International Comparative Legal Guides

Merger Control 2021

A practical cross-border insight into merger control issues

17th Edition

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1 Relevant Authorities and Legislation

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

The Japan Fair Trade Commission (the "JFTC") is the sole authority that reviews the merger control filing. Other authorities are generally not involved in the process.

1.2 What is the merger legislation?

The Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Act No. 54 of 1947, as amended) (the "Antimonopoly Act") prohibits those mergers that may result in substantial restraint of competition in any particular field of trade and provides filing requirements. The Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (the "Merger Guidelines") published by the JFTC describe an analytical framework used by the JFTC in its merger control review. In addition, the Policies Concerning Review of Business Combination published by the JFTC set forth the JFTC's merger review procedures.

The Antimonopoly Act was amended to introduce a form of voluntary resolution, which became effective on December 30, 2018. The JFTC can now send a notice to the merger parties informing them that they will be allowed to submit proposed commitments, if the JFTC has a preliminary belief that a proposed merger may result in substantial restraint of competition in any particular field of trade. The notified parties may submit proposed commitments within 60 days after receipt of this notice. If the JFTC finds that (i) the proposed commitments are sufficient for eliminating the JFTC's concerns, and (ii) they are expected to be implemented, the JFTC shall issue a conditional clearance decision.

1.3 Is there any other relevant legislation for foreign mergers?

The Foreign Exchange and Foreign Trade Act is applicable to foreign investment into Japan, and certain transactions are subject to mandatory pre-closing or post-closing filing requirements under this Act. Whether pre-closing filing is required for a given transaction depends on the business operated by the target company.

In addition, there are some sector-specific laws and regulations that are relevant to shareholdings in Japanese companies by foreign investors. For example, acquisitions of shares in broadcasting companies, airlines and Nippon Telegraph and Telephone Corporation, which is a holding company of a telephone carrier, are regulated under the relevant sector-specific laws.

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

Mergers between financial institutions are subject to review by the Financial Services Agency under the relevant laws – such as the Banking Act and Insurance Business Act. The special timed legislation provides that the merger control does not apply to mergers between local regional banks or local bus services to protect the interest of general consumers through maintaining the stable supply of essential services to the local community.

1.5 Is there any other relevant legislation for mergers which might not be in the national interest?

The Foreign Exchange and Foreign Trade Act is applicable to foreign investment into Japan, and certain transactions are subject to mandatory pre-closing or post-closing filing requirements under this Act. Whether pre-closing filing is required for a given transaction depends on the business operated by the target company. After the filing of the foreign investment filing, the relevant ministries may ask questions about the transaction to determine whether the transaction may harm the national interest, such as national security. If the relevant ministry identifies a national interest concern, it may prohibit the transaction or require remedy measures to be taken to resolve such national interest concerns.

2 Transactions Caught by Merger Control Legislation

2.1 Which types of transaction are caught – in particular, what constitutes a "merger" and how is the concept of "control" defined?

The following transactions are prohibited if they result in substantial restraint of competition: share acquisitions; joint share transfers (*kyodo-kabushiki-iten*); appointment of interlocking directorships; mergers; company splits (*kaisha-bunkatsu*); transfers of all or a significant part of the business; transfers of all or a significant part of the business fixed assets; leases of all or a significant part of the business; delegations of management regarding all or a significant part of the business; and contractual arrangements to share business profits and losses.

Among the types of transactions listed above, share acquisitions, joint share transfers, mergers, company splits, transfers of all or a significant part of the business and transfers of all or

a significant part of the business fixed assets are subject to pre-notification requirements if thresholds are met. There are no filing requirements for other types of transactions, such as the appointment of interlocking directorships. The Antimonopoly Act takes a formalistic approach rather than using the concept of "control" to determine whether a transaction triggers a notification requirement.

The concept of "control" is used to determine the group entities of which turnovers should be included for the purpose of the calculation of worldwide and Japanese turnovers. For example, the acquiring company group consists of companies that are controlled by, controlling, and under common control with the acquiring company. If a company, directly or indirectly, holds a majority of the voting rights in another company, the company is deemed to have control over the other company. In addition, if a company, directly or indirectly, holds between 40% and 50% of the voting rights in another company, various factors, such as board representation and loans, will be taken into account in determining whether the company has control over the other company.

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

If other thresholds are met, pre-notification is required for share acquisitions if the voting rights ratio held by an acquiring company group in a target company exceeds either 20% or 50% as a result of the share acquisition.

