

INTERNATIONAL TRADE LAW BULLETIN

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The Screening System for Essential Infrastructure Facilities Begins under The Economic Security Promotion Act of Japan: Key Practice Points for Potentially Affected Businesses

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I. Introduction

On 17 May 2024, the new Japanese “System for the Stable Provision of Core Infrastructure Services”, will become fully operational. It was established pursuant to Chapter III of the Economic Security Promotion Act of Japan, more specifically by Chapter III Ensuring the Stable Provision of Specified Essential Infrastructure Services in the Act on the Promotion of Ensuring National Security through Integrated Implementation of Economic Measures (“**ESPA**”). This system – designed to prevent essential infrastructure facilities being impaired or destroyed by overseas actors, such as the well-publicized cyberattack on an American pipeline operator in 2021 – will see arms of the Japanese government, among other things, examine the supply chain of equipment, systems and programs used in the provision of core infrastructure services, backed by the government’s authority to order changes in the supply chain or ultimately block the proposed transaction. Both infrastructure providers and suppliers/contractors involved in the introduction and maintenance of related infrastructure facilities should stay up to date on developments in this area as this system has the potential to significantly impact their businesses including through notification obligations. These are borne by infrastructure providers, who, in turn, will request their suppliers and contractors to cooperate with such obligations arising under the system.

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II. To Whom Does this System Apply?

In principle, ESPA and this system covers 14 “core” infrastructure sectors, specifically: electricity, gas, petroleum, water supply, railroads, trucking, ocean freight, aviation, airports, telecommunications, broadcast, mail, banking, insurance businesses, and credit cards. It is anticipated that additional sub-sectors may be added from time to time by future amending legislation. Indeed, an amendment bill to ESPA adding ports as a sub-sector is currently pending and expected to be adopted shortly. Within these sectors, the competent minister is empowered by legislation to designate individual core infrastructure providers as “**Specified Providers**”, subjecting them to the notification obligations.¹ Similarly, ministerial orders are able to designate certain essential infrastructure facilities as Specified Important Facilities (“**SIF**”). If, for example, you are a system/program vendor supplying your products or service to an infrastructure provider in one of these sectors, it is worth examining whether the infrastructure provider has been designated a Specified Provider, as you may well then be affected by the obligation borne by the infrastructure provider.

III. What Obligations Do You Bear?

As of 17 May 2024, when a Specified Provider seeks to either (1) introduce a SIF, or (2) entrust another person with the maintenance, management, or operation of the SIF, then (pursuant to ESPA Article 52) the Specified Provider bears an obligation to provide prior notification to the competent minister of this introduction or entrustment, before it takes place (unless the proposed step is a defined urgent case, in which case prompt later notification will be required). Authorities will consider whether there is a significant risk that the SIF could be used as a means of sabotage by overseas actors (“**Specified Sabotage**”), be it sabotage carried out electronically (such as through cyberattacks or computer viruses) or by physical means.

The required prior notification must contain various pieces of information including an outline of the SIF in question, the content and timing of the introduction/entrustment, multiple corporate details of the entities along the supply chain, including certain personal details and documents of directors and officers, shareholders, and details of any relationships with foreign governments.

¹ The list of Specified Providers can be found at this link: (https://www.cao.go.jp/keizai_anzen_hos/ho/doc/infra_jigyousya.pdf) (in Japanese only).

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The details of the information that the Specified Providers must submit to competent authorities are specified in relevant ministerial orders.

Further, the required prior notification must show certain risk management measures implemented by the Specified Providers, such as measures to prevent any unauthorized changes in the SIF and to detect any sign of sabotage and secure redundancy in case of sabotage. Some of these measures are expected to be backed by contractual safeguards with suppliers and contractors. In principle, the obligations borne by the Specified Providers flow down to suppliers and sub-suppliers providing SIFs and their components, or contractors and sub-contractors involved in the maintenance and management of the SIFs, in that they must cooperate closely with the Specified Providers to prepare and complete the required notifications.

