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Merger Control 2025

21st Edition

Contributing Editors:
Nigel Parr & Steven Vaz
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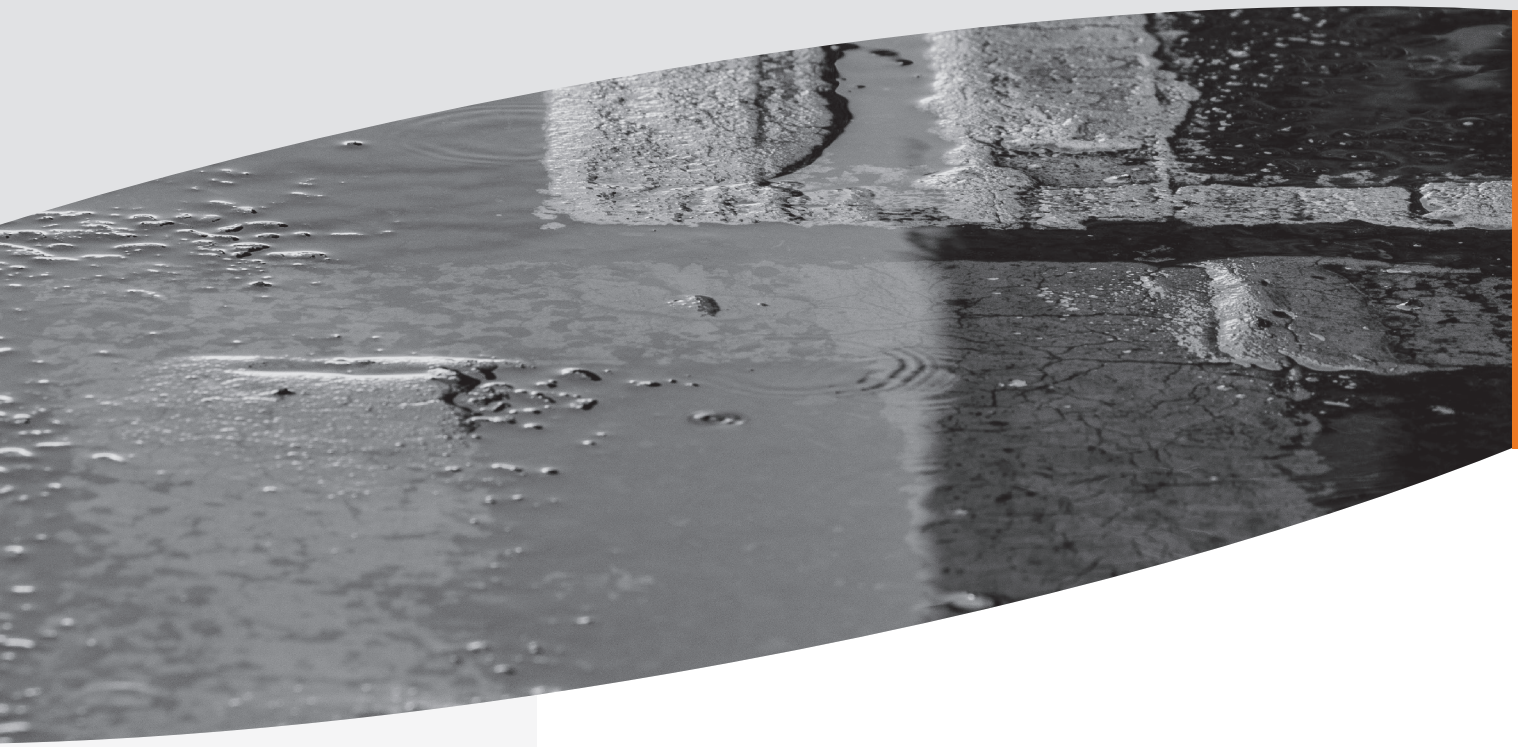

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Expert Analysis Chapters

Q&A Chapters

Q&A Chapters Continued

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From the Publisher

Welcome to the 21st edition of *ICLG – Merger Control*, published by Global Legal Group.

This publication provides corporate counsel and international practitioners with comprehensive jurisdiction-by-jurisdiction guidance to merger control laws and regulations around the world, and is also available at www.iclg.com.

