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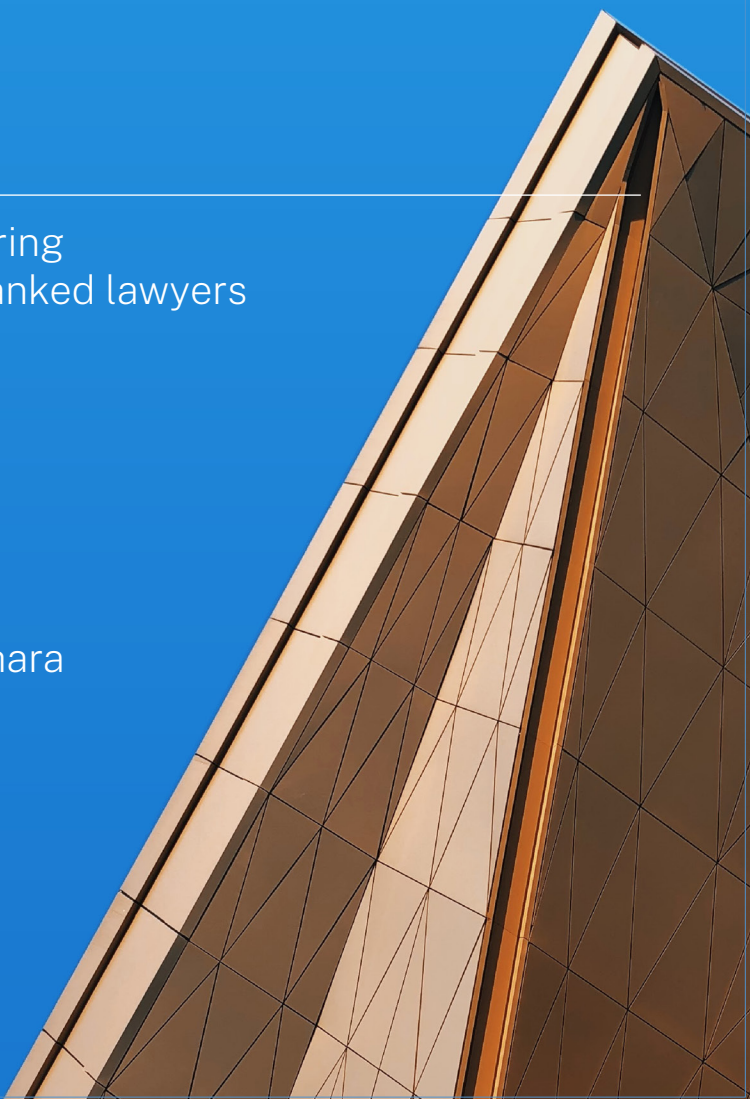
# Merger Control 2025

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## **Japan: Law & Practice**

Tsuyoshi Ikeda, Aya Yasui,  
Hiroko Fukushima and Kohei Kohara  
Ikeda & Someya



# JAPAN

## Law and Practice

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**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 a cutting-edge antitrust law practice, handling a number of large-scale cases in-

volving business alliances, on-site inspections by the Japan Fair Trade Commission and consumer law. Ikeda & Someya also has 24 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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## 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, 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.

Although not directly related to the foregoing, in April 2025, the JFTC issued a cease-and-desist order against Google, finding that Google has been committing an act that violates a provision of Article 19 (falling under paragraph (12) [Trading on Restrictive Terms] of Unfair Trade Practices) of the Act. As such, the JFTC is strengthening its vigilance against unfair practices conducted by tech giants and preparing to enforce new digital regulations to ensure fair competition.

## 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 with the merging party or parties. Specifically, in the Merger Review Policies revised in 2019, the JFTC recommends that parties whose domestic sales amounts fall under the thresholds of the notification have a voluntary consultation 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, 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 typically consult with the JFTC voluntarily prior to filing a notification, as described in **3.9 Pre-notification 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; 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 chang-

es to articles of association), although the JFTC does investigate such operations in some cases – for instance, if challenged by relevant parties with regard to 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 distinguishes 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. In fact, the JFTC announced that it had completed merger review of 15 cases that are below the threshold during the fiscal year of 2022.

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 the subsidiaries of the ultimate parent company 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.

The thresholds in a merger 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.

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](#).

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 turnover of one of the company groups splitting all of its businesses exceeds JPY20 billion, and the total domestic turnover of another exceeds JPY5 billion;
- the total domestic turnover of one of the company groups splitting all of its businesses exceeds JPY20 billion, and the total domestic turnover generated by the target business of another of the company groups splitting a substantial part of its businesses exceeds JPY3 billion;
- the total domestic turnover of one of the company groups splitting all of its businesses exceeds JPY5 billion, and the total domestic turnover generated by the target business of another of the company groups splitting a substantial part of its businesses exceeds JPY10 billion; or
- the total domestic turnover generated by the target business of one of the company groups splitting a substantial part of its businesses exceeds JPY10 billion; and the total domestic turnover generated by the target business of another of the company groups exceeds JPY3 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](#).

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% and 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 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 outside 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 made in a foreign currency should be converted into Japanese yen using the conversion rate applied for account settlement. If such an exchange rate is not available, the average telegraphic transfer 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 company, 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 by the latter company.

