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**Merger Control**

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# Japan

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## Overview of merger control activity during the last 12 months

The Antimonopoly Act (the “AMA”) is the primary law governing the merger control and filing requirements in Japan. The Japan Fair Trade Commission (the “JFTC”), the competent agency supervising the AMA, also issues the Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (the “Merger Guidelines”) and the Policies Concerning Procedures of Review of Business Combination (the “Merger Review Policies”), which reflect the JFTC’s attitude regarding merger review.

The JFTC annually publicises an overview of merger filings and merger review in Japan as well as major cases of the preceding fiscal year. According to the JFTC’s announcement, 266 merger cases were filed with the JFTC during the fiscal year of 2020 (starting in April 2020, ending in March 2021), which is lower than the average rate of around 300 cases per year. The number of merger cases involving non-Japanese party(ies) has significantly dropped to 20 cases, compared to 51 cases in fiscal year 2019. These numbers are considered to reflect the effects of COVID-19 pandemic. A total of 258 out of 266 cases were cleared in Phase I review, and one case was sent to Phase II review in fiscal year 2020.

The number of merger filing cases received by the JFTC in the recent five fiscal years are as follows:

	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020
Total number of merger cases filed	319	306	321	310	266
Number of cases cleared in Phase I	308	299	315	300	258
(Out of the above numbers) Number of cases in which the waiting period was shortened	(171)	(193)	(240)	(217)	(199)
Number of cases withdrawn before completion of Phase I	8	6	4	9	7
Number of cases sent to Phase II	3	1	2	1	1

Previously, the merger review results of individual cases were released only for cases sent to Phase II review. However, in recent years, the JFTC has begun to make public announcements not only on cases sent to Phase II review, but also on cases completed in Phase I review, as well as one case that was not subject to the filing requirement. As such

cases are socially high-profile and may be used as reference for businesses, it is believed that this new trend of public announcement will continue.

### **New developments in jurisdictional assessment or procedure**

The AMA prohibits the acquisition or possession of the shares of a company, interlocking directorates, shareholding by a person other than a company or a merger of companies, joint incorporation-type split or absorption-type split, joint share transfer, or acquisition of businesses, etc. (these are referred to as “business combinations”), where it creates a business combination that may substantially restrain competition in any particular field of trade, or where a business combination is created through an unfair trade practice. Prohibited business combinations are subject to a cease-and-desist order pursuant to Article 17-2 of the AMA.

Notification is compulsory if the transaction meets a certain threshold under Chapter 4 of the AMA and the Merger Guidelines. The AMA does not define any market share jurisdictional thresholds. A transaction within the same company group is generally exempt from the obligation of notification.

Foreign-to-foreign transactions are subject to merger control examination under the AMA, as long as the thresholds – which apply equally to foreign-to-foreign transactions and domestic transactions – are met. There is no local effect test; a local presence does not always trigger the notification requirement. However, any transaction that meets any of the notification thresholds is considered to have a local effect.

The JFTC can review any merger below the notification threshold, either on its own initiative or through a voluntary consultation by the merging party(ies).

The completion of transactions that are subject to a notification requirement must be suspended for 30 calendar days of the statutory waiting period (corresponding to the end of the “Phase I review period”) from the date of acceptance of said notification. Nevertheless, the JFTC can shorten the waiting period in response to a written request from the notifying party, if it is deemed appropriate to do so.

The related parties can theoretically implement transactions after the waiting period ends, even if the succeeding review process (the “Phase II review period”) has been commenced by the JFTC. In practice, however, they tend not to complete transactions before the Phase II review is completed. If a transaction that has a possibility of substantially restraining competition is to be closed during the Phase II review period, the JFTC can request the Tokyo District Court to issue an urgent injunction order to refrain the related parties from completing the transaction.

If the related parties fail to meet the waiting period requirement, they will risk a criminal fine of up to JPY2 million, which can be imposed both on the notifying company(ies) and on any representative(s) or employee(s) responsible for the failure.

Although the JFTC has never imposed such penalties in any case, it did issue a warning in the case of Canon Inc.’s acquisition of Toshiba Medical Systems Corporation (“TMSC”) in 2016, for being possibly inconsistent with the notification system. To be more specific, before filing the notification to the JFTC, Canon acquired a stock option of TMSC, paying an amount equal to the value of the underlying common shares to Toshiba Corporation, the parent company of TMSC. In addition, a third party other than Canon and Toshiba was designated to own voting shares of TMSC until Canon exercised the stock option. The JFTC cautioned that a company that plans to acquire shares of a target company in this way is required to file a notification with the JFTC prior to implementation.

In practice, the parties conventionally consult with the JFTC voluntarily prior to filing a notification in Japan. Parties can discuss issues on a voluntary basis with the JFTC by means of a pre-notification consultation. During the consultation, the parties can submit written explanations concerning an overview of transactions and potential competitive issues, and discuss substantive issues including market definition and any other anticompetitive concerns (such as high market shares or lack of strong competitive pressure from current or potential competitors).

