
CHAMBERS GLOBAL PRACTICE GUIDES

Merger Control 2023

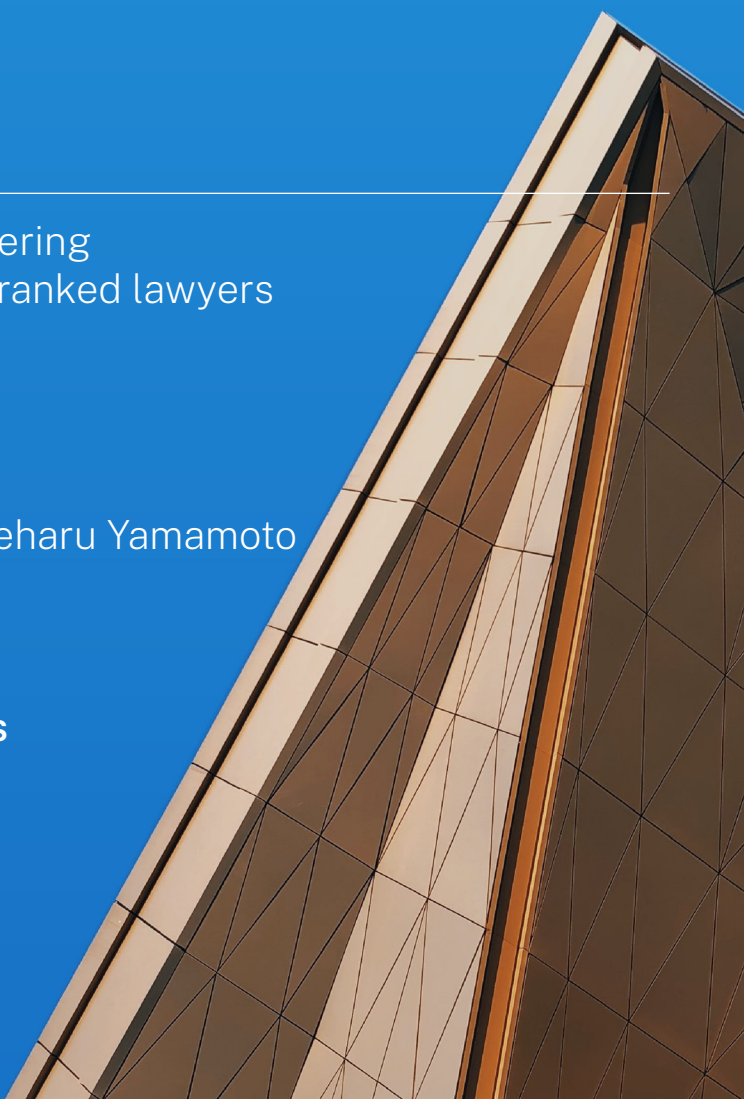
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Japan: Law & Practice

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Japan: Trends & Developments

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JAPAN



Law and Practice

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cases involving business alliances, on-site inspections by the Japan Fair Trade Commission, and consumer laws. **Ikeda & Someya** also has 16 other lawyers with experience at regulatory agencies or in-house at major companies. The two founding partners' comments have been cited in various newspapers, magazines and media, including the *Nikkei*.

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COMPETITION AND CONSUMER LAW ATTORNEYS

1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

Chapter 4 of the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No 54 of 1947 – the “Anti-Monopoly Act” or AMA) prohibits transactions that will substantially restrict competition in any relevant market.

The Japan Fair Trade Commission (JFTC) is the competent Japanese authority for the AMA and prepares and publishes the Guidelines to Application of the AMA Concerning Review of Business Combination (established in May 2004 and most recently amended in December 2019) (the “Merger Guidelines”) to clarify details of how it analyses a proposed merger. The Merger Guidelines are also applied to cases below the filing threshold.

The JFTC has also published the Policies Concerning Review of Business Combination (established in June 2011 and most recently amended in December 2019) (the “Merger Review Policies”), containing detailed merger control review procedures.

1.2 Legislation Relating to Particular Sectors

The Foreign Exchange and Foreign Trade Act (FEFTA) regulates foreign transactions or inward investments as foreign direct investments or specified acquisitions. For example, 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 some industries, restrictions on inward investment under the industry-specific legislation will also apply, including under the following:

- the Civil Aeronautics Act;
- the Radio Act;
- the Broadcasting Act;
- the Mining Act;
- the Ships Act; and
- the Financial Instruments and Exchange Act.

1.3 Enforcement Authorities

Merger control rules under the AMA are enforced by the JFTC as the sole regulatory authority in Japan. The JFTC is an external agency of the

Cabinet Office, and the AMA expressly specifies that the JFTC must exercise its authority independently from any other governmental bodies.

2. Jurisdiction

2.1 Notification

Notification is compulsory if the transaction meets a certain threshold under Chapter 4 of the AMA and relevant regulations. A transaction within the same company group is generally exempt from the obligation of notification.

Meanwhile, the JFTC can review any merger below the notification threshold, either on its own initiative or through a voluntary consultation by the merging party or parties. Specifically, in the Merger Review Policies revised in 2019, the JFTC recommends parties whose domestic sales amounts fall under the thresholds of the notification to make a consultation 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 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.

In practice, the targeted parties conventionally consult with the JFTC voluntarily prior to filing a notification, as described in **3.9 Pre-notifi-**

cation Discussions With Authorities. Without the voluntary consultation, the parties could be requested to provide further related information.

2.2 Failure to Notify

If a party obliged to notify fails to make/file a notification, it is subject to a criminal fine of up to JPY2 million. No such penalty has yet been imposed on any party, but in June 2016 the JFTC issued a warning on a “warehousing” case; please see **2.13 Penalties for the Implementation of a Transaction Before Clearance** for further details.

2.3 Types of Transactions

Please note that the thresholds for notification vary in accordance with the following types of transactions:

- share acquisitions;
- mergers;
- joint incorporation-type or absorption-type company splits (demergers);
- joint share transfers (as defined by the Companies Act); and
- acquisitions of businesses or assets.

Interlocking directorships (one type of business combination) are subject to merger review by the JFTC but are not subject to mandatory notification obligation.

More specifically, the above-mentioned acquisitions of businesses or assets include:

- accepting assignment of the whole or a substantial part of the business of another company;
- accepting assignment of the whole or a substantial part of the fixed assets used for the business of another company;

- taking on a lease of the whole or a substantial part of the business of another company;
- undertaking the management of the whole or a substantial part of the business of another company; and
- entering into a contract that provides for a joint profit and loss account for business with another company.

Internal restructurings or reorganisations within the same company group are not subject to notifications in general. The AMA does not technically require notification regarding operations that do not involve the transfer of shares or assets (eg, shareholders' agreements or changes to articles of association), although the JFTC does investigate such operations in some cases – for instance, if challenged by relevant parties as a violation of other provisions of the AMA.

2.4 Definition of “Control”

The AMA does not define or use the concept of “control”. Even if they do not raise any issues of “control”, transactions are subject to notifications once they meet the thresholds described in 2.5 Jurisdictional Thresholds.

