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This issue covers the following topics:

■ General Corporate/Mergers and Acquisitions

Widening the Business Sectors Subject to Prior Notification Requirements for Foreign Investment in Japanese Companies

I. Introduction

On May 27, 2019, Cabinet Office, the Ministry of Internal Affairs and Communications, Ministry of Finance, and other relevant Ministries of Japan promulgated amendments to two existing public notices concerning the foreign investment in Japan (the "Amendments"). The Amendments widen the scope of the business sectors where foreign investors are required to make a notification filing to the Bank of Japan prior to making an investment. The Amendments are driven by national security concerns, particularly in relation to cyber espionage, and are intended to strengthen Japan's national security regime by, for example, monitoring the potential for the outflow of material technologies relating Japanese national security or the undermining of material manufacturing or technology related to national defense.

II. Regulations regarding foreign investment in Japanese companies

In principle, foreign investment in Japanese companies falls under two classifications of investments: Inward Direct Investment and Specified Acquisitions. Inward Direct Investment covers acquisitions by a foreign investor of shares or equity interests in a non-listed Japanese company (other than Specified Acquisitions), acquisitions by a foreign investor of 10% or more shares in a listed Japanese company, and other certain investments stipulated by law. Specified Acquisitions relates to acquisitions by a foreign investor of shares or equity interests held by another foreign investor in a non-listed Japanese company.

Whether foreign investment is an Inward Direct Investment or a Specified Acquisition, if it is made in relation to certain business sectors (each a "Notifying Business"), the foreign investor is required to submit a prior notification to the Bank of Japan. Once such prior notification has been submitted, the foreign investor may not complete the investment until a 30-day waiting period has elapsed from the date that the notification has been received by the Bank of Japan. Such 30-day waiting period can usually be shortened into two weeks, and in certain circumstances even to five business days, if particular conditions are met.

If the Minister of Finance and the Minister having jurisdiction over the relevant business (the "Relevant Minister") determine that a particular investment is highly likely to be detrimental to national security, they may recommend that the foreign investor modify or withdraw its investment. If the foreign investor notifies the Minister

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of Finance and Relevant Minister of its 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 Relevant Minister may formally order the foreign investor to modify or withdraw its investment. The foreign investor is obliged to comply with such order or otherwise be subject to criminal penalties.

For Inward Direct Investment into entities that are not Notifying Businesses then the foreign investors are only required to submit a post-closing report to Bank of Japan. No notification or post-closing report is required for Specified Acquisitions into entities that are not Notifying Businesses.

III. Widening the scope of Notifying Businesses

The table below illustrates the business sectors that have been newly added by the Amendments as Notifying Businesses:

1. Manufacturing of devices or parts relating to data processing
Manufacturing of integrated circuits
Manufacturing of semiconductor memory media
Manufacturing of optical discs, magnetic tape and discs
Manufacturing of electronic circuit implementation boards
Manufacturing of wired communication equipment
Manufacturing of mobile phones and PHS
Manufacturing of radio communication equipment
Manufacturing of computers (other than personal computers)
Manufacturing of personal computers
Manufacturing of external storage
2. Production of software relating to data processing
Custom software services
Embedded software services
Package software services
3. Information and communication services
Regional telecommunications (other than wire broadcast telephones)[1]
Long-distance telecommunications
Wire broadcast telephones
Miscellaneous fixed telecommunications
Mobile telecommunications
Data processing services
Internet support services

The description provided of some of the newly added business sectors are not clear and leave room for interpretation. For example, “custom software services”, “embedded software services”, and “package software services”, are broad and somewhat ambiguous, making it difficult to easily determine what types of businesses are now subject to the prior notification requirements. To that end, reference to the standard classification of industries in Japan known as the “Japan Standard Industrial Classification”, which has been periodically publicized by the Ministry of Internal Affairs and Communications, may assist in clarifying the scope of the business sectors newly added by the Amendments.