The period of pre-notification depends mainly on the intention and purpose of the parties. For instance, if the parties only ask the JFTC to review the draft of the formal notification, it will take just a few days; while in the case of complicated transactions that have various potential competition issues, it is expected to take several months or more.

The JFTC and the parties communicate confidentially in this process. If the parties have already publicly disclosed the transaction, the JFTC may contact their competitors and customers so that it can obtain their opinions on such transaction.

It should be noted that, in the Merger Review Policies that were revised in 2019, the JFTC recommends parties whose domestic sales amounts fall under the thresholds of the notification to consult voluntarily prior to the notification process when the total consideration for the acquisition (transaction value) will exceed JPY40 billion, and the scheduled transaction is deemed to affect domestic consumers, such as by satisfying one of the following:

- the business base or research and development base of the acquired (target) company is located in Japan;
- the acquired company conducts sales activities targeting domestic consumers, such as creating a Japanese website or using a brochure in Japanese; or
- the total domestic sales of the acquired company exceed JPY100 million.

Recently, there has been an increased awareness that an acquisition of small businesses such as start-up companies with lower sales but a potentially high value of data and strong competitiveness may pose an antitrust problem, because such businesses would lose a chance to compete with other larger potential competitors. As described above, in Japan, the JFTC has the power to review merger cases even if such cases do not meet the filing threshold. However, the JFTC decided to provide expressly in the Merger Review Policies in 2019 that the JFTC has an intention to examine such merger transactions even if they do not meet the filing threshold. In fact, the JFTC conducted merger reviews on at least two cases in 2019 and 2020 that did not meet the filing threshold (*Google/Fitbit* and *M3/Nihon Ultmarc*).

In the case of *Google/Fitbit*, according to the JFTC, the JFTC decided to conduct a merger review on the grounds that the transaction was significantly large and would likely affect consumers in Japan, although this transaction did not meet the thresholds under the AMA. The JFTC cleared the transaction by concluding that it would not substantially restrain competition based on the behavioural remedy proposed by the parties. This is the first public case in which the JFTC investigated a merger on a concentration that fell below the notification thresholds since the Merger Review Policies were amended in 2019. It would be sensible to assume that the JFTC will likely investigate future merger cases involving a big tech company regardless of whether the transaction meets the notification thresholds. This case is a good example of how active the JFTC is in vertical and conglomerate mergers.

In the *M3/Nihon Ultmarc* case, even though the transaction did not meet the jurisdictional threshold to file a notification under the AMA, and the parties had already executed the transaction several months previously, the JFTC opened its examination on whether it

would likely substantially restrain competition in certain relevant markets, and imposed the behavioural remedy proposed even though the parties had already consummated the transaction. This was the first case in which the JFTC made it public that it challenged a consummated merger.

**Key industry sectors reviewed and approach adopted to market definition, barriers to entry, nature of international competition, etc.**

In some industry sectors, through accumulated experience of various cases, the JFTC has several certain approaches that are typically used to define “relevant market”. The below cases relating to prescription drugs and retail are examples of such approach.

Generally, the JFTC’s precedents define the relevant market concerning prescription drugs by considering the ATC Classification System established by the European Pharmaceutical Market Research Association (the “EphMRA”). Specifically, in examining substitutability from the demand side between different products, the JFTC would identify the function or effect of those products on the ATC Classification and define the product market.

In addition, unlike the ordinary course of examination of a horizontal merger in which the market share held by the parties is assessed, the JFTC tends to adopt a unique examination method for the merger of retail businesses. Firstly, the JFTC identifies the geographic trading area (“*Shoken*” in Japanese) within which the parties’ stores are competing, such as “within a 500m to 2km radius from the store”, based on POS system data. Next, the JFTC applies this geographic trading area on each retailing store operated by the parties, and analyses how many stores operated by the parties and their competitors compete within each geographic trading area before and after the merger. Then, if the JFTC finds a high market concentration in a certain geographic area, where the number of brands declined from three to two or from two to one, it would further examine the substantial restraint on competition in such areas by assessing the magnitude of competitive pressure by the geographically adjacent market or other business category (such as General Market Stores, supermarkets, etc.).

With respect to digital markets, in December 2019, the JFTC revised the Merger Guidelines and the Merger Review Policies, and this revision focuses on business combinations in digital markets, which can be outlined as follows:

- The definition of product and geographical market in a platform service – the JFTC may define a relevant market consisting of multiple segments of customers (for example, users and shops in the case of a credit card) as one or multiple markets. In doing so, the JFTC may take into account various elements, including the degree of scope of products or region for users’ replacement in the competition of service quality, and other elements specific to digital services, such as the type of service or functions available.
- Substantial restraint of trade – in a horizontal business combination, among other things, the JFTC will take network effects into account where the such effects are significant, and switching is difficult due to network effects and/or a high switching cost. In vertical or conglomerate business combinations, the JFTC will consider – in a combination of upstream and downstream players that both deal with data – whether the transaction may lead to a refusal to supply data to other companies. In the purchase of start-ups, the transaction would hinder new entry to the market (killer acquisition).