2.5 Jurisdictional Thresholds

The AMA determines different notification thresholds for each type of transaction described in 2.3 Types of Transactions. It should be noted that the thresholds described in this section are the thresholds for a mandatory notification requirement. The JFTC has the authority to review any merger case below the notification thresholds.

Share Acquisitions

The thresholds in a share acquisition are as follows:

- the total domestic sales amount of the acquiring company group, composed of

- the acquiring company, its subsidiaries, its ultimate parent company and subsidiaries of the ultimate parent company (“Total Domestic Sales Amount”) exceeds JPY20 billion;
- the total domestic sales amount of the target company and its subsidiaries exceeds JPY5 billion; and
- the voting rights in the target company held by the acquiring company group will exceed 20% or 50% as a result of the acquisition.

Mergers and Joint Share Transfers

The thresholds in such transactions are as follows:

- the Total Domestic Sales Amount of any of the merging parties or the parties involved in the joint share transfer exceeds JPY20 billion; and
- the Total Domestic Sales Amount of any of the other parties exceeds JPY5 billion.

Absorption-Type Company Split (Demerger)

In such cases, a transferring company transfers its business to a succeeding company. If a part of the business of the transferred company (not its entirety) is acquired by a succeeding company, a notification is required when either of the following applies.

- Case 1:
 - (a) the Total Domestic Sales Amount of the transferred part of the business of the transferring company subject to the company split exceeds JPY10 billion; and
 - (b) the Total Domestic Sales Amount of the succeeding company exceeds JPY5 billion.
- Case 2:
 - (a) the Total Domestic Sales Amount of the transferred part of the business of the

- transferring company exceeds JPY3 billion; and
- (b) the Total Domestic Sales Amount of the succeeding company exceeds JPY20 billion.

When the entire business of the transferring company is transferred to a succeeding company, different (higher) thresholds will apply (see the JFTC website at www.jftc.go.jp).

Joint Incorporation-Type Company Split

In the case of a joint incorporation-type company split (where two or more companies jointly establish a new company), when all the parties to the transaction transfer only a part of their business, a notification is required if:

- the Total Domestic Sales Amount of the transferred part of the business of one of the parties to the transaction exceeds JPY10 billion; and
- the Total Domestic Sales Amount of the transferred part of the business of another party to the transaction exceeds JPY5 billion.

When any of the parties to the transaction transfers its entire business to a new company, different (higher) thresholds will apply (see the JFTC website at www.jftc.go.jp).

Acquisitions of Businesses or Assets

The thresholds in such transactions are as follows:

- the Total Domestic Sales Amount of the acquiring company exceeds JPY20 billion; and
- the Total Domestic Sales Amount generated by the target business/assets exceeds JPY3 billion.

All sectors are necessarily subject to these jurisdictional thresholds. Nevertheless, it is worth noting that the AMA prohibits a bank and an insurance company from acquiring or possessing more than 5% or 10%, respectively, of voting rights in another domestic company (except for an acquisition of a bank by another bank or an acquisition of an insurance company by another insurance company), in principle. The acquisition or possession will be permitted when one of the exemptions under the AMA applies, or if the party obtains prior approval from the JFTC.

2.6 Calculations of Jurisdictional Thresholds

The total amount of the price of goods and services supplied in Japan during the latest fiscal year is regarded as domestic turnover, from which the thresholds are calculated. In addition to direct sales within and into the country, indirect sales in Japan will be included in domestic turnover if the party recognises that the goods and services will be shipped to Japan by the direct purchaser at the time of entering into the contract without changing their nature and characteristics. The intra-group company sales amount within the same group is to be excluded from the domestic sales.

Sales booked in a foreign currency should be converted into Japanese yen using the conversion rate applied for the account settlement. If such an exchange rate is not available, the average telegraphic transfer middle rate is used.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

In a share acquisition, the Total Domestic Sales Amount of the acquiring company for the purpose of the notification thresholds includes the domestic sales amount of the acquiring com-

pany, its subsidiaries, and its ultimate parent company and (direct and indirect) subsidiaries thereof. The ultimate parent company must be included in the relevant entities only if it is in the form of a “company”.

On the other hand, the Total Domestic Sales Amount of the target company group includes the domestic sales amount of the target company and its subsidiaries but does NOT include the sales amounts of the seller (ie, a parent company of the target company) and its affiliates.

It should be noted that not all the subsidiaries need to be in the form of a “company”, which means a partnership can be considered as a subsidiary.

A company is deemed to be a subsidiary if another company holds the majority of the voting rights of that company. In addition, when 40–50% of the voting rights of a company are held directly or indirectly by another company, the former company can be considered as a subsidiary of the latter company, by taking into account various factors such as board representation and loans provided from the latter company.

The scope of the group companies (a parent company, ultimate parent company and subsidiaries) is defined at the time of the closing of the proposed transaction. Changes in the business during the reference period have to be reflected in general. For instance, for calculation of the Total Domestic Sales Amount of an acquiring company that consummated a separate share acquisition transaction that results in obtaining more than 50% of the voting rights in another company (Company A) after the settlement of the last fiscal year, the domestic sales of Company A for the last fiscal year must be included

in the calculation of the Total Domestic Sales Amount of the acquiring company group.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to pre-notification and 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 by the JFTC to have a local effect.

A party without any sales exceeding the thresholds within or into Japan is not required to file a notification. Nevertheless, the JFTC may recommend that a party to the transaction makes a consultation voluntarily prior to the notification process if the amount of the transaction exceeds JPY40 billion and the attempted business combination is found to affect domestic customers. That is to say, even without sales in Japan, according to the Merger Review Policies referred to in **2.1 Notification**, the business combination could affect domestic customers if:

- the party has its business or research base in Japan;
- the acquired company conducts sales activities targeting domestic consumers; or
- the total domestic sales of the acquired company exceed JPY100 million.

2.9 Market Share Jurisdictional Threshold

The AMA does not define any market share jurisdictional thresholds.

2.10 Joint Ventures

Due to the absence of the concept of “joint control”, the JFTC does not apply any special rules to joint ventures regarding filing requirements under the AMA; instead, joint ventures are regulated by the same principle as the jurisdictional thresholds mentioned in **2.5 Jurisdictional Thresholds**.

2.11 Power of Authorities to Investigate a Transaction

The JFTC can investigate any transaction, even when it does not meet the notification thresholds. The authority is able to require the targets of the investigation to explain reasonably why the transaction in question would not substantially restrain competition in a relevant market, and can request further detailed information if competitors or customers of the parties raise concerns about the transaction. In fact, the JFTC is becoming more proactive in reviewing such business combinations that do not meet the thresholds.

There is no statute of limitations on the JFTC’s authority to investigate.

2.12 Requirement for Clearance Before Implementation

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 paper-based 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 restraining competition substantially 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 restrain the related parties from completing the transaction.

2.13 Penalties for the Implementation of a Transaction Before Clearance

If the related parties fail to meet the waiting period requirement noted in **2.12 Requirement for Clearance Before Implementation**, 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 practice, 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 share warrant 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 share warrant. The JFTC cautioned that a company that plans to acquire shares of a target company in this way is required to file a notification prior to implementation.

