

The International Comparative Legal Guide to: Merger Control 2010

A practical insight to cross-border merger control issues



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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)?

1. The Fair Trade Commission of Japan (the “JFTC”), which consists of a chairman and four commissioners, is the sole agency in Japan in charge of the enforcement of The Law Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade, commonly called the Antimonopoly Law (the “Antimonopoly Law”), including regulation on mergers.
2. The Merger and Acquisition Division, which is one of the divisions of the Economic Affairs Bureau of the General Secretariat of the JFTC, is primarily in charge of the merger review.
3. In Japan, as with the importance of the Merger Guidelines, (defined in question 1.2 below), clearance through the prior consultation and filed notifications, the role of the JFTC is viewed as quite important for the practice in this area.

1.2 What is the merger legislation?

1. The Antimonopoly Law governs the merger cases as the antitrust/competition law.
2. The major JFTC guidelines for the specific concentration of economic power, (such as mergers and acquisitions of business), as opposed to the regulation on the general concentration such as those under Articles 9 (Prohibition of incorporation of a company which may cause excessive concentration of economic power) and 11 (Restriction on the stockholding by a bank or insurance company), are the “Guidelines concerning Review of Business Combination” (the “Merger Guidelines”) launched on May 31, 2004 and substantially amended as of March 28, 2007 which reflect the most recent developments in this area. Moreover, the JFTC published the “Guidelines for Merger Investigation concerning Cases on Corporate and Industrial Revitalization” on April 9, 2003 (the “Special M&A Guidelines”), which is also amended as of March 28, 2007. The Special M&A Guidelines provide guidance under the Antimonopoly Law for cases to which the Corporate and Industrial Revitalization Special Measures Act (*Sangyo katsuryoku saisei tokubetsu sochi-ho*) applies.

1.3 Is there any other relevant legislation for foreign mergers?

1. Certain acquisitions of shares/equity in a Japanese company by a foreign entity are subject to the filing requirements with the Bank of Japan and relevant ministers under the Foreign Exchange and Foreign Trade Law (the “Forex Law”).

2. Having said that, except for the cases described in Paragraph 3 immediately below, no prior notice is required under the Forex Law. Only a very simple *post facto* report must be filed by the parent company within 15 days of the incorporation, if the Forex Law requires the filing.
3. In certain sensitive business areas such as mining, petroleum, leather goods, fishing, forestry, agriculture, aircraft, weaponry, atomic energy and space development, a prior notice must be filed and a certain waiting period (usually 30 days) must be observed (a *post facto* report must also be filed within 30 days of the given acquisition under the Foreign Exchange and Foreign Trade Act).

1.4 Is there any other relevant legislation for mergers in particular sectors?

Mergers between the financial institutions (e.g., the banks and the insurance companies) are subject to the regulation under the applicable business affairs laws (e.g., the Banking Law and the Insurance Business Affairs Law).

Moreover, acquisition of shares in the broadcasting companies, major airlines and Nippon Telephone & Telegraph companies by foreign entities are restricted under the applicable laws.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught - in particular, how is the concept of “control” defined?

1. General concentration of economic power
Article 9 of the Antimonopoly Law prohibits the incorporation of a company which may cause excessive concentration of economic power, and Article 11 of the Antimonopoly Law prohibits a bank or an insurance company from acquiring more than 5% or 10%, respectively, of the voting rights in a Japanese company unless otherwise provided under the Antimonopoly Law or approved by the JFTC prior to the given acquisition.

2. Specific concentration of economic power

The following specific concentrations which may substantially restrain competition in a particular field of trade are prohibited under the Antimonopoly Law:

- Acquisition of stock (i.e., voting rights) (Article 10).
- Interlocking directorates (Article 13).
- Merger (amalgamation) (Article 15).
- Acquisition of the entire or an important part of

business/assets for business, etc. (Article 16).

- Company split resulting in the concentration (Article 15-2).
- Stock transfer involving business combination (Article 15-3).(*)
- (*) The JFTC made a public announcement that the bill of amendment to the Antimonopoly Law, which was passed in the National Diet in June 3, 2009, will be effective in January, 2010 (the “2010 Amendment”). Article 15-3 will be added by the 2010 Amendment.

