost providers of international and commercial legal services in Japan. The firm represents domestic and foreign companies and organizations involved in every major industry sector and in every legal service area in Japan. The firm has structured and negotiated many of Japan's largest and most significant corporate and finance transactions, and has extensive litigation strength spanning key commercial areas, including intellectual property, labor and taxation. The firm comprises around 400 lawyers capable of providing its clients with practical solutions to meet their business needs.