The JFTC also explains how to assess the importance of data in assessing competition.

The revised Merger Guidelines provide that, in assessing the importance of data for competition purposes or whether a business operator will become a potential influential competitor, the following points will be taken into consideration:

- (a) what kinds of data are held or collected by one of the parties;
- (b) how much data are held and how much data are collected by one of the parties daily, and from how wide an area;
- (c) how frequently one of the parties collects data; and
- (d) how much the data held or collected by one of the parties relate to the improvement of the service provided by the other party in the product market. Furthermore, also taken into consideration is how advantageous the data are that are held or collected by one of the parties, as compared to the data that are available to the competitor in the product market of the other party, from the perspectives of (a) to (d) above.

**Key economic appraisal techniques applied, e.g., as regards unilateral effects and co-ordinated effects, and the assessment of vertical and conglomerate mergers**

Recently the JFTC has been actively expanding its human resources for economic appraisal techniques. For example, on April 1, 2021, the JFTC established a new division of the Economic Analysis Office.

In some precedents, the JFTC has also showed its tendency to actively introduce new economic appraisal techniques into the merger review process. For instance, we may see cases in which the JFTC analyses relatively new topics, such as whether or not competitors whose minor shareholdings are owned by mutual shareholders would behave competitively to each other (*Idemitsu/Showa-shell* (2016)), as well as applied typical econometric modelling.

**Approach to remedies (i) to avoid second stage investigation, and (ii) following second stage investigation**

To avoid a second stage investigation, if the JFTC indicates an anticompetitive concern relating to the transaction, the party may consider consulting with the JFTC about a remedy even at the pre-notification consultation.

The case of *Z Holdings/Line* (both of which are IT giants in Japan) is very useful in understanding the importance of the pre-notification consultation in Japan. This case commenced with the parties' consultation with the JFTC on November 18, 2019, and the JFTC finally made a clearance without any conditions. While the parties spent eight months in pre-notification consultation with the JFTC, the JFTC had just 21 calendar days (12 business days in Japan) to review the transaction in the Phase I process. Based on these facts, it is reasonable to state that the JFTC investigated the case substantially, including an evaluation of the proposed remedy, during the pre-notification phase.

The case of *Google/Fitbit* is also worth noting, as the parties promised to conduct a behavioural remedy for the "longest" period of 10 years. As this case shows, the JFTC tends to adopt behavioural remedies to resolve anticompetitive issues in merger transactions. In recent years, there has been a notable case cleared with a structural remedy, other than the case of *DIC/BASF Color Effect Japan* (2020).

In evaluating a proposed remedy's effectiveness, the primary focus is whether this remedy could resolve anticompetitive concern raised by the JFTC in the merger review process. For a behavioural remedy, it is essential that the proposed behaviour could increase the number of other competitors and/or empower other competitors' competitiveness, which could activate competition between them; and it would be considered necessary for a neutral third party to monitor the parties' implementation of the proposed behavioural remedy for a long time period. Likewise, for a structural remedy, it would be necessary for a neutral

third party to monitor the parties' implementation of the proposed structural remedy so that a candidate with potential competitiveness is chosen as a prospective acquirer.

It is worth noting that, in the remedy package in the case of *Google/Fitbit*, it was set out that the monitoring trustee would monitor the parties' compliance with the proposed behavioural remedy and report to the JFTC semi-annually for 10 years.

According to an unofficial statement from the JFTC, some JFTC officials intend to introduce a "Monitoring Trustee" system, which has been well adopted in the EU, and plans to enhance the effectiveness of remedies.

### **Key policy developments**

The JFTC does not conduct its merger review process under the AMA from the viewpoint of economic or national security; this is instead governed by the Foreign Exchange and Foreign Trade Act (the "FEFTA").

The FEFTA regulates foreign transactions or inward investments as foreign direct investments or specified acquisitions – e.g., the FEFTA requires the filing of a notification prior to transactions in certain areas, such as weapons, aircraft, space, nuclear facilities, dual-use technologies (which could be used for military purposes), cybersecurity, electricity, gas, telecommunications, water supply, railways and oil.

In sum, the JFTC does not forbid parties from implementing mergers due to a threat to economic or national security.

### **Reform proposals**

As mentioned above, the Merger Guidelines and other relevant regulations issued by the JFTC have been recently revised, and thus there is no specific plan to amend the AMA and the relevant regulations.

However, as also previously mentioned, the JFTC has implied that it may introduce an EU-style "Monitoring Trustee" system in Japan, which will likely cause reform of the merger control regulation under the AMA.





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