2.14 Exceptions to Suspensive Effect

There is no exception to the suspensive effect; it is not permitted to seek a waiver or derogate from the regulation. Meanwhile, because a notifi-

cation can be filed before a definitive agreement is executed, the related company will be able to consummate a tender offer bid, for instance, by filing a notification 30 days prior to the consummation of the bidding process.

Furthermore, the JFTC can shorten the period of suspensive effect in response to a paper-based request from the notifying party, when it is appropriate to do so.

2.15 Circumstances Where Implementation Before Clearance Is Permitted

Although the related parties can theoretically implement transactions after the statutory 30-day waiting period, they tend not to implement the transactions in practice before the subsequent review (if any) is completed.

Even under a pressing schedule in the case of foreign-to-foreign mergers, the JFTC would not permit an implementation of the transaction before a clearance by implying a possibility of filing an urgent injunction order. It seems to be possible technically for the parties to propose a carved-out agreement; nevertheless, as far as is known, there has been no case in which the JFTC agreed to such a proposal.

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There is no deadline for notification. However, taking into account the 30-day statutory waiting period, a notification must be filed with the JFTC at least 30 days prior to the completion of the transaction (see **3.11 Accelerated Procedure**). The notification can be submitted even before a binding agreement between the parties is made.

3.2 Type of Agreement Required Prior to Notification

No definitive agreement binding the parties is required prior to the notification. The parties can notify the JFTC on the basis of an agreement at an earlier stage, such as by a letter of intent or memorandum of understanding. The JFTC even regularly accepts filings with less formal agreements, but, in such cases, it requests a notifying party to submit a draft or other documents indicating that the parties have a good-faith intention to consummate the transaction. In such cases, the notifying party needs to provide the JFTC with a signed binding agreement as soon as said agreement is executed.

3.3 Filing Fees

No filing fees are required.

3.4 Parties Responsible for Filing

In share acquisitions and business/asset transfers, the acquiring party is responsible for filing. In other types of transactions, all the parties are obliged to jointly file a notification.

3.5 Information Included in a Filing

To file a notification with the JFTC, a company must comply with the prescribed format, which can be downloaded from the JFTC's website. It should be noted that different forms are set out for different types of transaction. The notification form and the required materials to be attached must be completed in Japanese, while summary translations are accepted in general regarding additional information requested from the JFTC on a voluntary basis.

The information to be included in the notification is as follows:

- a brief explanation of the purpose, background and method of the transaction;

- descriptions of the notifying company group, such as domestic sales, assets and the major business of each company involved;
- high-level market information, including types of products or services subject to horizontal overlap or vertical relationships between the parties; and
- the market ranking and market share of the major players with which the parties have a horizontal or vertical relationship.

Certain documents must be attached, depending on the type of transaction, such as a copy of the definitive agreement, financial statements and annual reports of the notifying party, a list of major shareholders, the minutes of the shareholder meeting or board meeting that approves the transaction, and powers of attorney.

In addition to the required information, the JFTC often requests – usually on a voluntary basis – additional materials to review the transactions substantially, such as definitions of the product and geographic markets, the degree of competition between the parties, competitive pressures including those from competitors, import products, new entries or customers, and efficiencies.

Furthermore, the parties' internal documents can be requested by the JFTC, including presentation materials and the minutes of meetings such as board of directors' meetings, materials used in analysis and decision-making processes, and emails of persons concerned, which may refer to synergies, effects or competitive concerns, typically at a later stage of the review.

Although the documents to be submitted are not required to be certified, notarised or apostilled, certifications by the company representative are required for copies of certain documents.

3.6 Penalties/Consequences of Incomplete Notification

If the notification is deemed incomplete, the JFTC will not accept the notification, in which case it may recommend the parties to withdraw and refile the notification if amended.

Nevertheless, prior to said formal notification, parties can engage in a pre-notification consultation, in which a draft notification is submitted to the JFTC for review (a so-called draft check). This draft check process usually takes between a few days and a couple of weeks. If a submitted draft notification is deemed incomplete, the JFTC can request the parties to amend the draft further.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

Filing inaccurate or misleading information is subject to a criminal penalty of up to JPY2 million, though no such penalty has yet been imposed, as far as is known.

In addition, the JFTC can issue a cease-and-desist order at any time if it finds significant false or misleading information in a notification, regardless of the time limit of its ability to issue an order. In other words, the JFTC can overturn its clearance decision at any time if there is significant false or misleading information in a notification.

3.8 Review Process

It should be noted that the parties concerned can consult voluntarily with the JFTC in advance through the pre-notification process. When the JFTC accepts a formal notification, the statutory waiting period will commence (Phase I review).

Phase I

The JFTC has 30 calendar days from the date of a formal acceptance to review the transaction. The party/parties can request the authority to shorten the waiting period on a discretionary basis; in practice, the period is shortened in a large number of cases. Please note that a request for information from the JFTC does not suspend or reset the 30-day review period.

If the JFTC comes to the conclusion that the transaction in question will not substantially restrain competition, the clearance will be granted through a written decision stating that the JFTC will not issue a cease-and-desist order (a “Clearance Letter”).

If the JFTC determines that it is necessary to conduct a more detailed review, the Phase II review will be triggered by officially requiring the filing party/parties to submit the necessary information or materials, which is called a “Request for Report, etc”.

Phase II

At the initiation of Phase II, the JFTC discloses the fact of its review and seeks public comments on its website. The authority must conclude the Phase II review within either 120 calendar days from the date of the JFTC’s acceptance of the notification or 90 calendar days from the date of acceptance of all the responses to the Request for Report, etc, whichever is later. In practice, it usually takes several months or even more than a year for the JFTC to formally accept all the responses to the Request for Report, etc.

While the suspensive effect is not applicable for the Phase II review period, in practice the parties are recommended to refrain from completing the transaction until the clearance is granted.

If, following a Phase II review, the JFTC finds that the transaction will not substantially restrain competition, it will grant the clearance by issuing a confirmation letter which states that the JFTC will not issue a cease-and-desist order on the transaction. When finding that the transaction could substantially restrain competition, the JFTC will afford the filing party an opportunity to express their opinions (including a proposal of remedies) and submit evidence before the JFTC’s final decision on whether to issue a cease-and-desist order. In any case, the results of the review will be made public.

3.9 Pre-notification Discussions With Authorities

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 competitive 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 of the notifying parties. For instance, if the parties ask the JFTC just to review the draft of the formal notification, it will take only a few days, while in the case of complicated transactions, it is expected to take several months or more.

The JFTC and the notifying parties regularly communicate confidentially in this process. If the parties have already publicly disclosed the transaction, the JFTC may contact their competitors and customers in order to obtain their opinions about the transaction.

3.10 Requests for Information During the Review Process

The JFTC can request the parties to provide further information at any time during the review process. The amount and content of the information requested depend on the transaction in question.

It should be noted that the review process will not be suspended or restarted by requests for information. Regarding the Phase II review, the 90-day statutory review period will start to run only when the JFTC accepts all the necessary information requested in the forms of the Request for Reports, etc.

3.11 Accelerated Procedure

The AMA does not technically provide a short-form or fast-track procedure in terms of the review process. Although the party/parties can ask for the 30-day waiting period to be shortened, the JFTC has sole discretion on whether to agree to such a request.