2.3 Are joint ventures subject to merger control?

There is no concept of "joint control" under the Antimonopoly Act. In addition, there are no special rules for joint ventures, and the jurisdictional thresholds explained below apply to the formation of joint ventures. For example, if the joint venture is formed through the acquisition of 49% of the shares by one of the joint venture partners in the existing wholly owned subsidiary of the other joint venture partner, the company acquiring the shares is required to notify if other thresholds are met, as it exceeds the 20% voting rights threshold.

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

Different jurisdictional thresholds apply depending on the transaction structure categories, which are defined based on the Japanese Companies Act. As a result, in some cases, it is not clear which category a given foreign transaction would fall under. Moreover, even for a transaction that could be understood as an acquisition of a business as a whole, the JFTC takes a formalistic approach by breaking down the transaction by structure to determine the transaction categories and the number of notifications required. For example, a global transaction could be recognised as a combination of multiple share acquisitions and business transfers.

- Share acquisition
  Pre-notification is required for a share acquisition if all of the following thresholds are met:
  (a) as a result of the share acquisition, the voting rights ratio held by an acquiring company group in a target company exceeds either 20% or 50%;
  (b) the total Japanese turnover generated by the acquiring company group for the last fiscal year exceeds JPY 20 billion (approximately USD 192 million or EUR 163 million); and
  (c) the total Japanese turnover generated by the target company and its subsidiaries for the last fiscal year exceeds JPY 5 billion (approximately USD 48 million or EUR 40 million).
- Joint share transfers
  The joint share transfer is a type of transaction under the Japanese Companies Act, in which two or more companies establish a new common holding company. Pre-notification is required for a joint share transfer if all of the following thresholds are met:
  (a) the total Japanese turnover generated for the last fiscal year by one of the company groups participating in the joint share transfer exceeds JPY 20 billion (approximately USD 192 million or EUR 163 million); and
  (b) the total Japanese turnover generated for the last fiscal year by one of the other company groups participating in the joint share transfer exceeds JPY 5 billion (approximately USD 48 million or EUR 40 million).
- Merger
  Pre-notification is required for a merger provided the following thresholds are met:
  (a) the total Japanese turnover generated for the last fiscal year by one of the company groups participating in the merger exceeds JPY 20 billion (approximately USD 192 million or EUR 163 million); and
  (b) the total Japanese turnover generated for the last fiscal year by one of the other company groups participating in the merger exceeds JPY 5 billion (approximately USD 48 million or EUR 40 million).
- Incorporation-type company split
  Pre-notification is required for an incorporation-type company split if any of the following thresholds are met:
  (a) the total Japanese turnover generated for the last fiscal year by one of the company groups splitting all of its business exceeds JPY 20 billion (approximately USD 192 million or EUR 163 million); and the total Japanese turnover generated for the last fiscal year by the other company group splitting all of its business exceeds JPY 5 billion (approximately USD 48 million or EUR 40 million);
  (b) the total Japanese turnover generated for the last fiscal year by one of the company groups splitting all of its business exceeds JPY 20 billion (approximately USD 192 million or EUR 163 million); and the Japanese turnover generated from the corresponding business for the last fiscal year exceeds JPY 3 billion (approximately USD 28 million or EUR 25 million) if the other company group splits a substantial part of its business;
  (c) the total Japanese turnover generated for the latest fiscal year by one of the company groups splitting all of its business exceeds JPY 5 billion (approximately USD 48 million or EUR 40 million); and the Japanese turnover generated from the corresponding business for the last fiscal year exceeds JPY 10 billion (approximately USD 96 million or EUR 81 million) if the other company group splits a substantial part of its business; or
  (d) the Japanese turnover generated from the corresponding business for the last fiscal year exceeds JPY 10 billion (approximately USD 96 million or EUR 81 million) if one of the company groups splits a substantial part of its business; and the Japanese turnover generated from the corresponding business for the last fiscal year exceeds JPY 3 billion (approximately USD 28 million or EUR 25 million) if the other company group splits all or a part of its business.

