

The Japanese Congress enacts the Pass-on Consumption Tax Act (POCTA) to prevent exploitative abuse when consumption tax rates are raised in the near future

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Japanese Congress, 12 June 2013, Pass-on Consumption Tax Act (POCTA)

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Japan has enacted an Act which is relevant to discussion of exploitative abuse. The Act in question is the Pass-on Consumption Tax Act (Act No. 41 of the 12th June 2013), termed “POCTA” in this essay [[1](#)].

1. Overview

Japan plans to raise consumption tax rates (from 5% to 8%) on the 1st April 2014 and again on the 1st October 2015 (from 8% to 10%). This was approved by Congress by the passing of an Act in 2012 (Act No. 68 of the 22nd August 2012).

Politicians in Congress favor the suggestion that small- and medium-sized enterprises (“SMEs”) will pass the increased tax burden onto customers.

On 5th June 2013, Congress passed the POCTA [[2](#)]. This Act has only a temporary effect, being in force from the 1st October 2013 (pursuant to Government Order No. 182 of the 14th June 2013) to the 31st March 2017 (pursuant to the POCTA Annex Art. 2 (1)). The POCTA has four parts: (a) prohibition of a refusal to pass on the tax, (b) prohibition of any representation giving rise to a refusal to pass on the tax, (c) temporary abolishment of a requirement that a total price (thus including the consumption tax) should be displayed, and, (d) exemption of certain cartels from forthcoming consumption tax rises.

This essay focuses on the first part (i.e. (a)), which is directly concerned with regulation of exploitative abuse. The other three parts will be mentioned briefly at the end of this essay.

2. Prohibition of a Refusal to Pass on the Tax

(1) The Prohibition in the Context of Competition Law

The POCTA was enacted to complement the Subcontract Act (“SCA”), which in turn complements the Antimonopoly Act (“AMA”); the various Acts can be viewed as the legislative approach toward regulation of exploitative abuse [3].

The AMA [4] regulates exploitative abuse of a superior position, which is effectively equivalent to Article 102 TFEU in part prohibiting exploitative abuse of a dominant position. The regulation applies to all trades and is enabled if (a) an alleged violator occupies a superior position within a trade and (b) abusive conduct takes place (AMA Art. 2 (9)(v)). The holding of a superior position is indicated when it is necessary for the alleged victim to continue to trade with the alleged violator [5]. The JFTC (Japan Fair Trade Commission) may issue a cease-and-desist order (AMA Art. 20) and then must issue an administrative surcharge order (AMA Art. 20-6) if illegal conduct is proven. The 2009 Amendment of the AMA, which took effect on the 1st January 2010, imposed an administrative surcharge on violators of exploitative abuse, and the JFTC is obliged to follow a detailed framework when calculating such a surcharge. As of June 2013, the surcharge system has been invoked three times [6]. Although the regulation can be applied to any trade, the focus is generally on protection of SMEs. The SCA (see below) deals with protection of subcontractors, whereas regulation of exploitative abuse by the AMA tends to focus on abuse of suppliers by large-scale retailers.

The SCA [7] was enacted in 1956 to complement the exploitative abuse regulation of the AMA. The SCA is easier to invoke than the AMA and the enforcement methods are softer when buyers exploitatively abuse subcontractors. Whereas the SCA applies only to subcontracting scenarios, the SCA requires formalistic comparison of the levels of capitalization of the subcontractor (the seller) and the buyer (SCA Art. 2 (7) and (8)). This exercise differs from identification of a ‘superior position’ required by the AMA (see above). A list of illegal types of conduct includes a refusal to receive ordered goods, failing to pay a promised amount, and offering an excessively low price. In an effort to balance the formalistic finding of dominance mentioned above, the SCA authorizes the JFTC to invoke a relatively soft enforcement method; this is a recommendation (SCA Art. 7) rather than a cease-and-desist order. A recommendation is softer than an order in the sense that the addressee is not formally obliged to conduct the expected actions, but a failure to obey a recommendation could give rise to a cease-and-desist order and a surcharge order pursuant to application of the AMA. In other words, obedience with the recommendation would ensure that the AMA would not be invoked to deal with exploitative abuse (SCA Art. 8). In the time since the 2003 Amendment of the SCA, the JFTC has publicly announced each recommendation. The SCA does not contain an authority to impose an administrative surcharge.