4. Substance of the Review

4.1 Substantive Test

The JFTC examines whether a business combination is likely to result in a “substantial restriction of competition in a certain market”, which means that competition itself is significantly reduced to such an extent that a particular business operator or group of business operators can control a market by determining prices, quality, quantity and other competitive parameter(s) at their own volition.

The Merger Guidelines, mentioned in **1.1 Merger Control Legislation**, classify business combinations into horizontal, vertical and conglomerate business combinations, and clarify the factors

to be taken into account and the framework of determining whether they may substantially restrain competition for each type of business combination.

According to the Merger Guidelines, the JFTC takes the following factors into account in assessing the (pro-/anti-) competitive effect of the transaction:

- competition in the relevant market: number of competitors, market share, competitive landscape, supply capacity of competitors, competition in R&D, characteristics of the market (whether so-called direct or indirect network effects are at work or multifaceted markets through platforms), etc;
- imports: barriers for importing, problems in distribution, substitutability with imports, etc;
- new entry to the market: barriers for entry, degree of entry possibility;
- competitive pressures from adjacent markets: competing products, geographically adjacent markets;
- competitive pressure from customers: competition among users, ease of switching suppliers;
- comprehensive business capabilities of the parties in question;
- economic efficiencies;
- financial conditions of the parties in question; and
- scale of the relevant market.

The Merger Guidelines set forth the safe harbour based on the Herfindahl-Hirschman Index (HHI). In principle, the JFTC does not conduct a substantive examination of a business combination that falls below the thresholds of the safe harbour.

4.2 Markets Affected by a Transaction

The JFTC defines relevant markets that are affected by the business combination from the perspective of the scope of the product and the geography by considering the substitutability for customers and, if necessary, suppliers.

The JFTC will use the factors described in the Merger Guidelines to define a relevant market.

The Merger Guidelines clearly state that the geographic market may extend beyond the borders of Japan, depending on the international nature of the relevant business. In fact, in some cases, the JFTC has defined the global market as the relevant market.

Another feature of the Merger Guidelines is that they establish safe harbours for three categories of business combinations: horizontal, vertical and conglomerate (each category is subject to a specific safe harbour). The JFTC believes that there is usually little or no likelihood of substantially restricting competition, and therefore no need to conduct a detailed examination of the business combination when it meets the requirements of a safe harbour. In such a case, the JFTC does not generally conduct the examination described in **4.1 Substantive Test**.

The safe harbour standards for horizontal business combinations are as follows:

- the HHI after the business combination is not more than 1,500;
- the HHI after the business combination is more than 1,500 but not more than 2,500, while the increment of HHI is not more than 250; or
- the HHI after the business combination is more than 2,500, while the increment of HHI is not more than 150.

If a horizontal business combination exceeds the safe harbour standards, the JFTC will examine whether it would substantially restrict competition in a relevant market through the test described in **4.1 Substantive Test**.

In addition, the Merger Guidelines clarify that, in light of past cases, if the HHI after the business combination is 2,500 or less and the market share of the business group after the business combination is 35% or less, the risk of substantially restricting competition is generally considered to be small.

The safe harbour standards for vertical or conglomerate business combinations are as follows:

- the market share of the parties after the combination is not more than 10% in all the relevant markets in which the parties are active; or
- the HHI is not more than 2,500 and the market share of the parties after the business combination is not more than 25% in all the relevant markets in which the parties are active.

As with the horizontal business combination described above, even if a vertical or conglomerate business combination does not fall within the safe harbour standards described above, it does not immediately mean that said business combination would likely substantially restrain competition.

In addition, if the HHI after the business combination is 2,500 or less and the market share of the parties' group after the business combination is 35% or less, the possibility that a business combination may substantially restrain competition is generally considered to be small.

It should be noted that the latest version of the Merger Guidelines states that, even if the business combination satisfies the safe harbour standards, if one of the parties has a potentially strong competitive power due to its assets (including important data and intellectual property rights) or any other reason, the JFTC will conduct a further review on the matter.

4.3 Reliance on Case Law

Regarding merger review, the JFTC basically defines the relevant market in accordance with its previous review cases, some of which are not disclosed to the public. However, if there are significant changes to the premise of the definition of the relevant market (such as innovation or development of an adjacent product market), the JFTC may take them into consideration.

The JFTC basically does not depend on the decisions by competition authorities in other jurisdictions, such as the EU Commission, US Federal Trade Commission or US Department of Justice. Nevertheless, if the JFTC has no previous case in the field of the transaction, it may use their decisions as references to define the relevant market.

4.4 Competition Concerns

The JFTC examines any kinds of competition concerns that may cause substantial restriction on competition in the relevant market, which include unilateral effects, co-ordinated effects, conglomerate or portfolio effects, vertical concerns and the elimination of potential competition.

Traditionally, unilateral and co-ordinated conduct possibly arising from horizontal business combinations has occupied a large portion of the JFTC's concern, since a horizontal business combination would basically reduce the num-

ber of competitors in the relevant market and thus potentially have a direct negative impact on competition.

However, this does not mean that the JFTC has competition concerns only in horizontal business combinations. Actually, the JFTC has also conducted numerous investigations on other competition concern matters, and there are some cases in which it has conditionally approved vertical business combinations as long as the parties undertook remedies. Furthermore, in some cases, the JFTC has assessed conglomerate or portfolio effects and any other kind of anti-competitive effects.

4.5 Economic Efficiencies

In examining competition concerns, the JFTC takes economic efficiencies into consideration. However, as the Merger Guidelines state, the JFTC considers that the improvement of efficiency must be an inherent outcome of the business combination and must be passed on to consumers through lower product prices, improved quality, and so on. Therefore, the JFTC tends to consider that the improvement of efficiency alone is not likely to justify the transaction.

4.6 Non-competition Issues

In principle, the JFTC considers only competition issues in the process of examination. Although it may consider non-competition issues in some cases, such as industrial policy and other issues of public interest, the JFTC is not bound by these kinds of concerns.

When a foreign investor (non-resident individual, corporation established under foreign laws and regulations, etc) makes inward direct investments, etc (eg, the acquisition of shares or voting rights of a domestic listed company as a result of which the investment ratio or voting

right ratio is 1% or more), or specified acquisitions (ie, the acquisition by a foreign investor of shares or equity of a domestic unlisted company from another foreign investor), and the business operated by the investee falls within a designated industry involving national security, etc, in principle, prior notification must be submitted to the Minister of Finance, etc, via the Bank of Japan within the six months before the intended transaction or activity.

These rules are set forth in the FEFTA and are separate from the merger control rules.

4.7 Special Consideration for Joint Ventures

Generally speaking, there is no special consideration for joint ventures under the AMA and the Merger Guidelines. That said, the Merger Guidelines state that when joint venture partners establish a joint venture to integrate only a part of their business, the JFTC will analyse the co-ordinated effects between the remaining businesses of joint venture partners (“spillover effect”).

With respect to a notification requirement, if the transaction involves multiple kinds of business combinations, each stage of the business combination may constitute a separate business combination subject to a pre-notification (for instance, in triangular merger cases, parties would likely have to file separate notifications for share acquisition and for merger). Likewise, if a joint venture transaction comprises multiple business combinations subject to pre-notifications, parties have to file notifications separately on the basis of each business combination.

