



Merger Control

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Editors:

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Overview of merger control activity during the last 12 months

The implementation of policies related to merger control falls under the jurisdiction of the Japan Fair Trade Commission (the “JFTC”), which was established pursuant to the 1947 Japanese Antimonopoly Act (the “AMA”), and consists of a chairperson, four commissioners, and a staff of around 800. The AMA also introduced Japan’s first anti-competition rules, including merger control provisions. The JFTC is an autonomous administrative body with broad enforcement powers.

The Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (JFTC, May 31, 2004, updated most recently as of June 14, 2011) (the “Merger Guidelines”) provide overall guidelines related to merger control. According to the latest statistics published by the JFTC in June 2016, 295 notifications were made in FY 2015 (*i.e.*, between April 1, 2015 and March 31, 2016) with a breakdown showing 222 notifications for share acquisitions, 23 for mergers, 17 for company splits, six for joint share transfers, and 27 for business transfers. Of the 295 notifications, eight notifications were withdrawn before the JFTC’s first-stage (Phase I) review was completed and 281 cases received clearance in the first-stage review process (97.9% of all notifications). Six cases moved to the in-depth second stage (Phase II) review. Four transactions were closed during the second-stage review, including one in which merger clearance was conditioned on taking certain remedial measures. No cease-and-desist order prohibiting a proposed transaction was issued. The number of notifications was around 250 to 300 in these three years (2013 to 2015).

New developments in jurisdictional assessment or procedure

Abolition of former “Prior Consultation mechanism”

The JFTC announced that the Prior Consultation mechanism for M&A transactions would be discontinued beginning July 2011. Prior to this announcement, M&A transactions could be submitted to the JFTC on a voluntary consultation basis pursuant to the Prior Consultation Guidelines, before submitting an official statutory filing of the contemplated M&A transaction. As a general matter, the JFTC would render an “unofficial” opinion about a contemplated transaction at this preliminary stage, which opinion could generally be relied upon. In practice, the JFTC’s opinions in formal notification cases rarely deviated from its early-stage opinions. As a result of this major shift in internal workings at the JFTC, the JFTC would no longer make any determinations or provide guidance on substantive issues prior to the filing of the official statutory notice. The official review would commence only after the official filing was made. The Prior Consultation mechanism was originally introduced so that companies could learn the JFTC’s determination before the official proceedings would begin.

However, in practice, the Prior Consultation was time-consuming, its procedures lengthy, and it was criticised for lack of transparency as the JFTC was not required to disclose its decisions. Addressing these concerns, the JFTC abolished the Prior Consultation mechanism altogether.

Availability of “Consultations Prior to Notification” in regard to formalities

The JFTC is still open to voluntary “Consultations Prior to Notification” but only for inquiries on how to complete the notification form. For example, as the notification form has a section in which the position of the notifying corporation in the domestic market must be described, it can consult with the JFTC about its view of a particular field of trade before submitting the notification.

In addition, the notifying company can submit with the JFTC, materials it believes necessary for receiving appropriate explanations concerning the consultation prior to notification. In this regard, the notifying company can also submit documents to demonstrate that the planned transaction is not problematic under the AMA. In fact, the JFTC announced in its second reviews that it had received opinion letters stating that the proposed transaction was unlikely to significantly restrain competition and other documents related to the proposed transaction from the notifying party before receiving the notification, and disclosed that it had meetings with the notifying party before the notification was made. This indicates that the JFTC still thinks it is important to communicate with the notifying party before the official proceeding begins.

Although the former Prior Consultation mechanism was abolished, it is still very important for a company in a complex case to provide sufficient information to the JFTC before filing an official notification to facilitate the procedure and get a feeling for how the JFTC views the transaction.