- Absorption-type company split
  Pre-notification is required for an absorption-type company split if any of the following thresholds are met:
  (a) the total Japanese turnover generated for the last fiscal year by the company group splitting all of its business exceeds JPY 20 billion (approximately USD 192 million or EUR 163 million); and the total Japanese turnover generated for the last fiscal year by the absorbing company group exceeds JPY 5 billion (approximately USD 48 million or EUR 40 million);
  (b) the total Japanese turnover generated for the last fiscal year by the company group splitting all of its business exceeds JPY 5 billion (approximately USD 48 million or EUR 40 million); and the total Japanese turnover generated for the last fiscal year by the absorbing company group exceeds JPY 20 billion (approximately USD 192 million or EUR 163 million);
  (c) the Japanese turnover generated from the corresponding business for the last fiscal year exceeds JPY 10 billion (approximately USD 96 million or EUR 81 million) if the company splits a substantial part of its business; and the total Japanese turnover generated for the last fiscal year by the absorbing company group exceeds JPY 5 billion (approximately USD 48 million or EUR 40 million); or
  (d) the Japanese turnover generated from the corresponding business for the last fiscal year exceeds JPY 3 billion (approximately USD 28 million or EUR 25 million) if the group splits a substantial part of its business; and the total Japanese turnover generated for the last fiscal year by the absorbing company group exceeds JPY 20 billion (approximately USD 192 million or EUR 163 million).
- Business transfer/business asset transfer
  Pre-notification is required for a business transfer/business asset transfer if the following thresholds are met:
  (a) the total Japanese turnover generated by the transferee's company group for the last fiscal year was more than JPY 20 billion (approximately USD 192 million or EUR 163 million); and
  (b) the transaction involves any of the following:
    - acquiring all of the business of a company that generated total Japanese sales of more than JPY 3 billion (approximately USD 28 million or EUR 25 million) for the last fiscal year;
    - acquiring a substantial part of the business of a company, and the part of the business to be transferred generated a Japanese turnover for the last fiscal year of more than JPY 3 billion (approximately USD 28 million or EUR 25 million); or
    - acquiring all or a substantial part of the business assets of a company, and the business assets to be transferred generated a Japanese turnover for the last fiscal year of more than JPY 3 billion (approximately USD 28 million or EUR 25 million).
- Value of the transaction test
  The JFTC has revised the Policies Concerning Procedures of Review of Business Combination. Under the new policy, the JFTC encourages the parties to consult with the JFTC even if the transaction does not meet the above turnover thresholds if the value of the transaction exceeds JPY 40 billion (approximately USD 383 million or EUR 326 million) and falls under any of the following:
  (1) the target company has a business base or research and development facility in Japan;
  (2) the target company is conducting marketing activities *vis-à-vis* Japanese customers, including setting up a Japanese language webpage or preparing Japanese language leaflets; or
  (3) the target company generated Japanese sales of more than JPY 100 million (approximately USD 0.95 million or EUR 0.81 million).
- Special jurisdictional threshold applicable to the finance industry
  The Antimonopoly Act provides special rules applicable to companies carrying out banking business or insurance business. Companies carrying out banking business are prohibited from acquiring more than 5% of the voting rights in another Japanese company, and companies carrying out insurance business are prohibited from acquiring more than 10% of the voting rights in another Japanese company, unless otherwise approved by the JFTC or if it falls under certain exceptions set forth in the Antimonopoly Act.
- Calculation of jurisdictional thresholds
  When calculating Japanese turnovers, in principle both direct and indirect sales in and into Japan should be included; however, the inclusion of indirect sales is required only if the party is aware of such indirect sales and the amount thereof. Intra-group captive sales should be excluded from the calculation of Japanese turnovers. The turnover in a foreign currency should be converted to Japanese yen by using the exchange rate used to prepare the financial statements. If these rates are not available, the publicly available average exchange rate for the given fiscal period should be used.

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

Merger control filing is required even in cases where there are no competition concerns.

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

The same thresholds apply to foreign-to-foreign transactions, and foreign-to-foreign transactions must be notified if the thresholds are met. There is no local effect test, and a local presence is not required to trigger the notification requirement. The filing will not be required if a target and its subsidiaries do not have any sales in or into Japan.

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

If the transaction is within the same company group, the parties are exempted from the notification requirement.

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?

Article 17 of the Antimonopoly Act prohibits the circumvention of the pre-notification requirement; however, there is no clear rule or test to identify whether the various stages constitute a single transaction or a series of transactions.