2.2 Can the acquisition of a minority shareholding amount to a “merger”?

According to the Merger Guidelines, the JFTC deems the “combination” of the party companies to be created through the acquisition of shares (i.e. voting rights) in the following cases, for the purpose of the substantive review:

- (a) when the voting right ratio held by the acquiring company in the acquired company exceeds 50%;
- (b) when the voting right ratio held by the acquiring company in the acquired company exceeds 25%, and the acquiring company stands alone as the leading holder of voting rights; or
- (c) when the voting right ratio held by the acquiring company, in the acquired company, exceeds 10%, the acquiring company is ranked among the top three voting right holders, and a combination between the party companies is formed, maintained or strengthened through the given acquisition, which is determined by taking into consideration, among other things, (i) the extent of the ratio of voting rights to be held by the acquiring company, and (ii) such as the rank as a voting right holder, differences in and distribution of the voting right ratios held among the holders.

The above thresholds for the review of “combination” will be the same under the 2010 Amendment.

For the filing requirements, 20% is a minimum threshold for the voting right ratio (see question 2.3) under the 2010 Amendment. Therefore, minority shareholders may not be exempt from the filing requirements solely because they are a minority voting right holder.

2.3 Are joint ventures subject to merger control?

A joint venture project involving an incorporation of a company (an acquisition of voting rights), the acquisition of business/assets for business, a company split or stock transfer involving a business combination, both of which are set out in question 2.1 above, is subject to the merger regulation, and the JFTC will review the incorporation of a company jointly owned by the parent companies (e.g., competitors) under the Merger Guidelines, taking account of the ancillary agreements.

A joint venture without involving a specific concentration (e.g., an alliance, a joint venture or an agreement) among competitors is subject to the prohibition under the Latter Part of Article 3 of the Antimonopoly Law as an unreasonable restraint of trade.

2.4 What are the jurisdictional thresholds for application of merger control?

A. Substantive law

There are no *de minimis* rules (specific thresholds) for the application of the substantive law with regard to the prohibition of the specific concentration under the Antimonopoly Law.

Note that the substantive law is applicable to a specific

concentration regardless of whether the filing is required under the Antimonopoly Law. Namely, if no filing is required under the Antimonopoly Law because the thresholds are not met, it is still possible that the specific concentration that may substantially restrain the competition in the relevant market in Japan is prohibited under the Antimonopoly Law.

B. Filing requirements

1. The filing is required for the general concentration (see question 2.1) and specific concentration under the Antimonopoly Law if the thresholds therefor under the Antimonopoly Law are met.
2. Certain companies with the amount of total assets prescribed under the Antimonopoly Law the level of which may cause the excessive concentration are required to file a report regarding its own business and that of its subsidiaries.
3. The acquisition of voting rights (Article 10), mergers (Article 15), acquisitions of a business or assets for business (Article 16), company splits involving a business combination (Article 15-2) and stock transfer involving a business combination (Article 15-3) under the 2010 Amendment are also subject to the filing requirements.
 - (1) The filing requirements for such specific concentration are determined for each transaction involved. See question 2.8 below.
 - (2) The filing requirements and thresholds thereof provided under the Antimonopoly Law are different depending on the types of transactions involved (e.g., a merger, acquisition of the whole or a part of the business/assets). Moreover, although the thresholds of the filing requirements for transactions between domestic companies and those for foreign companies are different under the Antimonopoly Law before the 2010 Amendment, the filing requirements will be the same for both Japanese companies and foreign companies.
 - (3) While it is difficult to provide a short description of all of the filing requirements, in general, the following is the rule of thumb:
 - (a) Merger, acquisition of business/assets for business and company split involving business combination is subject to the prior filing:

In general, the thresholds of 20 billion yen (214.7 million U.S. dollars and 149.9 million Euros) and 5 billion yen (53.7 million U.S. dollars and 37.5 million Euros) using the “domestic turnover” of a “corporate group”.