First stage review – Phase I (Primary Review)

The AMA provides for a 30-day waiting period after a party submits the notification form to the JFTC (“waiting period”), during which the contemplated transaction may not be consummated. During this time, the JFTC will normally either: (1) determine that the given business combination is not problematic in light of the AMA; or (2) determine that a more detailed review is necessary and request submission of necessary reports, information or materials. This will move the case to the in-depth review of the second stage (Phase II). The first stage review undertaken from the date of receipt of the notification until the day preceding the date of either of the above-mentioned determinations is referred to as the “primary review”. Normally, there is an ongoing discussion between the JFTC and the notifying party, which tends to expedite the JFTC’s review and often results in early clearance of the contemplated transaction, thereby avoiding requests for additional information and extended review periods. This ongoing discussion can include briefings on substantive issues by notifying parties or even interviews by the JFTC of interested parties, such as customers and competitors. The Merger Guidelines permit the JFTC to shorten the 30-day waiting period in cases where it is clear that the contemplated transaction is unlikely to significantly restrain competition in the relevant market. The notifying party may also make a written request with the JFTC for an expedited disposition.

Second stage review – Phase II (Extended Review)

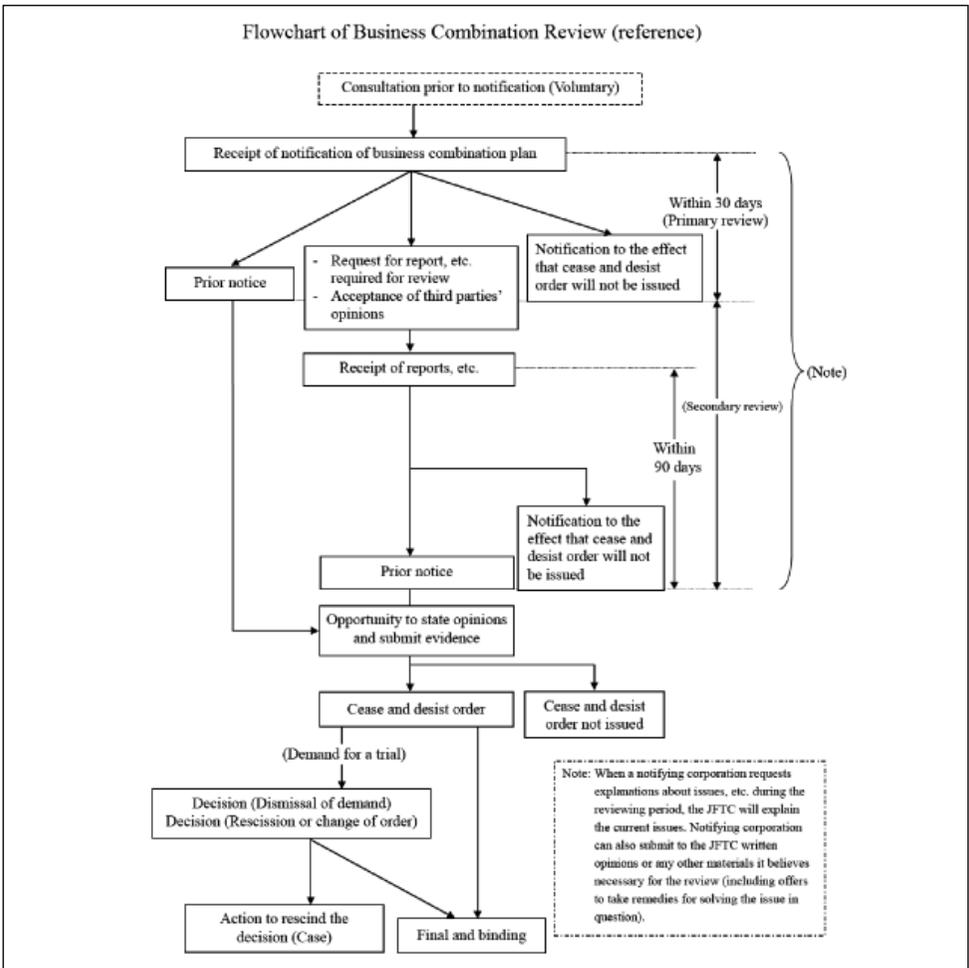
The second stage (Phase II) begins when the JFTC requests the notifying party to submit necessary reports, information or materials (“request for reports”) and continues for a 90-day period following receipt of all requested reports and information (or 120 days following the date of receipt of the notification, whichever date is later). Once the second stage begins, the

JFTC will make a public announcement to that effect and gather opinions from third parties regarding the proposed transaction.