It is worth noting, however, that the JFTC issued a warning to Canon that a warehousing deal structure – under which shares in the target company (Toshiba Medical Systems Corporation) were first acquired by an interim buyer but were planned to be

acquired by Canon after receipt of the necessary antitrust clearances – may lead to an infringement of the Antimonopoly Act. The JFTC did not find any violation in the above-mentioned case, but it shows the JFTC's growing interest in looking into "gun-jumping". The transaction was subject to a fine in the U.S., the EU and China.

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?

Notification is compulsory if the thresholds are met. There is no deadline for notification, provided that the transaction is not implemented before the lapse of the 30-day waiting period.

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

If the transaction is within the same company group, the parties are exempted from the notification requirement.

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

The JFTC may impose a criminal fine of up to JPY 2 million if the parties fail to notify, or if they close the transaction in breach of the waiting period. To our knowledge, however, there has been no case in which such a penalty was imposed. Parties that fail to notify are often requested to submit a letter with a brief explanatory note setting out the reason for such delay and the measures to be taken to avoid recurrence.

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

Theoretically, it is possible to agree on ring-fencing or a hold-separate arrangement with the JFTC; however, to our knowledge, there has been no successful attempt.

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

There is no clear rule as to the stage in the transaction timetable at which the JFTC will accept the notification. However, the outline of the transaction structure must be clear and the acquiring entity must be established and identified, as the filing form that needs to be used is different depending on the transaction category and the filing must be made by each acquiring company even if they belong to the same company group. Other than the above, in general, the JFTC will accept the notification if the parties can show a good faith intention to close the transaction. A copy of the definitive agreement is required to be submitted to the JFTC together with the notification as a supplemental document. Parties may, however, file on the basis of a less formal agreement such as a letter of intent or memorandum of understanding. In some cases, the JFTC has accepted the filing with even fewer formal documents such as a letter from the authorised representative of the party setting forth a good faith intention to close the transaction.

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?

Once the notification is duly accepted by the JFTC, the JFTC will issue an acceptance notice setting forth the case number and the date of the acceptance of the notification. The 30-day waiting period starts from the date of the acceptance of the notification (Phase I). Upon request from the parties, the JFTC may, at its sole discretion, shorten the 30-day waiting period and grant a clearance decision. The JFTC has been willing to shorten the 30-day waiting period if it is clear that the transactions would not raise competition concerns such as by meeting the safe harbour provided in the Merger Guidelines.

Within 30 days from the acceptance of the filing, the JFTC needs to decide whether to clear the transaction or move to Phase II. If the JFTC does not issue a report request during Phase I, the transaction is deemed to have been cleared.

If the JFTC issues a report request during Phase I requiring one or more parties to the transaction to submit additional materials or information, the review will move to Phase II. The JFTC will have until the later of 120 days from the date of the acceptance of the notification or 90 days from the date when the parties completed the response to the report request to decide whether to clear or prohibit the transaction. Once the case has moved to Phase II, the case is disclosed on the JFTC's website for third-party comments. In general, it takes at least two to three months to submit complete responses to the report request. However, parties often purposely do not complete responses to the report request to have more flexibility in terms of timing.

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?

Theoretically, parties are free to implement the transaction after the lapse of the 30-day waiting period, even if it is before the clearance. The court, upon petition by the JFTC, may order a temporary suspension to the implementation of transactions which it believes may result in substantial restraint of competition and finds an urgent need to suspend. In practice, parties choose not to implement transactions before clearance.

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

The notification must be filed in a specific form designated by the JFTC. The notification forms are available on the JFTC's website, and different forms should be used depending on the transaction categories. The notification must be in Japanese. The form does not require the notifying party to provide detailed explanations and economic analysis, such as market definitions, deal rationales and reasons the party believes that the transaction will not raise competition concerns. In practice, however, in relatively complex cases, parties voluntarily submit detailed explanations and economic analysis to provide additional information to assist the JFTC's review.

Parties can engage in pre-notification discussions with the JFTC. Pre-notification discussions are typically held in relatively

complex cases. In a complex case, there is a risk of the JFTC deciding to move to Phase II simply because it is not able to reach a conclusion within the 30-day Phase I review period, whereas by engaging in pre-notification discussions with the JFTC, the JFTC will have more time to review and reach a conclusion as there is no time constraint for pre-notification discussions.

3.9 Is there a short form or accelerated procedure for any types of mergers? Are there any informal ways in which the clearance timetable can be speeded up?

There is no short form or accelerated procedure. Upon request from the notifying party, the JFTC may shorten the 30-day waiting period. It is under the JFTC's sole discretion whether and when to shorten the waiting period.