For example, a filing is required for a merger between the firms, for example, if the “domestic turnover” of the “corporate group” of one party exceeds 20 billion yen and that of the other party exceeds 5 billion yen. The “corporate group” constitutes the party company, its directly/indirectly owned subsidiaries, the ultimate parent of the party company and its directly/indirectly owned subsidiaries. Please note that the “parent” and “subsidiary” will be defined using the concept of “control of finance and business” of another company, and “control of finance and business” will be determined taking account of certain factors such as the voting right ratio, number of directors, agreement with respect thereto, ratio of loan to be provided under the JFTC rules. The details of the calculation method of the “domestic turnover” will also be set forth in the JFTC’s rules.
 - (b) Further, a requirement of voting right ratio is determined with regard to the acquisition of voting rights. Namely:
 - (i) The acquiring company must file a prior notice with the JFTC 30 days before the acquisition, if:

(I)(A) the amount of the domestic turnover of the acquiring company's corporate group exceeds 20 billion yen (214.7 million U.S. dollars and 149.9 million Euros);

(II) the amount of the domestic turnover of the target company's corporate group exceeds 5 billion yen (53.7 million U.S. dollars and 37.5 million Euros); and

(III) the ratio of voting rights of the acquiring company's corporate group in the target company exceeds 20% or 50%, respectively, through the contemplated stock acquisition.

- (4) According to the 2010 Amendment to the Antimonopoly Law, as discussed above, a prior filing was introduced for the acquisition of shares (voting rights), thresholds for filing requirements will be changed and the same thresholds will be applied to both Japanese and non-Japanese corporations. Further, transactions within a "corporate group" are exempted from filing.

2.5 Does merger control apply in the absence of a substantive overlap?

1. The vertical merger and conglomerate merger, respectively, are also subject to scrutiny under the Antimonopoly Law.
2. If the increase in the market share of the party companies due to the given merger is not significant, it does not necessarily mean the given merger is not problematic under the Antimonopoly Law.

2.6 In what circumstances is it likely that transactions between parties outside Japan ("foreign to foreign" transactions) would be caught by your merger control legislation?

1. The JFTC interprets that the mergers outside Japan are subject to the Antimonopoly Law so long as they may have an impact on the competition in the relevant market in Japan.
2. The filing requirements are applicable to the concentration outside Japan. With regard to the filing requirements for foreign mergers, please see question 2.4 above.

2.7 Please describe any mechanisms whereby the operation of the jurisdictional thresholds may be overridden by other provisions.

No such jurisdictional thresholds exist for either the application of the substantive law or filing requirements under the Antimonopoly Law.

2.8 Where a merger takes place in stages, what principles are applied in order to identify whether the various stages constitute a single transaction or a series of transactions?

The filing requirements for such specific concentration are determined for each transaction involved. Namely, if the parent companies established a newco, and one of the parents transfers its business to the newco, the filing requirements for (a) acquisition by the respective parents, and (b) the acquisition of business by the newco, must be determined respectively. Such business integration outside Japan may also trigger the filing requirements under the Antimonopoly Law.

3 Notification and its Impact on the Transaction Timetable

3.1 Where the jurisdictional thresholds are met, is notification compulsory and is there a deadline for notification?

1. If the thresholds are met, the filing is compulsory.
2. The closing of a transaction involving a specific concentration is subject to a 30-day waiting period, which may be extended or shortened at the JFTC's discretion to the extent provided under the Antimonopoly Law. See question 3.6. The waiting period is, in principle, shortened with regard to cases to which the Special M&A Guidelines apply.

3.2 Please describe any exceptions where, even though the jurisdictional thresholds are met, clearance is not required.

No such exception exists so long as the filing is required (see question 2.4 B. 3 (4) with regard to the exception of the filing requirements). No explicit clearance is required if the waiting period has expired without the JFTC's objection.

3.3 Where a merger technically requires notification and clearance, what are the risks of not filing? Are there any formal sanctions?