(2) The POCTA

The POCTA was enacted to complement the SCA.

The POCTA features an enforcement framework similar to that of the SCA; a recommendation is made (POCTA Art. 6 (1)) and it is possible to make an AMA application if the recommendation is ignored (POCTA Art. 7). Every recommendation must be publicly announced by the JFTC (POCTA Art. 6 (2)). One difference between the POCTA and the SCA is that not only the SMEA (the Small and

Medium Enterprise Agency) but also other responsible industry agencies may refer allegations to the JFTC (POCTA Art. 5).

The most significant differences between the POCTA and the SCA concern trade eligibility and the nature of the relationship between the victim (the seller) and the abusive buyer.

The POCTA regulates all trades, not only subcontract trade, while the POCTA by definition focuses on abusive conduct by buyers.

In terms of the POCTA, the requirement to be met when establishing a seller-buyer relationship is much less arduous for the JFTC compared to even the capital comparison dictated by the SCA. The POCTA can be applied to a trade if either of the following two requirements is met: (a) the buyer is a large-scale retailer (POCTA Art. 2 (1)(i) and (2)(i)) or (b) the capital of the seller is not more than 300 million yen (POCTA Art. 2 (1)(ii) and (2)(ii)). Importantly, the POCTA does not require comparisons. If the buyer is a defined large-scale retailer, every seller to such a buyer may be a victim. The Act seems to reflect the current perception that large-scale retailers tend to abuse their positions. If the seller is a defined SME with a small capital base, every buyer may be a potential violator. This seems to reflect a perceived need to protect all sales made by SMEs.

An eligible seller (a potential victim) is termed a “Specified Supplier” and an eligible buyer (a potential violator) a “Specified Buyer” in the POCTA (Art. 2 (1) and (2)). Although a literal translation of the statutory concept of a potential violator would read “Specified Entrepreneur,” I prefer to use “Specified Buyer” to make the contrast with “Specified Supplier” clearer.

The POCTA list of prohibited conduct for Specified Buyers is similar to that of the SCA, but of course focuses on the passing-on of consumption tax increases. The list of summaries of conduct provided by the relevant provisions is as follows (POCTA Art. 3 (i)-(iv)):

(i) refusing to pass on consumption tax increases by reducing payment from a promised price or by setting an excessively low price compared to prices set by other trades offering similar products or services,

(ii) conditional acceptance of the passing on of consumption tax increases as reflected in the purchase of another product or service or by providing a monetary contribution or other advantages (such as dispatching employees of the Specified Supplier to stores of the Specified Buyer),

(iii) refusing an offer to include a pre-tax price as a negotiation parameter, or

(iv) retaliation after a complaint is filed by a Specified Supplier with the JFTC or another agency.

(3) Comments

Japan has already raised consumption tax twice, from 0% to 3% in 1989 (i.e., at the time of introduction of a consumption tax) and from 3% to 5% in 1997. On both occasions, the JFTC handled the issue of refusal to pass on the tax by promulgating specific and temporary guidelines under the AMA and the SCA. The list of prohibited activities described in earlier guidelines was similar to that of the POCTA of 2013.

When contemplating consumption tax elevations in 2014 and 2015, Congress, presumably concerned about the extent of the rises and long-time economic difficulties, passed the POCTA to deal with possible issues, rather than relying on guidelines. JFTC staff numbers are to rise from 799 to more than 900 [8]. It is thus likely that the JFTC, enjoying a generous political budget allocation, will be obliged to conduct “active” enforcement.

It will be difficult to determine whether a price is excessively low. The philosophy of contract states that a price should be freely negotiated between seller and buyer, and it is usually difficult to tell bargaining a pre-tax price from a refusal to pass tax on. If a buyer must accept an incremental increase in tax on 1st April 2014, that buyer may seek to bargain earlier to circumvent the POCTA. “Active” enforcement by the JFTC will result in development of guidelines and cases.

3. Other Regulations in the POCTA

(1) Prohibition of any Representation Giving Rise to a Refusal to Pass on the Tax

The POCTA provides that misrepresentations associated with the forthcoming consumption tax rises are prohibited and that the CAA (Consumer Affairs Agency) can issue recommendations to violators. The CAA routinely applies the Act against Unjustifiable Premiums and Misleading Representations (AUPMR) to counter misrepresentations. The POCTA has a new provision in the sense that the CAA can quickly issue a recommendation rather than a cease-and-desist order pursuant to the AUPMR.