3.10 Who is responsible for making the notification?

The parties responsible for filing depend on the transaction category under which the given transaction falls.

For share acquisitions, the party acquiring the shares is responsible for the filing.

For joint share transfers, the parties transferring the shares are responsible for the filing.

For mergers and company splits, all the parties participating in the merger or company split are responsible for the filing.

For business transfers and business asset transfers, the party acquiring the business or the business assets is responsible for the filing.

3.11 Are there any fees in relation to merger control?

Filing fees are not required.

3.12 What impact, if any, do rules governing a public offer for a listed business have on the merger control clearance process in such cases?

The rules governing a public offer for a listed company do not have any impact on the merger control clearance process. If the jurisdictional thresholds are met, the acquiring company is required to file the notification to the JFTC prior to the transfer of the ownership of the shares under relevant laws.

The public offer procedure may be affected depending on the content and the timing of the JFTC's decisions, such as mandatory extension of the offering period.

3.13 Will the notification be published?

The notification itself will not be made public. If the merger review proceeds to Phase II, the transaction will be made public on the JFTC's website for third parties' comments. Additionally, if the merger review is completed after Phase II, the detailed competition analysis conducted by the JFTC will be made public.

Moreover, the JFTC quarterly releases a list of the transactions that it cleared to the public. In addition, every June, the JFTC publicly releases a list of major merger cases with summaries of its competition assessment. The merger parties are given a chance to review a draft summary prepared by the JFTC to make sure that the summary does not contain any business secrets that the merger parties do not wish to be disclosed to the public.

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?

The Antimonopoly Act prohibits any mergers which substantially restrain competition in any particular field of trade. The Merger Guidelines provide the analytical framework and according to the Merger Guidelines, the JFTC will comprehensively consider the following factors in determining whether the effect of a merger may be substantial in restraining competition in a particular field of trade:

- the position of the parties and the competitive situation of the relevant markets, including market shares and rankings, past competition situations, the production capacity of competitors, and the degree of differentiation of relevant products/services;
- the competitive pressure from overseas competitors, including tariffs and non-tariff barriers such as the degree of institutional barriers, import-related transportation costs, distribution issues, and the degree of substitutability;
- the ease of market entry, including customer behaviours, the degree of institutional barriers to entry, and the degree of substitutability;
- the competitive pressure from neighbouring product markets and neighbouring geographical markets;
- the competitive pressure from users, including competition among users, ease of changing suppliers and market shrink;
- overall business capabilities, such as conglomerate effect and bundling effect;
- efficiencies; and
- the financial condition of the parties.

In addition to the data, materials and the results of the economic analysis provided by the parties on the above factors, the JFTC may conduct its own economic analysis as well as collect information and data through a market test (making inquiries to customers, suppliers and competitors and inviting the public to offer their opinions about the merger).

4.2 To what extent are efficiency considerations taken into account?

Efficiencies are one of the factors to be considered by the JFTC as mentioned in question 4.1 above.

The parties need to show that the efficiencies (i) are merger-specific, (ii) are viable, and (iii) may benefit consumers. However, mergers that create a state of monopoly or quasi-monopoly are hardly ever justified by their efficiency.

4.3 Are non-competition issues taken into account in assessing the merger?

The JFTC only takes into account competition issues in assessing the merger.

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

Third parties are able to inform the JFTC of their concern about any anti-competitive merger. In fact, there is a case in which

the JFTC has initiated an investigation of a foreign-to-foreign merger, which did not trigger a filing requirement under the Antimonopoly Act at that time, reportedly, because customers filed a serious complaint with the JFTC.

The JFTC in some cases contacts third parties as part of its review process by sending written questionnaires to third parties or having face-to-face interviews. The JFTC does not typically "market test" any remedies offered by the parties.

4.5 What information gathering powers (and sanctions) does the merger authority enjoy in relation to the scrutiny of a merger?

The JFTC can request information and documents on a voluntary basis at any time during the pre-notification stage and post-notification review stage. Moreover, if the JFTC decides to move to Phase II, the JFTC will issue a report request. The Phase II time limitation will not start counting until the parties fully comply with the JFTC's report request.

Failure to comply with the JFTC's request for information or report request may result in a significant delay or prohibition decision. In addition, the JFTC may impose a criminal fine of up to JPY 2 million if the notifying party is deemed to have supplied inaccurate information in the filing. To our knowledge, however, there have been no cases in which such a penalty was imposed.