IV. What are the Timelines and Procedural Basics of the Evaluation?

Once the Specified Provider has submitted a prior notification of the planned introduction or entrustment, it must not carry out this plan until 30 days have passed. During this prohibition period, an examination will take place, but it bears noting that the competent minister is empowered to extend the period for up to 4 months, if it is thought necessary. If the minister determines that there is indeed a significant risk that the SIF may be sabotaged to impair its stable functioning, then the minister is empowered to issue a recommendation for either changes to the implementation plan or discontinuance of the plan. Should the Specified Provider fail to voluntarily accept the recommendation, then the minister is further empowered to order the business to comply. Failure to comply can be met with penalties (including jail time for certain individuals involved). Conversely, if the prohibition period expires without the minister issuing any recommendation, then the Specified Provider may proceed with commissioning the introduction of the SIF or its entrustment.

V. Practical Guidance to Bear in Mind

At the outset, businesses in these sectors should note that one of their first and most onerous obligations will be the collection of the required information. A wide range of information on the Specified Provider's business and its directors and officers, and similar information from suppliers and contractors throughout one's supply chain, may be required. In order to ensure that you can obtain such information in a timely manner, it is advisable to put relevant obligations in

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contracts with your suppliers and contractors. These obligations should be, moreover, flow-through obligations in which your direct suppliers bear an obligation to place this obligation on their own suppliers of relevant goods and services. Further, in light of the submission of the personal information required concerning directors and officers, it is necessary to make sure such submission is compliant with Japanese and non-Japanese data privacy laws, potentially by obtaining consent from the relevant individuals to this disclosure and the cross-border transfer of their personal information.

The Specified Provider will also need to include any necessary contractual safeguards vis-à-vis its suppliers and contractors to make sure that the risk management measures reported in the prior notification are in place. On the other hand, the suppliers and contractors will need to carefully consider and negotiate to what extent they are willing to accept additional obligations which would not have been required but for ESPA, bearing in mind that the supplier may need to request its sub-suppliers to bear identical obligations so as to pass on its responsibilities.

Naturally, the allocation of risk will require careful consideration. For example, on which party should any risk fall if the competent minister's review results in a discontinuation recommendation? While it may be tempting for parties of greater bargaining power to simply impose onerous obligations and a one-sided allocation of risk, market participants will likely wish to be careful not to fall afoul of the Japanese law prohibition on abuse of a superior bargaining position or the Subcontract Act.

Finally, as the actual implementation of ESPA is as yet unknown, it remains possible (and if prior practice is any guide, likely) that informal consultation between business actors and the relevant ministries will occur. For this reason, parties would be well served by establishing communication channels with relevant ministries early, or by engaging counsel with experience, knowledge, and prior relationships on which to draw in this process.

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PUBLICATIONS

- Article “Legal Commentary: Latest Trends in Regulations and Industry Support by Major Countries Concerning Semiconductors”
Publication Business Houmu Vol.24 No.3
Author Kunio Miyaoka and Kyohei Kudo (CO-Author)

- Article “Cross-Sector Cybersecurity Laws (Vol. 5): Cybersecurity x Economic Security - Focusing on Infrastructure Protection and Security Clearance”
Publication NBL No.1262
Author Hideaki Umetsu, Daisuke Tsuta, Kenta Nishioka and Yuya Arai (Co-Author)

NEWS

➤ Opening of Yokohama Office

Mori Hamada & Matsumoto is pleased to announce the planned opening of an office in Yokohama, Japan.

The firm has been providing legal support for a wide range of matters through its offices in Tokyo and other locations in Japan, and has recently decided to open a new office in Yokohama, Kanagawa Prefecture, which is one of the largest economies in Japan, in order to provide services specifically tailored to the needs of clients in that region in a location that is close to where they do business.

The Yokohama Office will be staffed by Yuta Kawashima, who is a partner of the firm and has extensive experience in areas including corporate law-related services, litigation and dispute resolution, M&A, and startups, and other associates of the firm.