1. A failure to file or the making of any misrepresentations in a required prior notification or *post facto* report is subject to a fine of up to 2 million yen.
2. The JFTC may file an action to void the merger, a company split involving the business combination or stock transfer involving business combination closed without filing under the Antimonopoly Law.

3.4 Is it possible to carve out local completion of a merger to avoid delaying global completion?

In theory, it is possible if the portion which may affect the competition in Japan is excluded from the transaction outside Japan.

3.5 At what stage in the transaction timetable can the notification be filed?

A notification may be filed if all of the necessary information has become available and the party companies have decided to proceed with the given concentration. However, if the notification is filed at too early a stage, e.g., if the market information may change at the time of the closing, the JFTC is likely to request supplementation of the information or extend the date of the filing, as a matter of practice.

3.6 What is the timeframe for scrutiny of the merger by the merger authority? What are the main stages in the regulatory process? Can the timeframe be suspended by the authority?

During the waiting period, in principle 30 days, the JFTC may issue a cease and desist order or initiate hearing proceedings with a view to ordering necessary measures, such as divestiture. This period may be shortened at the JFTC's discretion. If the JFTC requires the submission of any supplemental materials during the waiting period, a separate examination period will apply of up to (a) 120

days after the receipt of the prior notification by the JFTC or (b) 90 days after the completion of the submission of the supplemental materials, whichever is the longest. Although the JFTC may not extend the waiting period beyond the time period prescribed under the Antimonopoly Law, the JFTC may determine whether submission of the necessary documents are completed.

3.7 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks in completing before clearance is received?

The mergers (Article 15), acquisitions of a business or assets for business (Article 16) company splits involving a business combination (Article 15-2), and stock transfer involving business combination (Article 15-3) may not be consummated before the expiration of the waiting period. The failure of the filing is subject to the criminal penalty (see question 3.3). See question 4.1 1.

3.8 Where notification is required, is there a prescribed format?

The JFTC has prescribed the format for the notification depending on the types of transactions. The party company which is required to file must complete the notification in the prescribed format with the necessary information and must attach certain prescribed documents (e.g., Articles of Incorporation, a copy of agreements, minutes of the meeting of appropriate corporate organisations, the business/financial report.).

3.9 Is there a short form or accelerated procedure for any types of mergers?

No short form or accelerated procedure exist.

3.10 Who is responsible for making the notification and are there any filing fees?

1. Party to file:
 - (1) Mergers, company splits involving a business combination and stock transfer involving business combination - all of the party companies.
 - (2) Acquisitions of a business or assets for business, acquisition of and stock transfer involving business combination (voting rights) - acquiring party.
2. No filing fee is required.

4 Substantive Assessment of the Merger and Outcome of the Process

4.1 What is the substantive test against which a merger will be assessed?

1. Antimonopoly Law

The concentration that may substantially restrain competition in a particular field of trade (i.e., the relevant market) in Japan or that involves unfair trade practice is prohibited under the Antimonopoly Law. Party companies subject to the merger regulation are both: (a) a domestic company; and (b) a foreign company (if mergers outside Japan would have anticompetitive effects in Japan).

If such a transaction violates the substantive law, the JFTC is authorised to issue a cease and desist order to take certain measures

necessary for eliminating that effect including issuing, e.g., a divestiture order, an order to split a company into two or more entities or to transfer shares in the acquired company. There are no recent cases, however, in which the sanctions are actually imposed. It is considered that many companies conduct prior consultation with the JFTC seeking clearance if they have antitrust concerns.

2. M&A Guidelines

- (1) The Merger Guidelines primarily cover: (a) the scope of the merger subject to the review by the JFTC, which is the concentration that form, maintain or strengthen the “joint relationship” between party companies and the criteria therefor (e.g., a stock acquisition through which the voting rights ratio achieves a certain ratio/rank) and that is not subject to the review of the JFTC (e.g., certain types of the affiliates which were already controlled by the parent company or the common parent company); (b) the approach to the definition of the relevant market; (c) the assessment of the impact on the competition in the relevant market; and (d) remedies. The Merger Guidelines take the approach for the definition of the relevant market (both product market and geographic market) and analysis which is similar to (but not the same as) the merger guidelines and practice of other jurisdictions.
- (2) The Merger Guidelines provide certain safe harbour for the horizontal concentration, including:
 - (i) the post merger Herfindahl-Hirschmann Index (“HHI”) is 1,500 or less; or
 - (ii) the post merger HHI is more than 1,500 but 2,500 or less, and the increased HHI is 250 or less; or
 - (iii) the post merger HHI is more than 2,500, and the increased HHI is 150 or less.