Misrepresentations covered by the POCTA are those made by sellers and shown to buyers. Prohibited misrepresentations include (i) a representation that pretends to “exempt” customers from consumption tax and (ii) a representation that pretends to discount some or all of the consumption tax (POCTA Art. 8). Such misrepresentations are regulated because they may give rise to a refusal to pass on tax by a seller of raw materials to a potential violator. However, of course, price-setting itself by the potential violator is unregulated. This is why this second category was modified in the House of Representatives to prohibit only representations that are explicitly linked to elevations in consumption tax rates. As a result, representations such as “Spring Discount of 3%” at the time of raise from 5% to 8% in April 2014 may be allowed.

The CAA may issue a recommendation to a violator pursuant to the POCTA Article 4 (see above) which is applied *mutatis mutandis* to misrepresentations (POCTA Art. 9). The CAA is given the power by the Prime Minister who is statutory given the power pursuant to the POCTA Articles 4 and 9 (POCTA Art. 18 (3)), just as in the AUPMR.

(2) Temporary Abolishment of a Requirement that the Total Price (thus Including the Consumption Tax) Should be Displayed

The Consumption Tax Act Article 63 obliges sellers to display the entire price (thus including consumption tax), principally to not confuse buyers.

The POCTA lifts this ban and allow sellers to hide the full price, provided that care is taken to not cause confusion. This means that price tags such as “1,000 yen plus tax” will be allowed. Such representations are preferred for at least two reasons. First, sellers will feel (relatively) more

comfortable when passing on increased rates if they do not have to show the actual amount of tax. Second, sellers will not need to renew price tags on the dates of the tax rises.

(3) Exemption of Certain Cartels from the Forthcoming Consumption Tax Elevations

The POCTA exempts certain cartels from the requirement to pass on increases in consumption tax (POCTA Art. 12).

Exempted cartels fall into two categories; (a) cartels that agree on acceptable methods of passing on tax and (b) cartels that agree on acceptable methods of displaying prices. At least two-thirds of cartel members in the former category (i.e. (a)) should be “small- and medium-sized entrepreneurs” as defined by the POCTA Article 2(3) (POCTA Art. 12).

Cartels must be registered with the JFTC to enjoy exemption (POCTA Art. 12).

The supposed “exemption” is really smoke and mirrors. The POCTA Article 12 carefully excludes cartels that maintain or raise prices by substantially lessening competition. Such cartels will not be exempted. This means that originally illegal cartels remain illegal even under the “exemption” provision. It may be that “exemption” serves as a simple political tool to soothe particular pressure groups. A similar exemption was temporarily introduced from 1989 to 1991 when consumption tax was first introduced, probably for the same reason.

[1] This essay was supported by JSPS KAKENHI Grant Number 25380070.

[2] One of the webpages officially reporting the enactment can be found at the JFTC website, <http://www.jftc.go.jp/houdou/pressr...> (only in Japanese).

[3] Tadashi Shiraishi, “A Baseline for Analyzing Exploitative Abuse of a Dominant/Superior Position”, UT Soft Law Review No.5 (2013), available at SSRN: <http://ssrn.com/abstract=2246558>.

[4] An English translation of the AMA is available at the JFTC website, <http://www.jftc.go.jp/en/legislatio...>

[5] Japan Fair Trade Commission, “Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act” (the 30th November 2010) II 1, available at <http://www.jftc.go.jp/en/legislatio...>

[6] Sanyo Marunaka, JFTC Orders on the 22nd June 2011; Toys“R”Us-Japan, JFTC Orders on the 13th December 2011; Edion, JFTC Orders on the 16th February 2012. Summaries of the second and the third cases are available at the JFTC website, <http://www.jftc.go.jp/en/pressrelea...>

[7] An English translation of the SCA is available at the JFTC website, <http://www.jftc.go.jp/en/legislatio...>

[8] Press Conference held by the Secretary General Takashi Yamamoto, on the 8th May 2013, available at <http://www.jftc.go.jp/houdou/teirei...> (only in Japanese). The current number (799) as of June 2013 is pursuant to Government Order No.121 of 1969 as amended by Government Order

No.104 of 2013.

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