5. Decision: Prohibitions and Remedies

5.1 Authorities’ Ability to Prohibit or Interfere With Transactions

Under the AMA, the JFTC can file a motion for an urgent injunction order (ie, an injunction against the consummation of the transaction prior to the completion of examination) and issue a cease-and-desist order (prohibition against the consummation of the transaction after the completion of examination).

Regarding an urgent injunction order, the JFTC must show that the business combination would likely substantially restrain competition, and that the consummation of a business combination would provoke irreversible damage to competition. The JFTC must file a petition for an urgent injunction order with the Tokyo District Court and prove the existence of a suspected violation of the AMA and the urgent need for such an order. The hearing will be held privately and expeditiously; if the court approves the JFTC’s request, it will issue the order.

A cease-and-desist order is an administrative action to prohibit a business combination transaction or to order a party to take measures to eliminate the likelihood that the transaction would substantially restrict competition after the JFTC completes its review. The order includes business divestitures, stock transfers and business transfers to eliminate substantial restraints on competition. The JFTC can issue a cease-and-desist order on its own (without any prior review or approval by a court), either before or after the consummation of a planned business combination.

The recipient of a cease-and-desist order issued by the JFTC can file an action seeking a cancel-

lation of said order with the Tokyo District Court within six months from the order.

In fact, the JFTC has not issued a cease-and-desist order for more than 40 years. In practice, if the JFTC informally indicates its competition concern to parties, the parties often propose a remedy, seeking the JFTC's clearance or voluntarily withdraw their notifications. Therefore, the JFTC has not faced the need to issue a cease-and-desist order on business combinations.

5.2 Parties' Ability to Negotiate Remedies

The parties in question may discuss remedies with the JFTC at any stage, including pre-notification, the Phase I review process and the Phase II review process. If the parties propose a remedy, the JFTC will review the business combination on the premise that the proposed remedy will be implemented.

During the pre-notification stage, the JFTC and the parties basically discuss the form and content of notification and the competition issues of the proposed transaction, but there are a few cases in which the parties and the JFTC negotiate a remedy in response to the JFTC's competition concerns.

5.3 Legal Standard

The legal standard for a prohibition (ie, cease-and-desist order) is whether a planned business combination is likely to substantially restrict competition in a relevant market. Therefore, any remedy should alleviate a competition concern to the extent that substantial restraint of competition is eliminated so that the transaction can be approved by the JFTC. The Merger Guidelines supplement this point.

The Merger Guidelines also state that the JFTC considers and examines what measures are appropriate for solving the likelihood of substantially restraining competition on a case-by-case basis for each business combination. The Merger Guidelines also clearly state that a structural remedy is the most effective remedy and thus should be taken in principle, such as business transfers. However, in practice, a behavioural remedy could be acceptable in many cases, if it is appropriate to resolve the JFTC's competition concern.

5.4 Typical Remedies

The Merger Guidelines state that structural remedies are the most effective remedies, but behavioural remedies can also be accepted.

Structural remedies include the transfer of all or part of the business units of either party, the withdrawal of a certain relationship with a company belonging to the parties' group (eg, suspension of the holding of voting rights, reduction of the ratio of voting rights, or suspension of the concurrent holding of executive positions), and the withdrawal of the business alliance with a third party.

On the other hand, behavioural remedies include the elimination of discriminative terms and conditions or refusal of supply, cost-base trading, a Chinese wall on the exchange of secret information, etc.

The parties may discuss with the JFTC what remedies are appropriate to eliminate the JFTC's concerns. Upon the request of the party/parties after the consummation of the transaction, the JFTC may approve a change of content of the remedies or even a termination of the remedies as a result of assessing the necessity of continu-

ing the remedies in light of changes in competitive conditions after the business combination.

5.5 Negotiating Remedies With Authorities

Please see 5.2 Parties' Ability to Negotiate Remedies.

5.6 Conditions and Timing for Divestitures

The Merger Guidelines state that remedies should, in principle, be fully carried out prior to the implementation of the business combination. However, as an exception, remedies can be carried out after the clearance if the proposed remedy properly and clearly defines the deadline and the JFTC approves it.

If the parties fail to carry out the remedies, the JFTC may issue cease-and-desist orders to prohibit the parties from implementing the business combination, or it may take measures to eliminate the substantial restraint of competition caused by the business combination.

5.7 Issuance of Decisions

When the JFTC concludes that the business combination will not substantially restrict competition, it will issue a notice to the parties that it will not issue a cease-and-desist order. This notice itself is not available to the public.

Regarding confidentiality, please see 7.3 Confidentiality.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

The JFTC may issue a clearance subject to remedies for foreign-to-foreign transactions. It has issued conditional clearance for the following foreign-to-foreign transactions:

- Google LLC/Fitbit, Inc. (FY2020);
- JX Metals Deutschland GmbH/H.C. Starck Tantalum and Niobium GmbH (FY2018);
- Qualcomm/NXP Semiconductors (FY2017);
- Dow Chemical/DuPont (FY2016); and
- Abbott Laboratories/St Jude Medical (FY2016).

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Neither the AMA nor the Merger Guidelines give express guidance regarding ancillary restraints or related arrangements. However, the JFTC may carry out in-depth assessment regarding ancillary restraints in its substantive review.

If, in the course of the review process, the party reports ancillary restraints and the JFTC still issues clearance without raising any competition issue, it would be unlikely that the JFTC would challenge the transaction after the issuance of clearance in a practical sense. However, ancillary restraints are still subject to challenges by the JFTC in theory, even after the clearance.

7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

7.1 Third-Party Rights

As a general rule, the AMA provides that any person who believes there is an act in violation of the AMA may make a report to the JFTC and ask for appropriate measures to be taken. While there is no formal or statutory procedure, any third party may informally submit any report or

complaint to the JFTC at any time, including customers and competitors.

As a part of the formal procedure of a merger review, the Merger Review Policies provide that, at the beginning of a Phase II review, the JFTC invites the public to offer their written comments on the contemplated transaction within 30 days of the announcement on the JFTC's website.

The JFTC is not obliged to respond to a third party's comment but will normally take information provided by a third party into account in the substantive review. Furthermore, if the report made by any person under the AMA meets the requirements and qualifies as notice as provided in the AMA and the Rules on Investigations by the Fair Trade Commission (established in October 2005, and most recently amended in March 2021), the JFTC shall notify such a person about its decision as to whether it will take appropriate measures for the case reported in accordance with the AMA.

7.2 Contacting Third Parties

The JFTC typically contacts third parties such as competitors or customers by sending written questionnaires or requesting oral interviews as a part of its review process if the planned transaction is publicly announced or the investigation proceeds to the Phase II review. Also, as stated in **7.1 Third-Party Rights**, a third party will be invited to submit comments in writing at the beginning of a Phase II review.

The JFTC tends to make these inquiries proactively when it sees issues in the substantive review. In addition, the JFTC sometimes conducts a kind of "market test", in which it asks for the opinions of third parties for the purpose of assessing the feasibility of proposed remedies.

7.3 Confidentiality

During the Period of the JFTC's Review

The JFTC does not make the information available to the public until the initiation of the Phase II review. Therefore, in the course of a merger review, the existence of a fact of filing and any confidential information or business secrets that consist of filing documents, supporting documents or oral guidance to the JFTC will not be publicly disclosed if the case is cleared before going to a Phase II review.

