THE MERGER CONTROL REVIEW

Eighth Edition

Editor
Ilene Knable Gotts

THE LAWREVIEWS

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EIGHTH EDITION

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For further information please email
Nick.Barette@thelawreviews.co.uk

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JAPAN

Yusuke Nakano, Vassili Moussis, Takeshi Suzuki and Kiyoko Yagami[1]

I INTRODUCTION

Merger control was introduced in Japan by the 1947 Japanese Antimonopoly Act (AMA) together with Japan's first competition rules. Merger control is enforced by the Japan Fair Trade Commission (JFTC), which was established as an independent administrative office with broad enforcement powers and is composed of a chair and four commissioners. The JFTC has primary jurisdiction over the enforcement of merger control under the AMA.

i Pre-merger notification

Types of regulated mergers and thresholds

Share acquisitions (including joint ventures), mergers,[2] joint share transfers, business or asset transfers and corporate splits (or demergers) are subject to prior notification under the AMA if they exceed certain thresholds. Mergers and acquisitions (M&A) transactions whose schemes involve more than one of these transactions (e.g., reverse triangular mergers that involve a merger between a target and a subsidiary of an acquirer and an acquisition by the acquirer of shares in the target) are separately analysed at each step of the transaction and may require separate filings for each of the various transactional steps.

Joint ventures are also notifiable as long as they satisfy the thresholds for share acquisitions. Unlike the regime in the EU, Japanese law does not make a distinction between full-function and non-full-function joint ventures. A notification may be also required when a partnership (including a limited liability partnership) formed under Japanese law or under foreign laws acquires shares in another company through the partnership. The controlling company of such partnership should file a prior notification if the filing thresholds are otherwise satisfied.[3]

Generally speaking, no notification is required for transactions that amount to internal reorganisations of companies within a combined business group.[4]

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1 Yusuke Nakano and Takeshi Suzuki are partners, Vassili Moussis is a senior foreign counsel, and Kiyoko Yagami is a senior associate at Anderson Mōri & Tomotsune.

2 The JFTC uses the term 'merger' in its English translation of the AMA to describe what is called 'amalgamation' in many other jurisdictions.

3 Article 10, paragraph 5 of the AMA.

4 A combined business group consists of all of the subsidiaries of the ultimate parent company. A company will generally be considered to be part of a combined business group not only when more than 50 per cent of the voting rights of a company are held by another company, but also if its financial and business policies are 'controlled' by another company. The Merger Notification Rules specify detailed thresholds for 'control' to exist, which might be found even in cases where the ratio of beneficially owned voting rights is even

Domestic turnover

Domestic turnover, which is defined as the total amount of the price of goods and services supplied in Japan during the latest fiscal year,[5] is used as a decisive factor in the calculation of thresholds. The same thresholds will apply to both domestic and foreign companies.

According to the Merger Notification Rules,[6] the domestic turnover of a company includes the sales amount accrued through direct importing into Japan regardless of whether the company has a presence in Japan.

To be precise, domestic turnover is the total amount of the following three categories of sales:[7]

a sales amount derived from the sale of goods (including services) sold to domestic consumers (excluding individuals who are transacting business);

b sales amount derived from the sale of goods (including services) supplied in Japan to business entities or individuals who are transacting business (business entities) (excluding sales of goods where it is known that such goods will be shipped outside Japan at the time of entering into the contract, without any changes made to their nature or characteristics); and

c sales amount derived from the sale of goods (including services) supplied outside Japan to business entities where it is known that such goods will be shipped into Japan at the time of entering into the contract, without any changes made to their nature or characteristics.

In cases where the calculation of domestic turnover cannot be made in strict compliance with these rules, it is also permitted to use a different method to calculate the amount of the domestic turnover as long as it is in line with the purpose of the above-specified method and in accordance with generally accepted accounting principles.[8]

Notification thresholds for each type of transaction

Under the AMA, different notification thresholds apply depending on the different types of transactions, namely, share acquisitions, mergers, joint share transfers, business or asset transfers and corporate splits.

For share acquisitions (including joint ventures), the thresholds are based both on domestic turnover and the level of shareholding in the target. First, the aggregate domestic turnover of all corporations within the combined business group of the acquiring corporation must exceed ¥20 billion, and the aggregate domestic turnover of the target corporation and its subsidiaries must exceed ¥5 billion to meet the filing requirement.[9] Second, such acquisition

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slightly higher than, 40 per cent. The concept of 'control' to decide which companies are to be included in the combined business group is in line with the concept of 'control' used to define group companies under the Ordinance for the Enforcement of Companies Act. This concept of 'control' generally (there are still some remaining differences) aligns Japanese merger control with the merger rules of other jurisdictions, especially the EU rules as to the identification of the undertaking concerned.