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

It is basically not possible to withhold confidential commercial information from the JFTC altogether. There is no official process to ask the JFTC for special confidential treatment. That being said, the JFTC commissioners and officers owe a confidentiality obligation under the Antimonopoly Act and, in practice, the risk of confidential information leaked by the JFTC is low.

Please also see question 3.13 above.

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

5.1 How does the regulatory process end?

Please see question 3.6 above.

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

If the parties can show that the restraint of the competition in a particular field as a result of a merger will be eliminated by taking certain remedy measures, the conditional clearance (with the condition to implement the remedies) will be granted for such merger.

According to the Merger Guidelines, in principle, the parties should implement structural remedies that could basically restore the competition that will be lost as a result of the merger, while there could be cases where the behavioural remedies would be appropriate. However, in practice, there are many cases where the JFTC has accepted behavioural remedies as appropriate remedies even for horizontal cases.

Once the remedies are agreed by the parties and the JFTC, the parties are required to submit the amendment notification indicating the measures to be taken as remedies.

5.3 To what extent have remedies been imposed in foreign-to-foreign mergers?

Consistently each year there are a few or several cases where the JFTC grants clearance with conditions. Foreign-to-foreign transactions are not exceptional. For example, in the fiscal year of 2017, the JFTC cleared the transaction between Qualcomm River Holdings B.V. and NXP Semiconductors N.V., and the transaction between Broadcom Ltd. and Brocade Communications Systems Inc. with conditions proposed by the parties as remedies.

5.4 At what stage in the process can the negotiation of remedies be commenced? Please describe any relevant procedural steps and deadlines.

The parties can offer remedies and start discussions with the JFTC at any time during the review process. The discussion regarding the remedies usually takes place sometime after the parties are informed by the JFTC of its concerns that the proposed merger may give rise to anti-competitive effects, although some companies may propose a remedy plan from the beginning of the process.

The position taken by the JFTC is that the remedies should be proposed by the parties. That being said, the case team formally or informally convey their view as to whether they believe that the merger may result in substantial restraint of competition in a particular field of trade. The details of the remedies should be considered and proposed by the parties to the JFTC and the JFTC will respond, formally and/or informally, as to whether they believe such proposed remedies are sufficient to restore the competition that may be lost as a result of the merger.

5.5 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 JFTC has not provided any standard approach to the terms and conditions to be applied to the divestment. A divestment trustee and/or monitoring trustee are not necessarily required.

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

The Merger Guidelines provide that, in principle, remedies should be implemented before the closing of the transaction. However, the guidelines also provide that the parties may close the transaction before the implementation of remedies if implementing remedies before closing is not feasible, as long as the details have been approved and implementation deadlines have been set. If the remedies involve the divestiture of a certain business, the JFTC usually considers it more appropriate for the parties to identify the buyer before the closing of the transaction, and sometimes requires prior JFTC approval.

5.7 How are any negotiated remedies enforced?

If remedies are not fully complied with, the JFTC may petition the court requesting an order to temporarily stop the implementation of the business combination. Also, the JFTC may issue a cease and desist order against the business combination.

The JFTC generally requires regular reporting to monitor the parties' compliance with the terms of the remedies.

5.8 Will a clearance decision cover ancillary restrictions?

The JFTC's clearance decision will not cover ancillary restraints, and separate notifications are not required or possible for ancillary restraints. Accordingly, in theory, the JFTC can challenge any anti-competitive ancillary restraints even after the merger parties receive the JFTC's clearance decision. That said, if the merger parties inform the JFTC of the relevant ancillary restraints in the course of its merger review process, the JFTC will request that the merger parties amend or abandon any ancillary restraints that the JFTC believes are likely to fall foul of the Antimonopoly Act. In that sense, the merger parties will be able to obtain a certain level of comfort as a matter of practice if they make the JFTC aware of any relevant ancillary restraints and the JFTC does not raise any concerns about these restraints.

5.9 Can a decision on merger clearance be appealed?

The parties can appeal a decision to the Tokyo District Court. As far as the authors are aware, there is no precedent for parties appealing a decision by the JFTC. Therefore, there are no examples of successful appeals.