If the case is subject to a Phase II review, the JFTC invites the public to offer their written comments on the contemplated transaction, at the beginning of Phase II (see **7.1 Third-Party Rights**). The description of the transaction will be made public in such cases.

Disclosure for Statistical Purposes or as a Precedent Case

Aside from the slight chance of the JFTC issuing a cease-and-desist order, which will fully disclose the transaction, the JFTC announces the outcome of its review on cases subject to the Phase II review.

In addition, the JFTC annually publishes a report of the major business combination cases on its website around June, which provides a summary of merger review cases and serves as a useful reference. These cases are selected from those cleared in Phase I as well as Phase II, and the parties will be contacted by the JFTC before the publication, to confirm whether the publication contains any confidential information.

Since 2017, the JFTC also announces quarterly a list of the cases it has cleared. The list shows each filing date, the parties' names, the date of clearance and whether it was short-track (ie,

whether the statutory waiting period was shortened).

7.4 Co-operation With Other Jurisdictions

The JFTC has entered into agreements for co-operation with various overseas authorities, including the European Commission and the DOJ and the FTC in the United States. Article 43-2 of the AMA expressly provides that the JFTC may exchange information with authorities in other jurisdictions for specific transactions if doing so is not against the national interest, and if the authorities of other jurisdictions can maintain the confidentiality of information.

In practice, if the JFTC wishes to disclose the information of a specific transaction to any foreign authority, it obtains the parties' written waiver in advance.

While the JFTC believes that co-operation with other jurisdictions will be beneficial in multi-jurisdiction filing cases, as a practical matter, whether the JFTC works closely with other jurisdictions depends on the specific case and regulators.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review

Pursuant to the provisions of the AMA, if a party is unsatisfied with a cease-and-desist order, it may bring an action seeking the cancellation of such order against the JFTC before the Tokyo District Court. That said, practically speaking, it is unlikely that a cease-and-desist order will be issued in merger cases, which results in the unavailability of judicial review in merger review cases.

8.2 Typical Timeline for Appeals

An action seeking cancellation of a cease-and-desist order must be filed with the Tokyo District Court within six months.

Since there is no precedent of appeal against a cease-and-desist order on a business combination after the amendment of the AMA that provides the current system, the timeline is difficult to predict. However, it could take several years if the non-prevailing party appeals the cease-and-desist order from the first instance until a court judgment is finalised. Considering this, a party that plans to bring an action needs to consider petitioning for a stay of execution of the order in accordance with the Administrative Case Litigation Act.

8.3 Ability of Third Parties to Appeal Clearance Decisions

There is no precedent in which a third party has successfully appealed against a clearance decision or a cease-and-desist order. However, any third party may bring an action against a cease-and-desist order as long as it has standing to sue.

9. Foreign Direct Investment/ Subsidies Review

9.1 Legislation and Filing Requirements

Article 27 of the Foreign Exchange and Foreign Trade Act regulates that a foreign investor intending to make an inward direct investment specified by Cabinet Order shall notify the Minister of Finance and the pertinent minister for the business in advance of the business purpose, the amount and time of making the investment, and other items regulated in the Order. The Cabinet Order determines the list of business sectors for which prior notification is mandatory; the

Japanese government added advanced specific pharmaceutical and medical device businesses to this list in 2020 during the COVID-19 pandemic.

10. Recent Developments

10.1 Recent Changes or Impending Legislation

In December 2019, the JFTC revised the Merger Guidelines and the Merger Review Policies. This revision focuses on business combinations in digital markets, which can be outlined as follows.

- Definition of product and geographical market in a platform service: the JFTC may define a relevant market consisting of multiple segments of customers (eg, 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 competition of quality of the service, and other elements specific to digital service, such as type of service or functions available.
- Substantial restraint of trade: in a horizontal business combination, the JFTC will take network effects into account where they are significant, and the difficulty of switching due to network effects and/or a high switching cost, among other things. 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 a purchase of start-ups, the transaction would hinder new entry to the market ("killer acquisition"). The JFTC has also explained

how to assess the importance of data from the competition perspective.

- In a 2019 revision, the JFTC announced that it will proactively review cases that do not meet the threshold for notification, if the consideration for the acquisition is large and it is expected to have an impact on the Japanese market. Thus, the JFTC explains that voluntary consultation will be encouraged for such cases, as outlined in **2.1 Notification**.

10.2 Recent Enforcement Record

According to the JFTC's announcement in June 2022, in FY2021 the total number of notifications for merger control filed was 310 cases, out of which one case went to Phase II review. There has been no case for which the JFTC imposed a fine (for failing to file). There were three cases that were cleared with conditions. With respect to the number of foreign transactions, 33 transactions between foreign businesses were notified with the JFTC in FY2021.

10.3 Current Competition Concerns

In March 2023, the JFTC compiled the "Guidelines Concerning the Activities of Enterprises, etc, Toward the Realisation of a Green Society under the Antimonopoly Act", in order to prevent anti-competitive conduct that deters the realisation of a Green Society and to raise transparency and predictability of the application and enforcement of the Act for businesses working toward a Green Society.

According to these guidelines, a large number of business combinations aimed at strengthening R&D capabilities and streamlining business activities, among other purposes, in their efforts toward the realisation of a Green Society have pro-competitive effects, such as the facilitation of active R&D activities leading to innovations such as the development of new technologies and the

realisation of efficient production and distribution contributing to the reduction of greenhouse gas. However, if a business combination is to substantially restrain competition in a market despite its purpose being the strengthening of R&D capabilities that can contribute to reduction of greenhouse gas, it may not only reduce users' choices and thereby impose a disadvantage on them, such as a price increase, but also cause the parties to the business combination to lose their incentives to appropriately deal with demand and consequently lose opportunities to grow further. From these perspectives, the JFTC clarified that the AMA prohibits any business combination that may substantially restrain competition in a market.

Business combinations in digital markets remain an important issue for the JFTC.

Trends and Developments

Contributed by:

Tsuyoshi Ikeda, Aya Yasui, Muneharu Yamamoto and Myongwon Lee

Ikeda & Someya

Ikeda & Someya was founded in Tokyo in October 2018 by two lawyers, Tsuyoshi Ikeda and Takaaki Someya. The founding partners previously worked at the Japan Fair Trade Commission (Tsuyoshi Ikeda) and the Consumer Affairs Agency (Takaaki Someya), and used this experience to form cutting-edge antitrust law practices, handling a number of large-scale

cases involving business alliances, on-site inspections by the Japan Fair Trade Commission, and consumer laws. Ikeda & Someya also has 16 other lawyers with experience at regulatory agencies or in-house at major companies. The two founding partners' comments have been cited in various newspapers, magazines and media, including the Nikkei.

Authors



Tsuyoshi Ikeda is a partner at Ikeda & Someya. He previously served as an investigator at the Japan Fair Trade Commission, where he participated in around 20 dawn raids, prepared the

implementation of the leniency system, and investigated a case involving standard essential patents. He is noted for his success in the most cutting-edge cartel, merger review and other antitrust/competition cases. Tsuyoshi is registered as an attorney in New York and California.