5 Article 10, paragraph 2 of the AMA.

6 The Rules on Applications for Approval, Reporting, Notification, etc., pursuant to Articles 9 to 16 of the AMA (as amended in 2015).

7 Article 2, paragraph 1 of the Merger Notification Rules.

8 Article 2, paragraph 2 of the Merger Notification Rules.

9 Article 10, paragraph 2 of the AMA.

must result in the acquirer holding more than 20 or 50 per cent of the total voting rights of all the shareholders of the target (i.e., an acquisition that increases a shareholding from 19 to 21 per cent is subject to a filing, while an acquisition that increases a shareholding from 21 to 49 per cent does not require one).[10] A minority ownership of over 20 per cent may be caught regardless of whether the acquirer will take control of the target company.

For mergers and joint share transfers,[11] the thresholds are based on domestic turnover. The aggregate domestic turnover of the combined business group of one of the merging companies, or of one of the companies intending to conduct the joint share transfer, must exceed ¥20 billion to meet the filing requirement. Furthermore, the aggregate domestic turnover of the combined business group of one other participating company must exceed ¥5 billion.[12]

For business or asset transfers, the thresholds are based on domestic turnover. The aggregate domestic turnover of all companies within the combined business group of the acquiring company must exceed ¥20 billion to meet the filing requirement. For the transferring company, separate thresholds are applied depending on whether the target business or asset is the whole business or asset of the company or a substantial part of the business or asset thereof. In the former case, a threshold of ¥3 billion of domestic turnover applies to the transferring company; in the latter, the same shall apply to that attributable to the target business or asset.[13]

For corporate splits, there are a number of relevant thresholds depending upon the structure of the transactions, but the ¥20 billion and ¥5 billion thresholds described above (or lower thresholds) similarly apply.[14]

In the case of a merger, corporate split or joint share transfer, both companies intending to effect such transactions have to jointly file.[15] On the other hand, in the case of a share acquisition or business transfer, only the acquiring company is responsible for the filing.

There are no filing fees under the AMA.

ii Regulations and guidelines relating to merger control issued in the past year

During FY2016, there were no significant amendments made to regulations or guidelines relating to merger control.

II YEAR IN REVIEW

During the 2016 fiscal year (from 1 April 2016 to 31 March 2017) (FY 2016), the JFTC conducted Phase II reviews in five cases: (1) the acquisition by Nippon Steel & Sumitomo Metal Corporation (NSSMC) of shares in Nisshin Steel Co, Ltd; (2) the business integration between Fukuoka Financial Group, Inc and The Eighteenth Bank, Ltd; (3) the acquisition by

10 Article 16, paragraph 3 of the Implementation Rules of the AMA.

11 Under Japanese law, 'joint share transfer' refers to a specific structure stipulated by the Companies Act of Japan that involves two or more companies transferring their shares into a new holding company in exchange for shares from that holding company.

12 Article 15, paragraph 2 and Article 15-3, paragraph 2 of the AMA.

13 Article 16, paragraph 2 of the AMA.

14 Article 15-2, paragraphs 2 and 3 of the AMA.

15 Article 5, paragraph 2; Article 5-2, paragraph 3; and Article 5-3, paragraph 2 of the Merger Notification Rules.

Toyo Seikan Group Holdings, Ltd of shares in Hokkan Holdings Limited; (4) the acquisition by Idemitsu Kosan Co, Ltd (Idemitsu) of shares in Showa Shell Sekiyu KK (Showa Shell); and (5) the acquisition by JX Holdings, Inc (JXHD) of shares in TonenGeneral Sekiyu KK (TG). The JFTC cleared the *Idemitsu and Showa Shell* case and the *JXHD and TG* case simultaneously in December 2016, and the *NSSMC and Nisshin Steel* case in January 2017, with some conditions. At the time of writing, the *Fukuoka Financial Group* and *The Eighteenth Bank* case and the *Toyo Seikan Group Holdings and Hokkan Holdings* case are still pending before the JFTC. The JFTC also conducted a substantive review of the business integration between Lam Research Corporation (Lam Research) and KLA-Tencor Corporation (KLA-Tencor), which was closed as the parties withdrew the notification in October 2016.