The Antimonopoly Act does not specify whether third parties can appeal a clearance decision. Under the Administrative Case Litigation Act, an action for the revocation of an original administrative decision may be filed only by a person who has "legal interest" to seek the revocation (i.e. legal standing). Given the lack of precedents, it is unclear whether and under what circumstances a court will rule that third parties have "legal interest" to appeal a clearance decision in relation to mergers. As far as the authors are aware, there have been no cases in which third parties have filed a lawsuit to challenge a clearance decision by the JFTC.

5.10 What is the time limit for any appeal?

The parties need to file an appeal within six months of the JFTC's prohibition decision.

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

For the notified transaction, please see question 3.6 above.

Technically, even if a transaction does not meet the threshold and is therefore not notifiable, the JFTC has the power to investigate the transaction. There is no statute of limitations or time limit on the JFTC's ability to investigate a transaction that was not notified.

6 Miscellaneous

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

The JFTC has been a steering committee member of the International Competition Network ("ICN") since ICN's establishment. The JFTC cooperates with foreign competition authorities not only on general policy matters but also on individual transactions on a regular basis. The JFTC typically requests permission from the merger parties to exchange information submitted by the parties with foreign counterparts.

6.2 What is the recent enforcement record of the merger control regime in your jurisdiction?

According to the latest annual report published by the JFTC, for the fiscal year ending on 31 March 2019, the JFTC received a total of 310 merger notifications, out of which 300 transactions were cleared within Phase I, and one case proceeded to Phase II. The merger parties withdrew their notifications for the remaining nine transactions and the JFTC has not blocked any of the notified transactions.

The authors are not aware of any recent enforcement action by the JFTC in terms of imposing fines for failing to notify. Please also see question 2.8 for the warning issued against Canon.

6.3 Are there any proposals for reform of the merger control regime in your jurisdiction?

The JFTC revised the Merger Guidelines, which became effective as of 17 December 2019. The amendments include, among others, how to consider two-sided or multi-sided market characteristics in defining the market relating to digital services, and how to consider features of digital services, such as a two-sided market, network effects and switching costs, in substantial competition analysis.

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

These answers are up to date as of 4 September 2020.

7 Is Merger Control Fit for Digital Services and Products?

7.1 Is there or has there been debate in your jurisdiction on the suitability of current merger control tools to address digital mergers?

The JFTC has set up a study group on data and competition policy. The study group discussed the issues of competition policy and the Antimonopoly Act relating to the accumulation and utilisation of data, including in the context of merger control review, and published a report in 2017. The Ministry of Economy, Trade and Industry has set up a similar study group, and the Council for Investments for the Future led by Prime Minister Shinzo Abe also discussed similar matters.

7.2 Have there been any changes to law, process or guidance in relation to digital mergers (or are any such changes being proposed or considered)?

The JFTC revised the Merger Guidelines, which became effective as of 17 December 2019. The amendments include, among others, how to consider two-sided or multi-sided market characteristics in defining the market relating to digital services, and how to consider features of digital services, such as a two-sided market, network effects and switching costs, in substantial competition analysis.

In addition, the JFTC revised the Policies Concerning Procedures of Review of Business Combination. Under the new policy, the JFTC encourages the parties to consult with the JFTC even if the transaction does not meet the turnover thresholds if the value of the transaction exceeds JPY 40 billion (approximately USD 383 million or EUR 326 million) and falls under any of the following:

(1) the target company has a business base or research and development facility in Japan;
(2) the target company is conducting marketing activities *vis-à-vis* Japanese customers, including setting up a Japanese language webpage or preparing Japanese language leaflets; or
(3) the target company generated Japanese sales of more than JPY 100 million (approximately USD 0.95 million or EUR 0.81 million).

7.3 Have there been any cases that have highlighted the difficulties of dealing with digital mergers, and how have these been handled?

The JFTC published a summary of a review regarding the merger between LINE Corporation, a provider of communication apps and other digital services, and Z Holdings, a parent company of Yahoo Japan. Even though the parties explained that they do not have any concrete plans to integrate, share or utilise the data after the merger, the JFTC pointed out in the report that it could not deny the possibility of the merged entity gaining further market power through the integration, sharing or utilisation of the data after the merger. The JFTC ultimately cleared the transaction with conditions, including the condition that the parties provide regular reports to the JFTC on the data utilisation of the merged entity.

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The competition law team of Nagashima Ohno & Tsunematsu consists of six partners and approximately 15–20 associates. Several of the team members have experience working in the JFTC or international organisations such as the OECD.

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