Moreover, the Merger Guidelines provided that the JFTC would view the concentration to be unlikely to restrict the competition in the relevant market if the *post facto* HHI is 2,500 or less and the combined market share is 35% or less based on the precedents reviewed by the JFTC.

The JFTC will review the proposed concentration which does not fall under the safe harbour set out above, from the perspective of “possible unilateral activities,” taking account of the factors such as the status of the party companies and competitors (i.e., market shares, ranking, and the differences in the market shares between the party companies and their competitors before the merger and after the merger), the existing competition between the party companies, competitive pressures from competitors, any excess in capacity for supply and substitutability, and the degree of product differentiation. Other factors such as pressure from imports, possible entry into the market, competitive pressures from closely related markets (such as competitive products and a nearby geographic market), the total capability of business (such as market power in the procurement of materials, financial status and advertisement), financial difficulties (such as a failing company) are also taken into account.

The Merger Guidelines provide that the JFTC will also examine the proposed concentration, in terms of coordinated effects, having regard to various factors (i.e., the number of market participants, existing competition between the party companies, any excess in supply capacity, the terms and conditions of the transactions and/or business practice in the market, competitive pressures from imports, potential entrants and (vertically) related markets).

- (3) The Merger Guidelines set out the safe harbours for both vertical and conglomerate mergers as follows:
 - (i) where the combined market share of the parties in any of the relevant markets is 10% or less; or
 - (ii) where (x) the combined market share of the parties in any of the relevant markets is 25% or less and (y) the post merger HHI is 2,500 or less.

Moreover, the Merger Guidelines provided that the JFTC would view the concentration is not likely to restrict the competition in the relevant market if the post merger HHI is 2,500 or less and the combined market share is 35% or less based on the precedents reviewed by the JFTC.

4.2 What is the scope for the involvement of third parties (or complainants) in the regulatory scrutiny process?

1. Any person may file a complaint with the JFTC. If the complaint is filed with the specific facts in writing, the JFTC is required to investigate the case at least to a certain extent, and to notify the person who filed the complaint of the decision by the JFTC based on the results thereof.
2. The party companies may conduct a prior consultation with the JFTC as to whether the proposed transaction would raise any antitrust concerns under the Antimonopoly Law and the JFTC has published its policy regarding the prior consultation under the prior consultation system for business merger, effective as of December 11, 2002 and amended as of March 28, 2007.

If the party companies conduct the prior consultation and the JFTC concludes that the second review is required, the JFTC seeks public comments and a third person may file comments on the particular transaction.

(Note) Prior consultation system

Initial review - Review through written documents filed by the party companies

The JFTC determines and inform party companies that have requested a prior consultation, in writing, within 30 days in principle, after all of the necessary materials including additional information and materials submitted in response to the JFTC's request are provided to the JFTC by the party companies, that (a) a particular transaction is not problematic under the Antimonopoly Law or (b) second review (further detailed review) by the JFTC is required.

Second review - Detailed review through the investigation by the JFTC

If the JFTC determines that a more detailed review is necessary, the proposed transaction must, in principle, be made public. If the party companies do not agree on the public announcement for the second review, the given specific concentration may not be subject to the prior consultation by the JFTC.

Any person may submit its opinion to the JFTC in respect of any specific concentration that requires detailed review by the JFTC.

The JFTC will inform the party companies of the results of the second review within 90 days, in principle, and also make a public announcement of the same.

