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**ANTITRUST AND COMPETITION**

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**I. Introduction**

On June 22, 2022, the Japanese Fair Trade Commission (the “JFTC”) published a document entitled “*The Fair Trade Commission’s Practices Regarding the Submission of Internal Documents in Business Combination Reviews*” (the “Guidelines”). The Guidelines signal a shift from the JFTC’s past practice in merger reviews in that, going forward, the JFTC may be more likely to request internal documents from parties involved in merger transactions to determine the merger’s potential impact on the market. The Guidelines indicate the JFTC’s intention to align with international practices, including the U.S. and the EU, in terms of not only the frequency of the requests for internal documents, but also the scope of the document requests. A key difference between Japan and other jurisdictions that parties must keep in mind when preparing internal merger documents is that Japan has no concept of legal attorney-client privilege. As a result, internal documents with attorney comments can be subject to a JFTC document request.

**II. JFTC’s Past Practice on Internal Document Production**

Traditionally, internal document production requests have not been part of the JFTC’s standard practice in its merger review process. In December 2019, a very brief reference to internal document production requests was added to the JFTC’s procedural policy on merger reviews; however, to date, there has not been any significant change in the JFTC’s merger review practice. Since internal document production requests have not been part of the JFTC’s standard practice, the JFTC has not issued any guidelines or manuals that merger parties could rely on or refer to if they receive an internal document submission request. The Guidelines, introduced this June, is the first and only guidance available from the JFTC for merger parties.

While not a regular feature, requests for internal documents did occur on rare occasions. Those requests were essentially limited to transactions that, as part of the JFTC’s merger review process, had entered into the detailed examination process of Phase II or were high profile and complex Phase I cases. One recent example of the latter is the Line/Yahoo merger in 2019, where the JFTC requested internal documents, including minutes from meetings of the Board of Directors and emails of officers, directors, and employees, from Yahoo and Line to review the appropriateness of market definitions, deal rationale and whether the deal could lead to a substantial constraint on competition in the relevant markets.

However, the fact that the JFTC has now compiled and published the Guidelines, suggests that the JFTC is getting ready to increase the number of future cases in which it will request internal documents, including those that discuss deal rationale or deal analysis, even though the JFTC merger notification form itself still

does not require the parties to submit any such internal documents. Notably, the Guidelines' statement that "*the use of such internal documents has become an internationally standard examination method*" indicates the JFTC's intention to revise Japan's substantive merger review process to be in line with the practices of major foreign jurisdictions, such as the U.S. and the EU, where internal documents are formally required as a filing requirement. The JFTC may be more likely to request internal documents as part of its merger review in the following types of cases:

- M&A transactions that involve relatively complex competition issues;
- M&A transactions involving relatively high market shares or a limited number of competitors; and
- M&A transactions in areas such as digital and IT fields where technological innovation is fast and can change the competitive environment rapidly.

### III. Typical Internal Document Requests

The Guidelines defines the scope of internal documents that the JFTC may request to be submitted as including:

- Documents, minutes, and similar used in meetings of the board of directors and other meetings of the companies involved in the merger;
- Documents in which the companies involved in the merger examined and analyzed the purpose and effects of the merger during their internal merger discussions, and documents that show how the companies involved in the merger began merger considerations;
- E-mails regarding the merger from directors/officers and employees of the companies who are involved in the merger;
- Documents regarding the business plan, business strategies or business reports prepared by the business department of the companies involved in the merger;
- Documents prepared by the companies involved in the merger during their internal merger review and analysis process regarding the business plans and entry plans of competitors and new entrants in the business concerned in the merger, and documents that show the parties' understanding and evaluation regarding the scope, competitiveness, and degree of competition of competitors;
- Reports prepared by the companies involved in the merger or third party research firms on the price and quantity of goods and services related to the business concerned in the merger, or on marketing activities, including market research, market forecasting, and market surveys; and
- Organizational charts of the companies involved in the merger, documents showing the nature of operations of each department or organization, and lists of employees for the companies as a whole and for each department or organization engaged in the supply, pricing or marketing of goods and services in fields of business related to the merger.

In most cases, documents dating back to two years from the time of the request for submission could be subject to the request; documents created before the M&A consideration stage may also be required. Further, not all documents will necessarily be requested at the beginning of the merger review; follow-up requests may be made after the initial request for submission. However, according to the Guidelines, after the JFTC issues a request for the submission of internal documents, it may be possible to narrow down the scope of requested documents to a certain extent after consultation between the JFTC and the companies involved.

As outlined above, the scope of the internal documents that may be subject to the JFTC's internal document production request is not significantly different from the "4c/4d" documents required for a HSR filing in the U.S., or the "Section 5" documents required in merger filings to the European Commission. Therefore, it should not be a significant additional burden for companies that are accustomed to HSR or EC filings to prepare such documents for submission to the JFTC.

#### **IV. No Refusal on Grounds of Legal Privilege in Japan; Approach to Mitigate**

While the JFTC's internal document production request should not create a significant additional burden for transactions that are required to be notified to the U.S. Department of Justice or Federal Trade Commission and/or the European Commission, the preparation of internal documents should still be handled with care. The companies involved should also keep in mind that unlike in the U.S. and the EU, there is no concept of legal privilege in Japan and, as a result, they cannot refuse to submit an internal document that may be privileged in other jurisdictions.

One way to address this issue would be to negotiate a reduction in the scope of the JFTC's request, which as the Guidelines state, is possible depending on the degree of necessity and upon consultation between the JFTC and the companies involved in the merger. Given that the JFTC's purpose in introducing the Guidelines is to align its practices with those of other major jurisdictions, including the U.S. and the EU, it is worthwhile negotiating with the JFTC to not include documents that are typically excluded on grounds of privilege in other major jurisdictions.

It may be possible to negotiate a reduction in the scope of document production on grounds that the submission of such internal documents can be refused in the U.S. and the European Commission due to their privileged status. For example, the submission to the JFTC of a document that was not submitted in the HSR filing in the U.S. as a 4c/4d document on grounds of privilege could result in a subject matter waiver in the U.S. and, as a result, submission of that document would subsequently be required in the U.S. since applicable privilege would be waived by the fact of the submission in Japan. As such, it may be reasonable for the parties to argue that submission of such document to the JFTC would be inappropriate as it unduly waives an applicable privilege in a foreign jurisdiction, and to request the JFTC to exclude such otherwise privileged documents from the document request in order to protect such privilege in the U.S. and other applicable jurisdictions.

#### **V. Conclusion**

While it is too early to predict how the JFTC will increase the number of cases where it requests internal documents, companies planning to execute an M&A transaction in the digital/IT fields or with relatively complex competition issues should keep in mind that Japan is now a possible jurisdiction where internal documents may be required to be submitted to the regulatory authorities. Executives, employees and company advisors should be aware of this possibility from an early stage of the M&A transaction and take appropriate care with the preparation of internal documents, particularly in light of the privilege risks involved.

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