In addition, on 30 June 2016, the JFTC gave a caution to Canon and made a public statement about Canon's acquisition of shares in Toshiba Medical Systems Corporation (Toshiba Medical) in which the JFTC noted that the scheme used by Canon deviated from the concept of the pre-notification system which would lead to an infringement of the AMA. However, no further administrative or criminal sanctions were taken by the JFTC.

i The Idemitsu and Showa Shell case and the JXHD and TG case[16]

Idemitsu, Showa Shell, JXHD and TG are Japan-based major oil refiners, which import, refine and distribute oil and gas fuel in all regions of Japan. The JFTC separately received a notification from Idemitsu for the acquisition of more than a 20 per cent share in Showa Shell in December 2015 and another notification from JXHD for the acquisition of more than a 50 per cent share in TG in February 2016 (see Section IV.iii, *infra*). As the proposed acquisitions would be implemented around the same time, when reviewing these cases the JFTC took a 'combined approach' (i.e., to assess the competitive impact of these cases simultaneously). The assessment was based on the assumption that the other transaction had already been implemented before the transaction at issue (as opposed to a 'priority rule', thereby assessing two cases separately and taking into account the increased market share resulting from the first transaction only, in the review of the second one).[17]

Among 45 overlapping product or service areas conducted by these parties, the JFTC carried out an in depth review on the following six areas where the parties had a relatively higher share in the respective market:

a refinery and wholesale of gasoline;
b refinery and wholesale of kerosene;
c refinery and wholesale of diesel fuel for land transportation;
d refinery and wholesale of Type-A heavy oil;
e production and wholesale of propane gas; and
f production and wholesale of butane gas.

With respect to the refinery and wholesale of products (a), (b), (c) and (d) above (fuel oil), the JFTC defined the relevant geographic market as Japan because prices of fuel oil are

16 JFTC press release of 19 December 2016, whose abbreviated version is available in English at www.jftc.go.jp/en/pressreleases/yearly-2016/December/161219.files/161219.pdf.

17 The JFTC seems to have taken the same 'combined approach' in the *Seagate/Samsung* case and the *Western Digital/Viviti Technologies* case in 2012.

determined by applying a unified formula throughout Japan and the refineries (including the parties and their competitors, hereinafter the same) can wholesale fuel oil to downstream distributors in all regions of Japan.

The JFTC was concerned that the notified acquisitions would result in a highly oligopolistic market (for example, with respect to the refinery and wholesale of gasoline, 50 per cent and 30 per cent of the market shares would be held by the JXHD group (including TG) and the Idemitsu group (including Showa Shell), respectively, while 10 per cent of the market would be held by a third-party competitor whose excess supply capacity was limited). Though, as for unilateral conduct, the JFTC found that, due to the high level of pressure from competition between JXHD and Idemitsu, neither the JXHD group nor the Idemitsu group would be able to raise prices of fuel oil on their own. On the other hand, as for coordinated conduct, the JFTC examined various factors, including the following:

a as the products are homogeneous and the quality and distribution costs of the products are generally common to the refineries, it would be relatively easy for the refineries to anticipate the pricing of other competitors;

b the excess supply capacity of the third party competitor was limited;

c a competitive pressure from downstream distributors would be limited if the refineries simultaneously raised prices;

d as the refineries and their distributors have a common understanding that it would be desirable for them if competition was loosened, and their earnings structure was improved, it would be easier for the refineries to reach a common understanding as to coordinated conduct; and

e as the refineries can obtain timely information on competitors' prices from industrial press, they would be able to mutually predict competitors' conducts to a substantial extent, thereby making it easier for the refineries to monitor each other's deviations from coordinated conduct.

The JFTC reached the conclusion that the proposed acquisitions would facilitate the refineries coordinating their conduct to restrain competition in the refinery and wholesale of fuel oil market.

With respect to the production and wholesale of propane gas and butane gas (LP gases), the JFTC found that prices of LP gases are determined by applying a unified formula throughout Japan, while LP gases are delivered locally within each region of Japan. The JFTC concluded that, in addition to Japan, each of the nine regions of Japan should also be considered a relevant geographical market.