1 Prior to the Amendments, a certain type of regional telecommunications business was already subject to a prior notification requirement insofar as registration was required for such business types under Article 9 of Telecommunications Business Act. The Amendments is intended to include business type of regional telecommunications not subject to such registration requirement within the scope of what is a Notifying Business. As for long-distance telecommunications, miscellaneous fixed telecommunications, mobile telecommunications, and internet support services, the scope of services classified under a Notifying Business has also been widened in a similar way

IV. Comments

Inward Direct Investments or Specified Acquisitions made in relation to the newly added business sectors after August 31, 2019, will be required to submit prior notification to the Bank of Japan. Foreign investors contemplating making an investment in a Japanese company ought to pay special attention to the Amendments and confirm whether their target business in Japan is now classified as a Notifying Business and subject to the requisite prior notification requirements.

■ Compliance/Crisis Management

Recent Developments Regarding Attorney-client Privilege in Japan

I. Introduction

If a client asks whether conversations with a Japanese lawyer regarding legal advice will be protected by attorney-client privilege in a Japanese court, the short answer is *no*, which is often surprising to non-Japanese clients (especially those from common law jurisdictions).[2] According to the OECD, Japan is one of only three OECD jurisdictions that do not afford attorney-client privilege.[3] The absence of attorney-client privilege requires foreign companies to be acutely aware of the differing treatment of sensitive communication in Japan and in their home jurisdiction. It may also pose a greater challenge to Japanese companies in the context of international disputes and/or investigations. This article addresses the recent discussions about attorney-client privilege in relation to investigations of corporate misconduct in Japan and the new regime of attorney client privilege being developed.

II. Attorney-client privilege in the context of investigations of corporate scandals in Japan

To date the practice of the investigation of corporate misconduct has been specially developed with close reference to Japanese laws on court procedures and the protection of confidential communications. Given that privilege cannot be asserted over any communication, investigative authorities have the power to seize any and all communications between the company subject to investigation and its legal advisors or in-house counsel regardless of how confidential it may be, and can use such information to establish their case in a criminal trial or before an administrative tribunal. This means that those anticipating being subject to a compulsory investigation should be cautious and, in practice, the communication of certain sensitive information with legal counsel in writing is often withheld. An interview memo or other work product drafted in the course of an internal investigation can be seized by the authorities and not, in the context of matters restricted to Japan, receive any benefit from the inclusion of an *Upjohn* warning. While the Japan Federation of Bar Associations (the "JFBA") and several business federations have been advocating the need for statutory exemption of confidential communications from seizure, this situation has remained unchanged.

In large corporate scandals of Japanese companies, the investigation reports prepared by the company's counsel are often voluntarily disclosed to the general public with the intention of repairing their reputation as quickly as possible. Further, companies or even government agencies sometimes establish a third-party investigation committee, in accordance with the JFBA's guideline, to investigate serious misconduct. According to the JFBA's guideline, the third party committee should investigate the case in the interests of "all stakeholders" and should disclose the result of its investigation to them. This investigation practice is strongly shaped by the Japanese legal system which does not have robust discovery procedures of evidence in lawsuits, US-style class actions, or attorney-client privilege.

However, as many enterprises globally expand their business activities and are involved in various global supply chains, corporate misconduct in such business activities could violate laws in multiple jurisdictions and expose the company to the risk of criminal or administrative investigations and civil lawsuits in common law jurisdictions. As a result, the management of global companies are confronted with a dilemma in the case of an international investigation between the civil and criminal exposure in common law jurisdictions and the Japanese practice that may constitute an intentional waiver of privilege or leave the investigation to a committee which may not fall under "attorney" for the purpose of privilege because it does not always act solely in the best interests of company. This dilemma is addressed in the Group Governance Practical Guideline published by Ministry of Economy, Trade and Industry in June 2019, which advocates the importance of the balancing of conflicting interests. While this issue has been more widely recognized recently, if a company does not disclose the result of an internally conducted investigation in a high profile case due to concerns it may have regarding the waiver of privilege, it would be prudent to carefully explain the reasons for its decision.