The publication begins with three expert analysis chapters written by Ashurst LLP, AlixPartners, and CMS that provide further insight into merger control developments.

The question and answer chapters, which in this edition cover 33 jurisdictions, provide detailed answers to common questions raised by professionals dealing with merger control laws and regulations.

As always, this publication has been written by leading merger control lawyers and industry specialists, for whose invaluable contributions the editors and publishers are extremely grateful.

Global Legal Group would also like to extend special thanks to contributing editors Nigel Parr & Steven Vaz of Ashurst LLP for their leadership, support and expertise in bringing this project to fruition.

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1 Relevant Authorities and Legislation

1.1 Who is/are the relevant merger authority(ies)? If relevant, please include details of: (i) independence from government; (ii) who the senior decision-makers are (e.g. Chair, Chief Executive, Chief Economists), how long they have been in position, and their professional background (lawyer, economist, academia, industry, professional services, politics, etc.); and (iii) any relevant key terms of appointment (e.g. duration of appointment) of those in leadership positions (such as Chair, Chief Executive, and Chief Economist).

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. The JFTC is one of the external bureaus of the Cabinet Office and administratively attached to the Prime Minister's office. The chair and four commissioners of the JFTC, whose resolution becomes the final decision, are appointed by the Prime Minister with the consent of both Houses of the Diet from among persons aged 35 or above and who have knowledge and experience in law or economics. The present chair is the former commissioner of the National Tax Agency, and the present commissioners consist of professors of antitrust law and economics, a former judge and a former prosecutor. The duration of their appointment is five years, though they can be reappointed until the age of 70. The chair and four commissioners exercise their authorities independent from the Prime Minister and the JFTC is largely considered politically neutral.

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 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 Procedures of Review of Business Combination (the "Policies Concerning Merger Review Procedures") published by the JFTC sets forth the JFTC's merger review procedures.

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 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 a foreign investment filing, the relevant ministries may ask questions about the transaction to determine whether it 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's 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's fixed assets are subject to pre-notification requirements if certain 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 or other form of influence 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. Only the transaction which falls under the types stipulated by the Antimonopoly Act, namely, 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's fixed assets, are subject to pre-notification requirements if certain thresholds are met. Conversely, the acquisition of any other form of influence will not trigger the notification requirement.

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 the following thresholds are met:

1. 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%;
2. the total Japanese turnover generated by the acquiring company group for the last fiscal year exceeds JPY 20 billion; and
3. the total Japanese turnover generated by the target company and its subsidiaries for the last fiscal year exceeds JPY 5 billion.

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 the following thresholds are met:

1. 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; and
2. 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.

Merger

Pre-notification is required for a merger provided the following thresholds are met:

1. the total Japanese turnover generated for the last fiscal year by one of the company groups participating in the merger exceeds JPY 20 billion; and
2. 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.

Incorporation-type company split

Pre-notification is required for an incorporation-type company split if any of the following thresholds are met:

1. 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; 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;

2. 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; and the Japanese turnover generated from the corresponding business for the last fiscal year exceeds JPY 3 billion if the other company group splits a substantial part of its business;
3. 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; and the Japanese turnover generated from the corresponding business for the last fiscal year exceeds JPY 10 billion if the other company group splits a substantial part of its business; or
4. the Japanese turnover generated from the corresponding business for the last fiscal year exceeds JPY 10 billion 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 if the other company group splits a substantial 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:

1. the total Japanese turnover generated for the last fiscal year by the company group splitting all of its business exceeds JPY 20 billion; and the total Japanese turnover generated for the last fiscal year by the absorbing company group exceeds JPY 5 billion;
2. the total Japanese turnover generated for the last fiscal year by the company group splitting all of its business exceeds JPY 5 billion; and the total Japanese turnover generated for the last fiscal year by the absorbing company group exceeds JPY 20 billion;
3. the Japanese turnover generated from the corresponding business for the last fiscal year exceeds JPY 10 billion 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; or
4. the Japanese turnover generated from the corresponding business for the last fiscal year exceeds JPY 3 billion 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.