Currently, there are four major producers of LP gases in Japan, whose combined market share would amount to 80 per cent (over 90 per cent in some regions of Japan), and each of the parties hold shares in one or two of these wholesalers. In particular, after the acquisitions, both the Idemitsu group and the JXHD group would hold 25 per cent each in one of the LP gas producers, Gyxis Corporation (Gyxis), together with two other competitors. Having examined various factors, including the status of joint shareholding and interlocking directorates, the JFTC found that, after the acquisitions, these producers of LP gases could easily anticipate the competitive conduct of other competitors. Econometric analyses were also conducted to support such findings. The JFTC thus concluded that the proposed acquisitions would create a 'joint relationship' (see Section IV.iii, *infra*) among these

four producers of LP gases, thereby resulting in a situation where the Idemitsu group and the JXHD group could restrain competition in the market for the production and wholesale of LP gases through coordination among the four producers.

Upon receiving the JFTC's findings, the parties proposed the following remedies to address the JFTC's concerns:

a For fuel oil, the parties should assume the responsibility of other oil importers to store fuel oil until such time that the volume of fuel oil imported by the competitors reaches 10 per cent of the entire domestic demand.[18] The parties further undertook that they will not treat the downstream distributors, which import fuel oil on their own, differently from other distributors.

b For LP gases, the Idemitsu group proposed a reduction of Showa Shell's shareholding (down to 20 per cent) and involvement in the management of Gyxis. The JXHD group also proposed to transfer all the shares that TG currently holds in Gyxis to a third party and to maintain its supply of products to Gyxis.

Based on the assumption that the Idemitsu group and the JXHD group would implement the above remedies, the JFTC concluded that the acquisitions would not substantially restrain competition in the relevant markets. This case is notable because the JFTC concluded that a substantial restraint of competition could exist solely on the basis of the likelihood of coordinated conduct (whereas the JFTC historically tended to conclude a substantial restraint of competition could exist only when they were able to find that unilateral conduct would substantially restrain competition).

ii NSSMC's acquisition of shares in Nisshin Steel[19]

NSSMC and Nisshin Steel are both Japan-based companies engaged in manufacturing and selling steel products. In May 2016, NSSMC notified the JFTC of its proposed acquisition of shares in Nisshin Steel, thereby holding more than 50 per cent of Nisshin Steel's shares. Among the approximately 20 product markets, in which the parties have horizontal or vertical overlaps, the JFTC identified, (1) hot-dip galvanising aluminium-magnesium alloyed steel sheet and (2) stainless cold steel sheet, as product markets worthy of review.

Hot-dip galvanising aluminium-magnesium alloyed steel sheet is one type of melted plated steel sheet, and unlike the other types of melted plated steel sheet, the demand and supply substitutability for hot-dip galvanising aluminium-magnesium alloyed steel sheet is extremely limited. The JFTC, based on an econometric analysis, defined a separate product market for hot-dip galvanising aluminium-magnesium alloyed steel sheet.

The relevant geographical market for hot-dip galvanising aluminium-magnesium alloyed steel sheet was defined as nationwide Japan. The JFTC found the market highly concentrated with Nisshin Steel holding an 80 per cent share and the remaining 20 per cent held by NSSMC. The JFTC also found the market to be closed to entry owing to the patent rights held by the parties were functioning as a barrier to new entrants. In addition, there was

18 Under Japanese law, to ensure a sufficient supply of fuel oil in Japan, each of the oil importers is required to store a certain amount of fuel oil (the amount of which is determined by the government for each importer) when they import fuel oil to Japan.

19 JFTC press release of 30 January 2016, whose abbreviated version is available in English at www.jftc.go.jp/en/pressreleases/yearly-2017/January/170130.files/161219.pdf.

almost no competitive pressure from imports or adjacent markets. After examining the above factors, the JFTC concluded that the parties would, if allowed to combine, easily control the price of the products and thereby substantially restrain competition in the market.

Stainless cold steel sheet is a type of steel sheet product that is highly resistant to corrosion. It is mainly used to produce exhaust air ducts for cars and interiors. Although the parties asserted that the geographic market should be defined as East Asia the JFTC concluded that, from the viewpoint of domestic purchasers and by applying econometric analysis, that the geographic market for stainless cold steel sheet should be nationwide Japan.

The combined market share of NSSMC and Nisshin would be 60 per cent post transaction. The JFTC was concerned that the supply surplus of the competitors would not be sufficient, and the entry and competitive pressure from purchasers or adjacent markets would be limited. The JFTC thus concluded that the combined group would be unilaterally able to control prices, and the proposed acquisition would create structures in which the combined group, together with other competitors, could easily coordinate their conduct, and thereby restrain competition in the market.