III. Competition laws and privilege

The absence of attorney-client privilege in Japan is often mentioned in relation to the enforcement of competition laws because (i) it is one of the areas where the administrative sanctions are most actively enforced against business organizations in Japan utilizing the leniency program; (ii) there are precedents where the government authority have

2 There are some systems similar to attorney-client privilege, e.g., attorney's right to refuse testimony in a civil lawsuit (Article 197 of Code of Civil Procedure), attorney's exemption from compulsory seizure (Article 105 of Code of Criminal Procedure) and they are arguably deemed as privilege

3 According to the Secretariat's research of public resources, the three OECD Members that do not recognize legal privilege are Japan, Korea, and Poland (although Poland would follow EU case law when assisting the European Commission with an inspection). (Treatment of Legally Privileged Information in Competition Proceedings, Background Paper by the Secretariat, November 26, 2018)

seized the personal computer of an attorney retained by the company that is the target of the investigation[4] or used legal advice of the defendant's lawyer to prove the intention of the company's violation[5]; and (iii) international cartel investigations have highlighted the lack of protection of communication in Japan compared to other jurisdictions. Consequently, after a lengthy history of discussions among committees established by Japanese Fair Trade Commission (the "JFTC") and lobbying by the JFBA and other groups, the latest amendment to the Anti-monopoly Law this year includes additional resolutions by Diet to partially introduce attorney-client privilege in administrative investigations pursuant to ordinances under the law or certain prescribed guidelines (the "Resolutions").

IV. New rules under Anti-Monopoly Law

Briefly, in relation to attorney-client privilege, the Resolutions state that (i) the scope and requirements for attorney-client privilege should be as consistent as possible with the global standard and will need to be revised based on the observation of practice under the incoming regime; (ii) processes for the substantive protection of attorney-client privilege, including a review process under the JFTC, shall be established; and (iii) the cases where attorney-client privilege is claimed should be publicly disclosed to ensure transparency and credibility. While the final draft of the relevant ordinance and guideline has not yet been disclosed, the JFTC has published an outline of the privilege rules to be introduced. The key takeaways of which are as follows:

- The privilege shall be applied to only *administrative investigation* of *unreasonable restraint of trade (e.g., cartel)*, not to criminal investigations
- *Written* communication between business organizations and their lawyers about legal advice of *unreasonable restraint of trade* are privileged
  - Legal advice for non-cartel misconduct, will *not* be privileged
  - Communication between foreign lawyers about foreign competition laws shall be privileged
  - Testimonies cannot be protected by privilege (however, the JFTC shall not ask about privileged communication at the interviews)
- Documents to be protected shall be properly kept as confidential
- An express request is necessary to exercise privilege and a record of privileged documentation must be submitted
- Communication with *in-house counsel* is *not* in principle? privileged
- A screening officer of the JFTC's secretariat *which is not in charge of the relevant investigation* will determine the applicability of privilege
- Exercise of privilege shall not be a factor considered when determining the amount of any discretionary surcharge

V. Comments

As you can find above, the new system of attorney-client privilege will be developed under the strong influence of US-style privilege laws and practices, but will be very narrowly tailored only for the protection of tangible evidence in administrative investigations of a certain category of misconduct. However, this is still a significant first step in Japanese law to create its own attorney-client privilege rules which will certainly assist in the harmonization of the Japanese piece of an international cartel investigation. The accumulation of cases applying attorney-client privilege under the new regime will give further clarity to the scope of privileged communications and will become the foundation for further development which might possibly extend to civil and criminal procedures in general.

On the other hand, the introduction of the new rules in only limited circumstances may highlight the absence of attorney-client privilege in other situations. Among others, when the choice-of-law analysis in foreign lawsuits concludes that Japanese privilege law governs, the court could more likely find a certain communication is not privileged in civil or criminal trials; although there is a US court ruling that a communication is not discoverable simply through the application of Japanese law.[6] Many discussions of Japanese privilege law seem to assume that, in the case

4 For example, it is reported by mass media that Tokyo Prosecutor's office seized a personal computer of an attorney retained by a construction company subject to the investigation of maglev train construction cartel in 2018

5 Tokyo High Court Judgement on September 12, 2013

6 Eizai v. Dr. Reddy's Laboratories Inc. (S.D. of NY Dec. 21, 2005)

of lawsuits or investigations in a foreign jurisdiction, the privilege laws of that jurisdiction are also applied to communications occurring in Japan. However, such complicated choice-of-law analysis from the perspective of maintaining privilege can become more important and warrant a more strategic approach.

Foreign companies which operate businesses in Japan as well as Japanese domestic companies should carefully follow up on the rules and guidelines of Japanese attorney-client privilege to be drafted and how they will be applied by the JFTC in practice.

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