Aya Yasui is experienced in general corporate matters, especially international transactions, with a particular focus on antitrust, personal information protection and

privacy issues. She previously worked at a US law firm and a major Japanese law firm, and has also been seconded to major global companies, in addition to having legal experience as in-house counsel at an automobile manufacturer. Aya can provide advice on legal risks in cutting-edge fields by utilising her extensive business experience and language skills.

JAPAN TRENDS AND DEVELOPMENTS

Contributed by: Tsuyoshi Ikeda, Aya Yasui, Muneharu Yamamoto and Myongwon Lee, **Ikeda & Someya**



Muneharu Yamamoto gained extensive experience at a major international law firm in a wide range of corporate legal matters, including related fields, with a focus on representing domestic

and foreign companies in litigation and disputes. He also gained familiarity with the US legal system through a law school programme while studying in the US. Making use of such experience, Muneharu provides practical advice that is tailored to business in the fields of antitrust law, competition law and consumer law, while keeping in mind subsequent legal developments that may be anticipated from the circumstances of each case.



Myongwon Lee was a member of a seminar specialising in antitrust laws in college and has since further deepened her knowledge in this field. While in law school, she was actively

involved in international activities, including participation in a law school programme in the US. She has also been involved in the development of AI contract review services and is knowledgeable about the legal technology field. With such experience, Myongwon is committed to assisting clients to the best of her ability in domestic matters as well as international matters.

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COMPETITION AND CONSUMER LAW ATTORNEYS

Merger Control in Japan: an Introduction

In Japan, the Anti-monopoly Act (AMA) governs merger control matters, including the merger review process conducted by the Japan Fair Trade Commission (JFTC), which is the competition authority in Japan. In addition, the JFTC publishes the Guidelines to Application of the Anti-monopoly Act Concerning Review of Business Combination (the “Merger Guidelines”) and the Policies Concerning Review of Business Combination (the “Merger Review Policies”).

To grasp the recent trends of the merger review process conducted by the JFTC, it is important to understand the latest versions of the Merger Guidelines and the Merger Review Policies, which reflect the JFTC’s recent attitude regarding merger review. It is worth noting that the revised Merger Review Policies explicitly recommend a party to a merger to make a voluntary consultation with the JFTC, even if the proposed merger transaction does not meet the thresholds set out under the AMA, in cases where the total consideration for an acquisition exceeds a certain amount and would likely affect domestic consumers in Japan (please see *Google/Fitbit: Merger review process*, below.) This revision indicates that the JFTC would likely examine a merger transaction that does not meet the jurisdictional threshold; in fact, the JFTC conducted merger reviews on at least two cases in 2019 and 2020 (please see *Google/Fitbit* and *M3/Nihon Ultmarc*, below).

Furthermore, in understanding the framework of merger review in Japan, it is important to understand the merger review flow in a practical sense, rather than the formal process stipulated under the law. Although the AMA literally stipulates a merger review process comprising two review steps (Phase I and Phase II), the JFTC has rarely initiated the Phase II review process. Accord-

ing to the JFTC’s publication in June 2023, just one case proceeded to Phase II review in FY 2022, while the JFTC received 337 notifications from parties during the same period (a 26.7% increase from FY 2021) (please see the official website of the JFTC for details: www.jftc.go.jp/houdou/pressrelease/2023, available in Japanese only).

There are two reasons why so few cases have proceeded to the Phase II process. First, a party to a merger has the right to withdraw a notification at its discretion, and thus can withdraw the notification and refile a notification later if it hopes not to proceed to the Phase II process. The second reason is that, in almost all cases, the parties and the JFTC discuss potential competitive concerns regarding the proposed transaction during the pre-notification consultation, and the parties file notifications as a mere formality after they resolve the JFTC’s competition concerns. In some cases, the parties and the JFTC substantially discuss potential remedies proposed by the parties even during the pre-notification consultation period (please see *Z Holdings/Line*, below).

Google/Fitbit Overview

The JFTC published the following facts on its official website:

- on 1 November 2019, Google LLC announced that it planned to acquire all shares in Fitbit, Inc., the manufacturer of a watch-type wearable device, by the method of triangular merger;
- although this transaction did not meet the thresholds under the AMA, the JFTC decided to conduct a merger review on the grounds that the transaction was significantly large and would likely affect consumers in Japan;

- the JFTC investigated this “below threshold” transaction in the same way as it reviews cases that meet notification thresholds – its review included interviews with the parties’ competitors and information exchange with foreign authorities (including the European Commission); and
- on 14 January 2021, the JFTC cleared the transaction by concluding that it would not substantially restrain competition based on the behavioural remedy proposed by the parties.

Merger review process

Under the revised Merger Review Policies, a party to a merger that does not meet the relevant jurisdictional threshold under the AMA is “recommended” to have a voluntary consultation with the JFTC if the merger meets the following requirements:

- the total consideration for the acquisition (transactional value) will exceed JPY40 billion; and
- the scheduled transaction is deemed to affect domestic consumers, such as by satisfying one of the following:
 - (a) the business base or research and development base of the acquired company is located in Japan;
 - (b) the acquired company conducts sales activities targeting domestic consumers in Japan, such as creating a Japanese website or using Japanese brochures; or
 - (c) the total domestic sales of the acquired company exceed JPY100 million.

In this transaction, based on the information published by the JFTC, it is likely that the total consideration for the acquisition of Fitbit exceeded the threshold of JPY40 billion. However, it is not clear from the JFTC’s announce-

ment whether Google and/or Fitbit voluntarily contacted the JFTC prior to their announcement of this transaction.

One of the takeaways from this case is that a merger transaction that is not subject to notification thresholds would still likely be subject to a merger review by the JFTC, which could have an impact on the schedule of a global filing project. Therefore, it should be noted that a party to a merger needs to analyse whether its proposed transaction will meet the threshold for a recommended voluntary consultation in addition to the threshold for a formal notification.

Vertical relationship and conglomerate effect

As Google and Fitbit had no significant competitive issues in their horizontal relationship, the JFTC focused its examination on three types of vertical relationships, such as the relationship between the operation system for a smartphone provider (as an upstream service) and the watch-type wearable device manufacturer (as a downstream product). The JFTC also raised the issue of whether a health-related database to be possessed by the parties would substantially diminish competition in the digital advertising market as a conglomerate effect.

Finally, Google and Fitbit proposed behavioural remedies to address the JFTC’s concerns regarding both the vertical and conglomerate effects. Regarding the vertical relationships, for instance, the parties promised not to refuse to provide an operation system for smartphones to watch-type wearable device manufacturers other than Fitbit for at least ten years. Concerning the conglomerate effect, the parties promised not to use the health-related database for digital advertising services for at least ten years.

Takeaways

This was the first public case in which the JFTC investigated a merger on a consolidation 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 investigate future merger cases involving big tech companies, regardless of whether or not the transaction meets the notification thresholds. This case is a good example of the JFTC's active attitude towards enforcement in vertical and conglomerate mergers.