Most cases that move to the second stage have two common characteristics: (1) the notifying party has participated in the “Consultations Prior to Notification”; and (2) it usually took several months for the requested reports and information to be submitted by the notifying party (thus the second-stage 90-day period did not start until after all those documents were submitted to the JFTC). This would indicate that: the notifying parties involved in complex transactions that moved to the second stage engaged in significant ongoing discussion with the JFTC using the preliminary consultation mechanism – “Consultations Prior to Notification” – even though, technically speaking, this mechanism is for consultation in regard to formalities of the notification; furthermore, the notifying parties also used the period between the end of first stage and the official beginning of the second-stage review to adjust the timing of submission of all the requested reports.

Outline of the review procedure

The outline of the JFT’s review procedure is as follows:



Sanctions for improper or insufficient notices

Although rarely used, the AMA gives the JFTC the discretion to impose a criminal fine of up to two million Japanese yen for failure of a party to comply with legal requirements for notice of a proposed merger. In practice, the JFTC will request the notifying party to provide a letter explaining the reasons for deficiencies in the notice rather than imposing the fine immediately.

Minority shareholders' reporting requirements

Under the Merger Guidelines, only the transaction that will form a "joint relationship" will be reviewed. Thus, potential lack of a "joint relationship" works as a safe harbour for the necessity of merger review.

Under the Merger Guidelines, a joint relationship will be deemed established:

- (i) When the ratio of the total number of voting rights pertaining to shares held by companies that belong to the group of combined companies to which the shareholding company belongs to all of the voting rights of the share issuing company exceeds 50%.
- (ii) When the ratio of the total number of voting rights pertaining to shares held by companies that belong to the group of combined companies to which the shareholding company belongs to all of the voting rights of the share issuing company exceeds 20% and the said ratio ranked as top by itself.
- (iii) If the ratio of voting rights held (the ratio of the voting rights pertaining to shares held by the shareholding company to all the voting rights of the share issuing company) is more than 10% and the shareholding company is ranked among the top three holders of voting rights, the following items will be taken into consideration to determine whether a joint relationship is formed, maintained or strengthened:
 - (a) the extent of the ratio of voting rights held;
 - (b) the rank as a holder of voting rights, differences in and distribution of the ratios of voting rights held among the holders, and other relationships between holders;
 - (c) cross-holding of voting rights (the share-issuing company concurrently holds voting rights of the shareholding company) and other mutual relationships between the companies involved;
 - (d) whether officers or employees of one of the parties are officers of the other parties;
 - (e) trading relationship between the parties (including financial relationship);
 - (f) relationships between the parties based on business alliances, technical assistance, and other agreements; and
 - (g) items (a) through (f), when including companies that already have joint relationships with the parties.

In a case announced in 2015, in which Oji Holding's purchase of Chuetsu Pulp & Paper Co., Ltd.'s shares, which would have resulted in Oji Holding's holding of 20.9% voting rights in Chuetsu Pulp & Paper Co., the JFTC cleared the proposed transaction in the second-stage review on condition that, among other things, one party keep its business operations independent of the other party. In that case, Oji Holding's ratio of voting rights ranked at the top.

That case indicates that the JFTC is certainly concerned about minority shareholdings even if they slightly exceed 20% of voting rights.