Business transfer/business asset transfer

Pre-notification is required for a business transfer/business asset transfer if the following thresholds are met:

1. the total Japanese turnover generated by the transferee's company group for the last fiscal year was more than JPY 20 billion; and
2. 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 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; 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.

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 can 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 such 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 Is the merger authority able to investigate transactions where the jurisdictional thresholds are not met? When is this more likely to occur and what are the implications for the transaction?

The JFTC is able to investigate transactions that do not meet the jurisdictional thresholds. There is no statute of limitations or time limit on the JFTC's ability to investigate such non-reportable transactions. The Policies Concerning Merger Review Procedures provides that the JFTC shall encourage the parties to consult with the JFTC even if the transaction does not meet the thresholds if the value of the transaction exceeds JPY 40 billion and falls under any of the following:

1. the target company has a place of business 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 brochures; or
3. the target company generated Japanese sales of more than JPY 100 million.

3.4 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.

3.5 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.

3.6 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.

3.7 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 must 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.

3.8 Is there any prohibition on completing the transaction before clearance is received or any compulsory waiting period has ended? What are the risks of completing before clearance is received? Have penalties been imposed in practice?

Theoretically, parties are free to implement the transaction after the lapse of the 30-day waiting period, even if it has not yet received clearance. The court, upon petition by the JFTC, may order a temporary suspension on the implementation of

transactions that 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.

The JFTC may impose a criminal fine of up to JPY 2 million if the parties 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.

3.9 Is a transaction which is completed before clearance is received deemed to be invalid? If so, what are the practical consequences? Can validity be restored by a subsequent clearance decision?

A transaction that is completed before clearance is received would not be deemed invalid. However, with respect to mergers, company splits and joint share transfers, Article 18 of the Antimonopoly Act stipulates that the JFTC can file a lawsuit to invalidate the transaction if parties complete the transaction in breach of the 30-day waiting period.

Moreover, if the transaction results in a substantial restraint of competition, the JFTC may issue a cease-and-desist order, which essentially requires the parties to unwind the transaction.

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

The notification must be filed using 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.

3.11 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 at the JFTC's sole discretion whether and when to shorten the waiting period.

3.12 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.

3.13 Are there any fees in relation to merger control?

Filing fees are not required.

3.14 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.

3.15 Are notifications 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 releases on a quarterly basis a list of the transactions that it cleared to the public. In addition, every June or July, 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.

The JFTC recently announced that, where it is considered necessary, it will publicly announce proposed transactions in complex and rapidly changing markets, particularly in the digital market, on the JFTC's website, to seek opinions from the public, regardless of whether the merger review has proceeded to Phase II. In fact, the JFTC has publicly announced and sought opinions from the public for some transactions involving well-known technology companies.

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 that 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, the degree of differentiation of relevant products/services and the parties' research and development activities;
- 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;
- the financial condition of the parties; and
- the scale of the market.

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 may seek comments regarding the remedies proposed by the parties from third parties. However, the JFTC does not typically make the remedies offered by the parties public to "market test" the proposed remedies.

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 have a confidentiality obligation under the Antimonopoly Act and, in practice, the risk of confidential information being leaked by the JFTC is low.

Please also see question 3.15 above.

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

5.1 How does the regulatory process end?

Please see question 3.7 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.

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.

As for the detail of remedies, please see question 5.3 below.

5.3 Are there any (formal or informal) policies on the types of remedies which the authority will accept, including in relation to vertical mergers?

According to the Merger Guidelines, in principle, the parties should implement structural remedies that could essentially

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.

As examples of structural remedies, the Merger Guidelines mention the following:

- divestiture;
- reduction of voting rights ratio;
- termination of interlocking directorates; and
- measures to facilitate imports and entry, such as making facilities and services necessary for imports available to importers, and licensing patent rights under proper conditions at the request of competitors or new entrants.

The Merger Guidelines also mention the following examples of behavioural remedies:

- to put in place an information firewall; and
- prohibition of discriminatory treatment of third parties with respect to the use of facilities essential to the operation of the business.

5.4 To what extent have remedies been imposed in foreign-to-foreign mergers? Are national carve-outs possible and have these been applied in previous deals?