M3/Nihon Ultmarc

Overview

The JFTC published the following facts on its official website:

- on 1 April 2019, M3, Inc., which operates platforms that provide information on drugs, announced that it had closed a transaction to acquire all of the voting rights in Nihon Ultmarc Inc., which provides a medical information database;
- although this transaction did not meet the jurisdictional threshold under the AMA and was already consummated, the JFTC had a certain concern regarding restraint of competition, and therefore opened a merger review process on its own, including oral interviews with the parties' competitors; and
- finally, on 24 October 2019, the JFTC determined that this transaction would not substantially restrain competition based on the behavioural remedies proposed by the parties.

Merger review process

Despite the fact that this transaction did not meet the jurisdictional threshold and was not subject to a notification requirement, and that the parties had already consummated the transaction, the

JFTC still started a merger review on whether it would likely substantially restrain competition in certain relevant markets.

The AMA does not literally prohibit the JFTC from conducting a merger review on a transaction that does not meet the threshold under the AMA but, in practice, there was no precedent in which the JFTC examined such a transaction before this case. In this context, this case would be considered the leading case ruling on the JFTC's power or authority (Google/Fitbit is considered to be consistent with this precedent). It is also worth noting that the JFTC started a merger review and imposed the behavioural remedy proposed by the parties even though the parties had already consummated the transaction several months previously.

Vertical relationship

In this case, the JFTC intensively examined whether the vertical relationship between the business conducted by M3 (as an upstream service) and the business conducted by Nihon Ultmarc (as a downstream service) might cause a substantial limitation on competition. Since M3 had a high share of 75% in the upstream market as of 2019, the JFTC determined that M3 had sufficient capacity to implement input foreclosure against Nihon Ultmarc's competitors, and thus this transaction would likely harm competition in the downstream market. The JFTC also examined the conglomerate effect of the bundling supply of the parties' services (please see the JFTC's official website for details).

To resolve these concerns, the parties proposed a behavioural remedy that included but was not limited to the following:

- the parties promised to continue providing drug information to competitors in the downstream market; and
- the parties promised not to discriminate against downstream competitors in the terms and conditions of the provision of drug information.

Takeaways

This was the first case in which the JFTC made it public that it had challenged a consummated merger. It is worth noting that the JFTC opened an investigation for a consummated transaction just to investigate vertical and conglomerate concerns. In addition, this case shows the JFTC's interest in platform and data business even aside from the big tech companies.

It is also important to note that the proposed remedies are supposed to remain in place for an indefinite period of time. The duration of behavioural remedies will be an important issue in remedy discussion in future cases as well, because the JFTC cannot extend the remedy period after the clearance decision.

Z Holdings/Line

Overview

The JFTC published the following facts on its official website:

- on 18 November 2019, Z Holdings Corporation (ZHD), a subsidiary of Japanese IT giant SoftBank, announced that it planned to acquire all shares in Line Corporation, the most well-known messenger application provider in Japan;
- on the same date, ZHD and Line voluntarily submitted a written explanation stating that there was no competition issue on the share acquisition and other relevant materials to the

JFTC, and started a pre-notification consultation;

- on 14 July 2020, ZHD and Line filed a notification with the JFTC; and
- on 4 August 2021, the JFTC granted a clearance conditional on behavioural remedies in certain markets.

Pre-notification consultation

ZHD and Line consulted with the JFTC between 18 November 2019 and 14 July 2020, with the purpose of resolving the JFTC's competition concerns. While the parties spent eight months in pre-notification consultation with the JFTC, the JFTC took 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 during the pre-notification phase, including an evaluation of the proposed remedy. It would be fair to assume that the parties filed the notification with the reasonable anticipation that the remaining procedure would be completed within 30 days.

In almost all cases, the JFTC addresses and resolves its competition concerns during the pre-notification consultation process, and therefore rarely opens a Phase II process.

Digital platform market

The JFTC's examination focused on news distribution services, advertisement-related businesses and code-based payment businesses due to the competitive pressure of competitors, customers or new entries, while there are many other markets in which the parties have overlaps or vertical relationships.

It is worth noting that the JFTC evaluated the magnitude of competitive pressure from competitors in the code-based payment business

by taking the “indirect network effect” into consideration, since said business was considered one of the multiple digital platform businesses in which the parties and competitors operated.

Although the aggregate market shares of the parties in the code-based payment business was approximately 60%, the JFTC concluded that this transaction would not substantially restrain competition in the code-based payment business, based on the following behavioural remedy proposed by the parties:

- the parties promised to annually report the competition situation of the code-based payment business to the JFTC; and
- the parties promised to remove exclusive dealing conditions in the code-based payment business.

Takeaways

This case is an excellent example of a horizontal merger with a significant combined market share that was cleared by the JFTC without any condition (for the free news supply business) or with relatively lenient behavioural remedies (for the code-based payment business). Even though the parties’ consumers are general smartphone users, the JFTC did not have an opportunity to collect comments from the general public as the parties successfully avoided the Phase II review.

Significant developments

On 16 June 2022, the JFTC released a statement titled “Proactive promotion of competition policy in response to socio-economic changes such as digitalisation: Co-operation and strengthening of advocacy and enforcement” (the “Position Paper”). The JFTC aims to enhance its response to changes in social economics, such as digitalisation, by considering enforcement and advo-

cacy as the fundamental tools for creating and preserving competitive environments.

The JFTC has outlined its plans to enhance the effectiveness of advocacy. Instead of primarily relying on voluntary surveys and hearings, the JFTC will exercise its investigative authority under Article 40 of the AMA, which grants compulsory powers, when information gathering becomes challenging.

On the other hand, regarding the strengthening of enforcement effectiveness, the JFTC has outlined several measures.

- In cases involving digital platform operators, the JFTC recognises the need for efficient and effective information gathering. Even at the initial stages of individual investigations, the JFTC intends to widely publicise the overview of cases and solicit information and opinions from third parties, while carefully considering the potential impact of such publicity on the review process.
- For merger cases, especially those related to digital markets, the JFTC will now publicly disclose and invite opinions, regardless of whether the Phase II review process has commenced or not. 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 the assessment of whether to initiate an investigation in both antitrust and merger cases, where information collection has traditionally been conducted on a voluntary basis, the JFTC will exercise its investigative authority under Article 40 of the AMA as needed. Fourthly, to gain insights into the intentions, objectives, effects on stakeholders, and future market prospects of companies involved in merger cases, particularly in digital market

contexts, the JFTC will request the submission of internal documents from the companies at the early stages of the examination. In June 2022, the JFTC published a document that explains the JFTC's practice regarding the submission of internal documents on the merger review from the viewpoint of the scope, timing, and way of submission of the internal document. Lastly, the JFTC emphasises the utilisation of economic appraisal not only in merger cases but also in investigations of suspected violations. In 2021, regarding a merger case of stock acquisition in the silicon wafer market, the JFTC found it appropriate to focus on a model based on the Cournot competition. On 31 May 2022, the JFTC published a document on the points to heed in submitting the reports and data for economic appraisal.

In summary, the JFTC aims to strengthen the effectiveness of advocacy by exercising investigative powers when voluntary information collection becomes challenging. Additionally, the JFTC intends to enhance enforcement effectiveness by increasing transparency in the examination process, soliciting public input, requesting internal documents from companies, and utilising economic analysis in both merger and violation cases, particularly in the digital market context.

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