Public access to JFTC filings and challenge to mergers

As a general rule, the public does not have any right to access merger notification filings. Pursuant to the Policy for Merger Review, the JFTC discloses brief summaries of notification filings of proposed mergers only if the review moves to the second stage (Phase II). Thus, third parties are not aware of proposed transactions until such disclosures. Otherwise, if a transaction received merger clearance in the first stage review (Phase I), third parties could learn about it only from the notifying party's disclosure.

Once the case moves into the second stage, and the JFTC gathers information from third parties for opinions and comments in regard to the proposed transaction, third parties may submit challenges to the merger with the JFTC by submitting opinions that the proposed transaction would result in a significant restraint of competition in a particular field of trade. However, the AMA does not give third parties any express right to intervene. Otherwise, anyone could notify the JFTC of possible violations of the AMA with respect to the notifying party's breach of notifying requirements.

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

Key industry sectors reviewed

The JFTC does not officially target any particular industry sector for enforcement and compliance. Indeed, the 10 publicly announced cases in 2016 involved businesses such as manufacturers, web service providers, banks and insurance companies.

Revisions of Merger Guidelines in 2011

Under the amendment of the Merger Guidelines in July 2011, the JFTC also slightly revised its standards of review by announcing that it would review transactions from the perspective of: (i) clearer market definition if the market's geographical scope crosses borders; (ii) competitive pressure when market demands are continuously and structurally shrinking; and (iii) more flexible consideration of competitive pressure from overseas imports and entry.

Cross-border market definition

The Merger Guidelines state that if users of a certain product, both inside and outside Japan, are conducting business without segregating domestic and foreign suppliers, even if the prices have been raised in Japan, users in Japan will be able to substitute those products with products from overseas suppliers, which may result in lowering of prices in Japan. In such a case, the geographical scope has been determined across the border. For example, in the cases announced in 2016 involving the merger of Intel Corporation and Altera Corporation and the merger of Denali Holdings Inc. and EMC Corporation, the JFTC defined the relevant market as being worldwide.

Competitive pressure under the Shrinking Market Condition

The Merger Guidelines state that the presence of competitive pressure from customers deriving from the fact that the quantity of the product demanded is continuously and structurally falling well under the quantity supplied as a result of a decrease in demand for the product, may possibly work as a factor to prevent the company group from freely exerting an influence on the price of the product to some extent. Thus, the JFTC may take into consideration the shrinking market condition as one of the factors which prevents the transaction from restraining competition.

Imports and entry from overseas

The Merger Guidelines state that in the presence of sufficient competitive pressure from imports, the possibility that business combinations will substantially restrain competition in a particular field of trade is usually small. If users can easily switch from a product of the company group to an imported product and the switchover becomes more likely if the company group raises the price of the product, the company group would be unlikely to raise the price on the grounds of a potential loss of sales due to the imported goods. The Merger Guidelines also point out that even if importation is currently not being conducted, the JFTC may consider a potential increase in imports over a period of around two years. In the past, competitive pressure from imports and entry from overseas were rarely considered unless already present. The change in the JFTC's perspective to consider future competitive pressure from overseas is likely to result in more practical determination of competitive pressures in the market.

In the case of a subsidiary of Mars, Inc.'s acquisition of P&G Japan's pet foods business (announced in 2015), the JFTC considered future competitive pressure from overseas in the pet foods market.

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

Consistent with the growing trend by the JFTC of aggressively using economic analyses in review of merger transactions, the JFTC has increased the number of economists among staff who analyse economic data provided by notifying parties and third parties. The JFTC may also initiate its own economic analysis in complex cases in the second-stage review.

In the case of acquisition of shares of C&H Co., Ltd. ("C&H") by Daiken Corporation ("Daiken") (announced in 2013), in order to define the product range, the JFTC used questionnaire surveys with users and competitors, asking whether users would switch to other products if the product prices increased by around 10%. And the JFTC took those answers into consideration. The use of economic appraisal techniques in retail business is also quite likely as POS (point of sales) data would be comparatively available.