In the past two years, the number of conditional clearances has been low, namely, one in the fiscal year of 2023 and one in the fiscal year of 2022. Prior to that, 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 2023, the JFTC cleared the *Korean Air/Asiana Airlines* transaction with conditions proposed by the parties as remedies.

National carve-outs (i.e., not integrating the parties' business in Japan as a remedy to close the merger) are theoretically possible if: (i) the relevant market where the JFTC raised concerns is limited to Japan; and (ii) such national carve-outs will maintain sufficient competition in the relevant market. The authors are not aware of any recent matters whereby national carve-outs were applied.

5.5 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.

5.6 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.

5.7 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, provided 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.

5.8 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.

5.9 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.

5.10 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 precedent, 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.

5.11 What is the time limit for any appeal?

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

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

For details on notified transactions, please see question 3.7 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 2024, the JFTC received a total of 345 merger notifications, out of which 335 transactions were cleared within Phase I, and no case proceeded to Phase II. The merger parties withdrew their notifications for the remaining 10 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 above regarding 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 and data accumulation, 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 at 26 September 2024.

7 Is Merger Control Fit for Digital Services & Products?

7.1 In your view, are the current merger control tools suitable for dealing with digital mergers?

In our view, the current control tools are suitable for dealing with digital mergers. One of the potential problems with digital mergers is that some digital mergers, including so-called killer acquisitions, do not meet the jurisdictional thresholds and therefore do not trigger the notification requirement. In this respect, as explained in question 3.3, the JFTC can investigate transactions that do not meet the jurisdictional thresholds. The JFTC has recently reviewed several mergers in the digital markets that do not meet the thresholds, including the *M3/Nihon Ultmarc* transaction and the *Google/Fitbit* transaction, in which merging parties for both cases end up proposing remedies to the JFTC as a response to concerns raised by the JFTC.

Relatedly, as explained in question 6.3 above, the JFTC revised the Merger Guidelines and added the analytical framework for digital mergers, which takes into account the characteristics of digital services, such as a two-sided market, network effects, and switching costs. In addition, the JFTC has published the final report of the Study Group on Innovation and Competition Policy in June 2024, which discusses the issues of competition policy and the Antimonopoly Act in relation to how to ensure a competition environment that promotes innovation, especially in the evolving digital markets, including in the context of merger control review.

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)?

Please refer to question 6.3 above.

In addition, the JFTC revised the Policies Concerning Merger Review Procedures. 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 and falls under any of the following:

1. the target company has an office, research and development facility or other business 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.

Moreover, the JFTC in its 2022 position paper, "*Towards the Active Promotion of Competition Policy in response to Socioeconomic Changes as represented by Digitalization*", announced that it will strengthen its merger control enforcement, especially in the digital markets, by, for example:

1. publicly announcing merger review cases, especially those in the digital markets, on the JFTC's website to seek comments from third parties, where it is considered necessary, regardless of whether the merger review has proceeded to Phase II;

2. exercising the compulsory investigation power under the Antimonopoly Act where it is considered necessary;
3. requesting the submission of internal documents, such as materials of the board of directors' meetings and internal competition analysis from the early stages of the merger review process, to understand the parties' purpose of the transaction and views on impact on various stakeholders; and
4. establishing the Economic Analysis Office within the JFTC to utilise more sophisticated economic analysis to ascertain the effect of the transaction on competition.

7.3 In your view, have any cases highlighted the difficulties of dealing with digital mergers? How has the merger authority dealt with such difficulties?

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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Nagashima Ohno & Tsunematsu is the first integrated full-service law firm in Japan and one of the foremost providers of international and commercial legal services based in Tokyo, including merger control works before the JFTC and coordination of merger control filings in multiple jurisdictions. The firm's overseas network includes offices in New York, Singapore, Bangkok, Ho Chi Minh City, Hanoi and Shanghai, and associated local law firms in Jakarta and Beijing. In addition, Nagashima Ohno & Tsunematsu has developed smooth and close collaborative relationships with prominent law firms in every major city in the world including cities in Europe, North and Latin America, and Asia based upon its many years of working relationships with law firms around the world. The competition law team of Nagashima Ohno & Tsunematsu consists of 10 partners and approximately 20–25 associates. Several of the team members have experience working in the JFTC or international organisations such as the OECD.

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