The Yokohama Office will endeavor to contribute to the economic development of Kanagawa Prefecture by providing cutting-edge legal support in a wide range of areas including corporate law-related services, litigation and dispute resolution, M&A, startups, business succession, crisis management, finance, restructuring, and cross-border transactions while working in close coordination with the firm's lawyers not only within Japan (Tokyo, Osaka, Nagoya, Fukuoka, Takamatsu, and Sapporo), but also at our overseas offices (those in Beijing, Shanghai, Singapore, Bangkok, Yangon, HCMC, Hanoi, Jakarta, and New York) as well as with other overseas law firms, etc. we have alliances with.

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The Yokohama Office is scheduled to open this summer, after the necessary procedures have been completed. Further details about the office, including the date of opening and the location, will be announced at a later date.

*The Yokohama Office will be established as a branch office of Mori Hamada & Matsumoto LPC.

➤ **Mori Hamada & Matsumoto (“MHM Group”) and Tayag Ngochua & Chu (“TNC”) establish strategic relationship**

MHM Group and TNC are pleased to announce a strategic relationship between the two Firms. This relationship will enable TNC to join as a member firm of the MHM Group to jointly provide ASEAN local law advice to both firms’ global clients.

Components of this relationship include joint training, knowledge sharing, and capacity building in practice areas relevant to clients of both firms investing in, or doing business in the Philippines. To drive our strategic relationship, Mikio Sonoda and Atsushi Inoue will take the lead for MHM Group. They are both MHM Group partners experienced in corporate, M&A and compliance issues in ASEAN including the Philippines.

MHM Group has been involved in Philippine related matters for many years. This strategic relationship will allow it to take one step further. MHM Group believes this strategic relationship, covering MHM Group offices and networks in Japan, ASEAN, China, and New York will enhance its capability to serve its clients globally.

The Philippines is a growing market with a population of over 110 million, which is expected to increase until around 2050, with the average age being approximately 25 years and the GDP growth rate exceeding 7% in 2022. The Philippines is expected to attract more investments globally including from Japan and Asia. With a well-educated and English-speaking workforce, a developed and sophisticated private sector, and a trend of liberalizing foreign direct investments, the Philippines continues to be a preferred investment destination.

TNC is an independent Philippine law firm represented by Carlos Martin Tayag, Patricia Cristina Tan Ngochua and Allan Christopher Sy Chu, who have more than 40 years’ combined experience as transaction lawyers, and are highly regarded in the Philippine legal market. TNC has substantial experience in mergers and acquisitions, joint ventures, corporate restructuring, foreign investments, banking

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and consumer lending, data privacy, information and communication technology, antitrust, regulatory, and general corporate matters for local and international clients.

Both MHM Group and TNC strongly believe that this relationship and their integrated capabilities will enable us to better contribute to the success of our clients' business.

➤ Notice of New York Office Relocation

With effective from 24 January, 2024, we relocated our New York Office to the address below.

Address / Contact

360 Madison Avenue, 24th Floor, New York, NY 10017, USA

TEL : +1-646-255-1148 / FAX : +1-646-255-1149

➤ Notice of Jakarta Office Telephone Number Change

We would like to inform you that the telephone number of our Jakarta Office has been changed from March 1, 2024.

■ Telephone number

Old phone number: +62-21-3020-0222

New phone number: +62-21-3021-2222

*Location will remain the same.

➤ Top rankings received from Chambers Global 2024

Mori Hamada & Matsumoto and our lawyers are recognized in the practice areas listed below in Japan for Chambers Global 2024. Our offices and lawyers in Thailand (Chandler MHM Limited), Myanmar (Myanmar Legal MHM Limited) and China have also received prestigious rankings as shown below.

Practice areas

JAPAN

- International Trade (Band 1)

Lawyers

JAPAN

- International Trade: Shigehiko Ishimoto, Hideaki Umetsu, Kunio Miyaoka, Yohsuke Higashi