Upon receiving the above findings of the JFTC, the parties proposed various measures, including the following:

a the parties would license the patents and know-how for manufacturing hot-dip galvanising aluminium-magnesium alloyed steel sheet and certain stainless steel sheet to third parties, namely, Kobe Steel for hot-dip galvanising aluminium-magnesium alloyed steel sheet and Nippon Yakin Kogyo for stainless steel sheet (licensees);

b the parties would provide necessary information to the licensees for marketing the products using the licensed technologies (licensed products);

c the parties would supply the licensed products to licensees for a period of two to five years on an OEM basis and, after expiry of the said period, the parties would provide certain processing services to the licensees so that they could manufacture the licensed products on their own;

d the services described in (c) above would be charged on full costs only and the charges for the services described in (a) to (c) above would be subject to approval of the JFTC;

e Nisshin Steel would establish an informatio firewall limiting access of the parties' sales personnel to confidential information of the licensees concerning the volume and specification of the licensed products; and

f the parties would periodically report the implementation status of these remedial measures to the JFTC.

The JFTC concluded that the offered remedies were sufficient to eliminate the competition concerns arising from the proposed acquisition.

iii The business integration between Lam Research and KLA-Tencor[20]

In February 2016 the JFTC received a notification relating to a proposed business integration between Lam Research, a US-based supplier of semiconductor fabrication equipment and KLA-Tencor, a US-based supplier of metrology and inspection equipment. The JFTC determined that the combined group's possible delay in supply of metrology and inspection equipment could result in a market foreclosure of semiconductor fabrication equipment. The

20 JFTC press release of 7 October 2016, available in English at www.jftc.go.jp/en/pressreleases/yearly-2016/October/161007.files/161007.pdf.

JFTC closed its review when the parties abandoned the plan and withdrew the notification. It is rather unusual for the JFTC to publicly announce the details of an investigation that was withdrawn by the parties before initiation of a Phase II review.

iv The acquisition by Canon of shares in Toshiba Medical[21]

On 30 June 2016, the JFTC approved Canon's acquisition of shares in Toshiba Medical, Toshiba Corporation's (Toshiba) medical equipment unit, but issued a statement warning about the way the parties carried out the deal, which could be deemed as a circumvention of the law including the prior notification obligation under the AMA. The parties structured the transaction in such a way that Toshiba could obtain the transaction price of ¥665.5 billion prior to the JFTC's clearance. Specifically, Canon acquired an equity warrant for which common shares in Toshiba Medical were the underlying securities, in return for which Canon paid to Toshiba an amount virtually equivalent to the consideration of common shares. Further, shares with voting rights in Toshiba Medical were acquired and held by an independent third-party owner up until the time Canon exercised the equity warrant. The JFTC found that the transaction structure formed part of a scheme that was aimed at Canon ultimately acquiring shares in Toshiba Medical.

The JFTC held that since there is no public precedent of its position as to such a transaction structure, it decided not to impose any sanctions in this case and approved the acquisition because it would not hurt fair competition in the medical equipment markets in Japan. This case is notable because it means that in the future, similar transaction schemes will be considered to be in violation of the AMA.

v Statistics of the JFTC's activity

According to the JFTC, the total number of merger notifications filed in FY 2016 was 319.

There are a few cases that were brought into Phase II review every year, while there were no formal prohibition decisions made by the JFTC. According to the JFTC's statistics, the number of filings and the cases cleared after Phase II review is as follows:

	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016
No. of filings	985	265	275	349	264	289	295	319
No. of cases cleared after Phase II review	0	4	3	5	3	1	3	3

III THE MERGER CONTROL REGIME

i Waiting periods and time frames

In terms of time frames, the standard 30-day waiting period will apply, which may be shortened in certain cases (see Section III.ii, *infra*). If the JFTC intends to order necessary measures regarding the notified transaction, it will do so within the 30-day (or shortened) waiting period (which is extremely rare) or, if a Phase II review is opened, within the longer period of either 120 calendar days from the date of receipt of the initial notification or 90 calendar days from the date of the JFTC's receipt of all of the additionally requested

21 JFTC press release of 30 June 2016, available in English at www.jftc.go.jp/en/pressreleases/yearly-2016/June/160630.files/160630.pdf.

information. It should be noted that the JFTC does not have the power to 'stop the clock' in either the Phase I or Phase II review periods. It is, however, possible for the notifying party to 'pull and re-file' the notification during the Phase I period, thereby effectively restarting the clock.