In the case of merger of UNY Holdings Corporation ("UNY") and FamilyMart Corporation ("FamilyMart") (announced in 2016), both of which are categorised as convenience stores, the JFTC also used questionnaire surveys with the consumer public in which it questioned how many times consumers use convenience stores depending on the number of the competitive conveniences located within 500 metres or 1 kilometre. Then, the JFTC used the GUPPI (Gross Upward Pricing Pressure Index) to determine whether the parties' convenience stores would have incentives to raise prices.

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

Timing of remedy proposal

In the first-stage (Phase I) review period, the notifying party generally has broad latitude to offer its own remedies, which may be accepted by the JFTC as a means of avoiding an extended second-stage review. After the commencement of a second stage, the notifying party enjoys the same right to propose remedies. In the original notification file, the notifying party will include a report of change and any remedies agreed to by the notifying party and the JFTC.

Early-stage acceptance of remedies offers the strategic advantage of avoiding a second-stage investigation. For transactions involving coordination of notification and review of deadlines in multiple jurisdictions, legal practitioners should bear in mind that the initial review period and the second-stage review period may not be extended even if remedies are still under discussion. The JFTC has no discretion to extend the deadlines. Accordingly, as noted above, using the preliminary consultation and taking advantage of the period between the end of the first stage and the submission of all the requested reports, ongoing discussion with the JFTC is critical to avoid running-out-of-time situations.

Regulation of conduct

In addition to the final approvals that are subject to structural remedies, the JFTC also has the latitude to condition a merger by imposing certain conduct between the parties or requiring taking certain actions, including incorporating these obligations in a written contract between the parties to the merger transaction. In the case of merger between Zimmer, Inc. and Biomet, Inc. (announced in 2015), the JFTC approved the transaction by accepting the condition proposed by the parties of: (i) transferring tangible assets and intellectual property rights of the leading brands in which they had 50% and 20% of the market share in particular fields; (ii) reporting after executing the transfer agreements with the third party and acquiring approval of the JFTC; and (iii) agreeing that an independent third party transfers such assets and intellectual property rights referred to above to a third party upon the JFTC's approval in the event that the transfer agreements are not executed within a certain period. The JFTC's approval of ASML US Inc.'s acquisition of Cymer Inc. (announced in 2013), is a case in point where ASML's proposed remedy of imposing mutual non-disclosure obligations on certain confidential information was adopted. These cases illustrate one common remedy that regulates behaviour between the parties. The use of independent monitoring tests to measure compliance with remedies is yet another example of the increasing acceptance of conduct-based remedies. In fact, the JFTC accepted this very concept, as proposed by the notifying party in the ASML/Cymer merger.

Warning on gun-jumping

The parties may be subject to the criminal penalty of fines and/or the JFTC's cease-and-desist orders if the merger contemplated in the notification filing is closed during the 30-day waiting period, or the 90-day period if it moves to the second stage. In most cases, the timing of the contemplation of the transaction would be clear to see, but in some cases there would be a grey zone regarding whether the transaction is contemplated or not.

The most noteworthy case in 2016 was the acquisition by Canon Inc. ("Canon") of shares of Toshiba Medical Systems Corporation ("TMSC"). In that case, before submitting the notification to the JFTC, Canon acquired options in respect of common shares of TMSC and, as consideration, Canon paid Toshiba Corporation (Toshiba) an amount equal to the value of the underlying common shares; furthermore, a third party other than Canon and Toshiba came to own voting shares of TMSC prior to Canon's exercise of the options. Even though the JFTC cleared the proposed transaction, it stated that "[T]his series of actions is likely to give rise to the formation of a certain joint relationship between Canon and TMSC through the above-mentioned third party, comprising part of a structure premised on Canon ultimately acquiring the voting shares of TMSC subject to approval being obtained in the business combination review under the AMA. Given that this series of actions had been undertaken before Canon made a notification to the JFTC, they are likely to lead to activities that could violate the provisions of Article 10(2) of the AMA by undermining the intent behind the prior notification system."

