

Merger Control

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CONTENTS

Preface	Nigel Parr & Steven Vaz, <i>Ashurst LLP</i>	
Jurisdiction chapters		
Belgium	Hendrik Viaene & Elisabeth Vanden Kerchove, <i>McDermott Will & Emery</i>	1
Brazil	Marcela Mattiuzzo, Anna Binotto & Mateus Bernardes dos Santos, <i>VMCA Advogados</i>	8
Canada	Micah Wood, Kevin H. MacDonald & Tori Skot, <i>Blake, Cassels & Graydon LLP</i>	14
China	Zhan Hao & Song Ying, <i>AnJie Broad Law Firm</i>	27
Czech Republic	Lucie Dolanská Bányaiová & Adam Holeček, <i>Bányaiová Vožehová</i>	38
Denmark	Frederik André Bork, Søren Zinck & Olaf Koktvedgaard, <i>Bruun & Hjejle Advokatpartnerselskab</i>	45
European Union	Hendrik Viaene, Stéphane Dionnet & Mélissa Hui, <i>McDermott Will & Emery</i>	55
France	Helen Coulibaly-Le Gac, Marie Doisy & Julia Coste, <i>BBLM Avocats</i>	68
Germany	Timo Angerbauer, Paul Dröbller & Tobias Pukropski, <i>ROCAN</i>	78
Greece	Efthymios Bourtzalas, <i>MSB Associates</i>	86
Indonesia	Daren Shiau & Elsa Chen, <i>Allen & Gledhill</i>	91
Israel	Dr. David E. Tadmor, Shai Bakal, Roi Krause & Shir Katav, <i>Arnon, Tadmor Levy</i>	100
Japan	Tsuyoshi Ikeda, Aya Yasui & Muneharu Yamamoto, <i>Ikeda & Someya</i>	114
Malaysia	Penny Wong Sook Kuan, <i>Rahmat Lim & Partners</i>	122
Singapore	Kala Anandarajah & Tanya Tang, <i>Rajah & Tann Singapore LLP</i>	131
Slovenia	Tomaž Lukman & Sanda Južnik, <i>Odvetniška družba Lukman o.p., d.o.o.</i>	142
Switzerland	Michael Tschudin & Janica Wyss, <i>Wenger Vieli Ltd.</i>	151
Turkey/Türkiye	Dr. Gönenc Gürkaynak & Öznur İnanılır, <i>ELIG Gürkaynak Attorneys-at-Law</i>	159
United Kingdom	Gustaf Duhs & Jeremy Kelly, <i>Stevens & Bolton LLP</i>	172
USA	William Kolasky, Kristin Millay & James Canfield, <i>Hughes Hubbard & Reed LLP</i>	182

Japan

Tsuyoshi Ikeda, Aya Yasui & Muneharu Yamamoto
Ikeda & Someya

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, 337 merger cases were filed with the JFTC during the fiscal year of 2021 (starting in April 2021, ending in March 2022), which is a little higher than the average rate of around 300 cases per year. The number of merger cases involving non-Japanese party(ies) has recovered to 44 cases from 20 cases in the 2020 fiscal year. These numbers are considered a reaction to the decline in 2020 due to the effects of the COVID-19 pandemic. A total of 328 out of 337 cases were cleared in Phase I review, and one case was sent to Phase II review in the 2021 fiscal year.

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

	FY 2019	FY 2020	FY 2021
Total number of merger cases filed	310	266	337
Number of cases cleared in Phase I	300	258	328
(Out of the above numbers) Number of cases in which the waiting period was shortened	217	199	248
Number of cases withdrawn before completion of Phase I	9	7	8
Number of cases sent to Phase II	1	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. Recently, the JFTC announced that the JFTC solicits opinions on cases in which it is necessary to seek opinions from a broader range of third parties, particularly in the digital field, regardless of whether Phase II has commenced. In 2022, the JFTC solicited opinions in the case of *Google LLC and Mandiant, Inc* and in the case of *Microsoft Corporation and Activision Blizzard Inc*. In *Microsoft and Activision Blizzard*, the JFTC cleared the case on March 28, 2023, because it does not bring about substantial restraint on competition in such areas.

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*).

According to the JFTC, in the case of *Google/Fitbit*, 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.

In addition, with respect to the filing requirement threshold, the JFTC announced in June 2022, regarding the *Nippon Steel/Tokyo Rope* case, which was not subject to the filing requirement of 20%. In this case, the JFTC examined whether the largest shareholder's acquisition of an additional 9.91% of voting rights by takeover bid in March 2021, in addition to its existing 10% of voting rights, amounting in total to 19.91%, creates a "joint relationship" of the parties, and the case is thus subject to merger review. When Nippon Steel learned the view of the JFTC, it offered to sell the shares gradually at a higher price than that at which it had obtained them in the transaction. As a result, the JFTC agreed not to start a merger review.

Starting from April 2021, the JFTC strengthened its resource and the power of Mergers and Acquisitions Division with respect to investigation under Article 47 of the AMA, by empowering officials in the Mergers and Acquisitions Division to issue executive orders more easily.

From another viewpoint, the JFTC sometimes requires the entity to submit internal documents such as minutes of the Board of Directors' meeting, materials that analyse the purpose and effect of the business combination, and a business plan of the relevant organisation or section of the business combination. In June 2022, the JFTC published a document that explains the JFTC's practice regarding the submission of internal documents on the review of the business combination. The document explains the scope, timing, and method of the submission of the internal documents.

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 merchandise store, supermarkets, etc.). A case of a Japanese major GMS, Aeon, which acquired Fuji, a supermarket and drugstore, cleared on January 19, 2022, is one of the examples of such approach. In this case, the JFTC defined the geographic range to be targeted within 2–7km from each store, because of the type and scale of stores, and that most users travel by car to visit stores.

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 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 is held and how much data is 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 is that is held or collected by one of the parties, as compared to the data that is available to the competitor in the product market of the other party, from the perspectives in points (a) to (d).

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 addition, on May 31, 2022, the JFTC published a document explaining the points to care in submitting the reports and data for economic appraisal. The document refers to the principles to be met on economic appraisal, the ideal structures of the reports, the practice of the data submission requirement for the JFTC's economic appraisal, and so on.

In some precedents, the JFTC has also shown 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 competitors whose minor shareholdings were owned by mutual shareholders would behave competitively to each other or not (*Idemitsu/Showa-shell* (2016)), as well as applied typical econometric modelling. In 2021, the JFTC used detailed economic appraisal in three cases. In the case of silicon wafer makers, the JFTC found it appropriate to focus on Cournot competition, assuming quantity competition (*GlobalWafers GmbH/Siltronic AG* (2021)).

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 not been a notable case cleared with a structural remedy, other than the case of *DIC/BASF Color Effect Japan* (2020) and the case of *Shinko kenzei/Nittetsu kenzei* (2021).

In evaluating a proposed remedy's effectiveness, the primary focus is whether this remedy could resolve anticompetitive concerns 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 would be 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, aircrafts, 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 prohibit 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 were issued by the JFTC in 2019, 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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