The scope of the group companies (a parent company, the ultimate parent company and its 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 resulting in more than 50% of the voting rights in another company (Company A) being obtained after the end 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 outside Japan is not required to file a notification. Nevertheless, the JFTC may recommend that a party to the transaction voluntarily has a consultation 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 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 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 ask 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 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 due to possible inconsistency with respect to 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 as the owner of 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 permissible to seek a waiver or derogate from the regulation. Meanwhile, because a notification 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 clearance, implying the possibility of filing an urgent injunction order. It seems to be possible technically for the parties to propose a carve-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 docu-

ments 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

There are no filing fees.

### 3.4 Parties Responsible for Filing

In share acquisitions and business/asset transfers, the acquiring party is responsible for filing. In the other types of transactions noted in **2.3 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 transactions. 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, or the minutes of the shareholder meeting or board meeting that approves the transaction. If the filing is made by an attorney on behalf of the notifying party, a power of attorney (POA) is required. It should be noted that the POA is required even at a pre-notification process.

In addition to the required information, the JFTC often requests – usually on a voluntary basis – additional information 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 arising 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 the emails of the 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 it, in which case it may recommend the parties withdraw and refile an amended notification.

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 on 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 facts 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 made in relation 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 made in relation to the Request for Report, etc.

While the suspensive effect is not applicable for the Phase II review period, in practice the parties are advised 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 stating 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). It should be noted that, if the pre-notification consultation is made by an attorney on behalf of the notifying party, a POA is required.

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 that the parties 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 for the Request for Report, etc.

### 3.11 Accelerated Procedure

The AMA does not technically provide a short-form or fast-track procedure for 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) of 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 for 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 – the number of competitors, market share, competitive landscape, supply capacity of competitors, competition in R&D, characteristics of the market (whether there are so-called direct or indirect network effects or multifaceted markets through various platforms), etc;
- imports – barriers to importing, problems with distribution, substitutability with imports, etc;
- new entry to the market – barriers to entry, likelihood of entry;
- competitive pressures arising from adjacent markets – competing products, geographically adjacent markets;
- competitive pressure arising from customers – competition among users, ease of switching suppliers;
- comprehensive business capabilities of the parties in question;
- economic efficiencies;
- the financial conditions of the parties in question; and
- the 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 com-

bination 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 a business combination from the perspective of the scope of the product and the geography, considering the substitutability for customers and, if necessary, suppliers.

The JFTC uses 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 combination: 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; and

- 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; and
- 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 in the foregoing, even if a vertical or conglomerate business combination does not fall within the safe harbour standards described previously, 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 combina-



tion 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 for any other reason, the JFTC will conduct a further review of 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 the development of an adjacent product market), the JFTC may take them into consideration.

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

#### 4.4 Competition Concerns

The JFTC examines all kinds of competition concerns that may impose a substantial restriction on competition in the relevant market, including 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 represented a large portion of the JFTC's concern, since a horizontal business combination would basically reduce the number 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 of 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 other kinds 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 in 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 improvement in efficiency alone as being unlikely 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 direct inward invest-

ments, 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 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 coordinated effects on the remaining businesses of the joint venture partners (the “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 will 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 completion of the 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 result in 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 possibility 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 cancel-

lation of said order with the Tokyo District Court within six months of 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 withdrawing 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 during the pre-notification stage, 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 discuss the form and content of the notification, and the competition issues related to 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 the measures appropriate for removing the possibility 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 applied in principle, such as in 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 Negotiating Remedies With Authorities

Concerning when parties can begin negotiating remedies with the authorities, please see **5.2 Parties' Ability to Negotiate Remedies**.

## 5.5 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.

## 5.6 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 is not available to the public.

Regarding confidentiality, please see 7.3 Confidentiality.

## 5.7 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:

- Korean Air Co, Ltd/Asiana Airlines Inc (FY2023);
- 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 of 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 in theory subject to challenges by the JFTC, 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 that appropriate measures 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 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 a 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 of the Fair Trade Commission (established in October 2005, and most recently amended in March 2021), the JFTC shall notify such person about its decision as to whether it will take appropriate measures in regard to the case reported in accordance with the AMA.

In October 2023, the JFTC commenced an investigation into Google's practices concerning the pre-installation and prominent placement of its applications on Android devices, which were suspected of restricting competition. In this case, for the first time, the JFTC invited the public to submit information and opinions at the

beginning of a Phase I investigation. This measure was taken pursuant to the JFTC's 2022 policy to strengthen enforcement in digital markets. The JFTC also made it clear that the commencement of the investigation does not itself imply that any violation of the AMA has been found.

## 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

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 consisting 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**). A description of the transaction will be made public in such cases.

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 of cases subject to a Phase II review.

In addition, the JFTC annually publishes a report on 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 among 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 has also issued a list of the cases it has cleared on a quarterly basis. 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 Federal Trade Commission and the Department of Justice 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 the 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.

In its review of Korean Air's acquisition of Asiana Airlines (referred to in **5.7 Prohibitions and Remedies for Foreign-to-Foreign Transactions**), the JFTC engaged in information exchange with several foreign competition authorities. These included the Australian Competition and Consumer Commission (ACCC), the UK Competition and Markets Authority (CMA), the United States Department of Justice (DOJ), the European Commission, the Korea Fair Trade Commission (KFTC) and the Chinese State Administration for Market Regulation (SAMR). The exchanges were conducted under existing co-operation frameworks.

## 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 FEFTA provides 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.

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