Accordingly, the JFTC cautioned Canon not to conduct such actions in the future and also urged Toshiba, who engaged in the implementation of the above structure, not to engage in the future in activities that might be inconsistent with the purport of the prior notification system.

The JFTC also warned prospective companies planning a business combination involving a similar structure in the future to file a notification with the JFTC prior to implementing any part of such a structure.

Therefore, in cases where a planned transaction consists of several phases that could be construed as implementation of the transaction, it would be advisable to consult with the JFTC using a preliminary consultation mechanism before actually taking the first step.

In addition, in the case of mergers between competitors, as the competition will continue until the merger closes, the parties should be very careful about the exchange of information while conducting due diligence. The parties should minimise the exchange of information and limit persons who are aware of the information to non-sales and marketing divisions.

Penalties for failure to implement remedies

The AMA does not expressly authorise the JFTC to monitor compliance by the notifying party with the agreed remedies; nor does the AMA grant the JFTC the right to proactively provide instructions or guidance to the notifying party on how to implement approved remedies. The only real leverage that the JFTC has is the right to penalise the parties for breaches of the accepted remedies contained in the original notification, if the failure causes a substantial restraint of competition in any of the relevant markets.

Key policy developments

Cooperation between the JFTC and foreign competition authorities

Cooperation between the JFTC and antitrust agencies in other countries has been on the rise in recent years, reflecting not only the increasing harmonisation of antitrust schemes but also Japan's integral role in international markets. In 2016 alone, the JFTC became a party to bilateral cooperation agreements with antitrust agencies in Canada, the United States and the European Union. Japan also signed a memorandum of understanding with the Chinese Ministry of Commerce in April 2016 concerning antitrust cooperation. These protocols provide a general framework for information exchanges and ongoing discussion between the participating parties. In addition to these bilateral agreements, the AMA also provides a legal basis for the JFTC to exchange information with authorities in other jurisdictions, subject to certain conditions, and where applicable, waivers by notifying parties.

As the JFTC's coordination of merger control work with foreign authorities is becoming more frequent and detailed, coordination of work among Japanese and foreign attorneys representing notifying parties is gaining importance. Moreover, to support the JFTC's coordination of work with foreign competition authorities, discussions between attorneys should be encouraged. Recent examples where the JFTC launched a joint investigation and engaged in information exchanges with foreign antitrust authorities (such as the US FTC and the European Commission) include the following cases announced in 2016: *Intel/Altera* case; *NXP Semiconductors/Freescale Semiconductor* case; and *Denali Holdings Inc./EMC Corporation* case.

Regulation on foreign-to-foreign mergers

The January 2010 AMA amendment requiring notification to the JFTC with respect to foreign-to-foreign mergers (i.e., mergers between two or more entities with no corporate

presence in Japan) that meet the substantial domestic turnover requirement is evidence of the JFTC's continuing aggressive stance *vis-à-vis* international mergers with a potential anti-competitive effect on the Japanese domestic market.

Recent reform

The AMA amendment bill passed in December 2013 and, effective as from April 2015, basically aims to abolish the former administrative hearing procedure exercised by the JFTC and replace it with a judicial appeal process. The outline of the bill is as follows:

1. Abolition of the JFTC's hearing procedure for administrative appeals.
2. Introduction of a system in which any appeals pertaining to cease-and-desist orders are subject to the exclusive jurisdiction of the Tokyo District Court, and a panel comprising three or five judges of the Tokyo District Court will hear the cases, with a view to ensuring expertise of the court.
3. With a view to ensuring due process, development of procedures for a hearing prior to issuing a cease-and-desist order:
 - providing the expected recipient of the order with an explanation of the content of the order;
 - providing an opportunity for the expected recipient to present opinions and/or submit evidence; and
 - stipulating the inspection of and/or opportunity to copy evidence relied on by the JFTC.

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