4.3 What information gathering powers does the regulator enjoy in relation to the scrutiny of a merger?

1. The JFTC is authorised to conduct investigation regarding the violation of the Antimonopoly Law; provided, however, to our knowledge there has been no such investigation published by the JFTC as a case of violation in recent years and the JFTC usually request the information on a voluntarily basis with regard to the merger cases.
2. The making of a misrepresentation (or misrepresentations) in a required prior notification is subject to a fine of up to 2 million yen. Such fine is imposed on the individual who is responsible for the filing and/or on the company which failed to make the filing or made the misrepresentation(s).

4.4 During the regulatory process, what provision is there for the protection of commercially sensitive information?

1. The JFTC officials are required under the Antimonopoly Law not to disclose confidential information such as the trade secrets, and the failure to meet such obligation is subject to imprisonment for up to one year or a fine up to 1 million yen or less under the 2010 Amendment.
2. The JFTC will not make a notification filed by the party companies public. Through the second review process of the prior consultation, the JFTC makes public announcements on its decision, including the outline of the transaction and the products and market conditions.

5 The End of the Process: Remedies, Appeals and Enforcement

5.1 How does the regulatory process end?

1. If the party companies conduct prior consultation and the JFTC approves, the parties may consummate the transaction with the applicable notification in accordance with the Antimonopoly Law and the expiration of the waiting period.
2. If a notification is filed without prior consultation, see question 3.6 above.

5.2 Where competition problems are identified, is it possible to negotiate "remedies" which are acceptable to the parties?

Yes. The Merger Guidelines provide the remedies such as a transfer of the business, dissolution of the relationship with the affiliates, and the measures to accelerate the imports or new entries into the relevant market. However, if the proposed remedy is not acceptable to the JFTC, the JFTC will not approve the proposed concentration.

5.3 At what stage in the process can the negotiation of remedies be commenced?

If and when the JFTC notify the parties of the antitrust concern raised by the given project. It is usually during the process of the review by the JFTC of the notification or the prior consultation.

5.4 If a divestment remedy is required, does the merger authority have a standard approach to the terms and conditions to be applied to the divestment?

The Merger Guidelines provide that the remedies should be the one which requires the changes to the structure of the industries in principle, and to the extent appropriate the remedies regarding behaviour of the party companies may be considered. The remedies committed by the party companies are made public by the JFTC. The remedies in a particular case depends on the antitrust issues found in the given case, and may well depend on the facts and issues in the given case.

5.5 Can the parties complete the merger before the remedies have been complied with?

The Merger Guidelines provide that, in principle, the remedies should be implemented before the closing. However, the Merger Guidelines also provide that in exceptional cases the party companies may close the transaction before the implementation of the remedies, if the details thereof are approved and the deadlines are explicitly determined.

5.6 How are any negotiated remedies enforced?

If such the commitment for remedies is not implemented, the JFTC may initiate procedures to issue a cease and desist order within one year from the deadline of implementation of such remedies. If an approval was granted by the JFTC through the prior consultation based thereon, the JFTC may revoke its approval granted through the prior consultation on the basis that the false statement by the party companies, and may initiate the investigation as a violation of the Antimonopoly Law.

5.7 Will a clearance decision cover ancillary restrictions?

If the party companies explained such ancillary restriction to the JFTC in the notification or through the process of the prior consultation, it is considered that the JFTC reviewed and approved the specific concentration, including such ancillary restriction.

5.8 Can a decision on merger clearance be appealed?

1. Decision by the JFTC through the prior consultation may not be appealed.
2. The cease and desist order issued by the JFTC, including that regarding the merger case, may be appealed.

5.9 Is there a time limit for enforcement of merger control legislation?

1. For the waiting period at the time of filing for a merger, etc., see question 3.6.
2. For the decision through the prior consultation, see question 4.2.

6 Miscellaneous

6.1 To what extent does the merger authority in Japan liaise with those in other jurisdictions?

Through, and to the extent permitted under, the Cooperation Agreements with the United States, Canada and the EC. The JFTC is a member of the ICN.

6.2 Please identify the date as at which your answers are up to date.

September, 2009. However, this draft is prepared based on the 2010 Amendment.



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