ii Parties' ability to accelerate the review procedure

There is no provision in the law and there are no regulations regarding the ability to accelerate the review process, but in practice it may be possible to put pressure on the JFTC by submitting a written request to the JFTC in cases where a filing is made less than 30 calendar days before the planned closing date. The Merger Guidelines[22] state that the JFTC may shorten the waiting period when it is evident that the notified merger may not substantially restrain competition in any relevant market (which means when the JFTC closes its review prior to the expiration of the 30-calendar-day review period).

iii Third-party access to the file and rights to challenge mergers

Access to the file

Generally speaking, no third party has access to the merger notification files. Further, the JFTC does not even disclose the fact of the filing of a merger notification or clearance thereof, except for cases in which a Phase II review is commenced (in which case the JFTC discloses the identity of the companies involved in the notified transactions).[23] This means that third parties cannot even confirm whether a merger has actually been notified, unless the case has moved on to Phase II. Apart from the above limited disclosure, although not timely, the JFTC usually discloses details of some major merger notification cases as part of its annual review, generally subject to obtaining approval for such publication from the notifying parties.

Rights to challenge mergers

Interventions by interested parties in JFTC proceedings have not historically been common; however, there was one case in which interventions were made by Japanese steel manufacturers before the JFTC in relation to the proposed hostile takeover attempt by BHP Billiton of Rio Tinto, first announced in 2007.

Although third parties may file a lawsuit to ask the court to order the JFTC to issue a cease-and-desist order, the legal path to successfully do so is extremely narrow and does not merit a detailed explanation here. There are two ways for third parties to submit complaints to the JFTC in the course of a merger review: one way is to notify the investigation bureau of the JFTC of a possible breach of the AMA;[24] and the other is to submit complaints to the mergers and acquisitions division of the JFTC.

In addition, as stated in the Policies for Merger Review, in the event that a merger review moves on to Phase II, the JFTC will publicly invite opinions and comments from third parties. Public hearings can be held[25] if deemed necessary, but they have been extremely

22 The Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (31 May 2004 (as amended)).

23 Policies Concerning Procedures of Review of Business Combination (14 June 2011; Policies for Merger Review, as amended in 2015).

24 Article 45, paragraph 1 of the AMA.

25 Article 42 of the AMA.

rare to date. The JFTC sometimes conducts informal hearings, and market tests by way of questionnaires, with third parties, including competitors, distributors and customers, in the course of its review, as it did in the review of the *Idemitsu and Showa Shell* case and the *JXHD and TG* case (see Section II.i, *supra*).

iv Resolution of authorities' competition concerns, appeals and judicial review

The JFTC can issue a cease-and-desist order when it believes that a proposed transaction has the effect of substantially restraining competition in a particular field of trade (i.e., a relevant market). Prior to issuing a cease-and-desist order, the JFTC will provide information about, *inter alia*, the outlines of the contemplated order as well as the underlying facts and the list of supporting evidence to the potential recipients of such order in advance to give them an opportunity to review and make copies of the evidence (to the extent possible) and to submit opinions as to the possible order.[26]

When the JFTC issues a cease-and-desist order, the parties to the transaction can appeal to the Tokyo District Court (instead of resorting to the JFTC administrative hearing procedure, as was the case in the past) for annulment of the JFTC order.

v Effect of regulatory review

The JFTC frequently holds consultations with sector-specific regulators with regard to general issues as to the relationship between the JFTC's competition policy and sector-specific public and industrial policies. In this regard, it is generally understood that the JFTC takes into consideration relevant public and industrial policy issues when ruling on a given transaction, without prejudice to the independence of its competition policy review and merger review. Among the various government ministries, the Ministry of Economy, Trade and Industry has been active in advocating competition policy, but depending on the specifics of each case, other ministries may also be involved.

vi Substantive review

The Merger Guidelines set out the various factors that may be taken into account by the JFTC when assessing the impact of notified transactions on the competitive situation. Specifically, the Merger Guidelines provide an analysis of the substantive test for each type of transaction (e.g., horizontal, vertical and conglomerate M&A transactions). One of the important parts of the substantive test analysis is the use of 'safe harbours' measured by the Herfindahl-Herschman Index (HHI) for each of the above three categories (see Section III.vii, *infra*). It is also suggested in the Merger Guidelines that, both before and after the transaction, the JFTC will closely analyse market conditions from various viewpoints, including whether the transaction may facilitate concentration between market players, to ultimately determine the actual impact on competition of the notified transaction.

The detailed method to define the 'particular field of trade' (i.e., relevant market) is also provided in the Merger Guidelines. Importantly, the Merger Guidelines were amended in 2007 to clarify that the geographic market may be wider than the geographical boundaries of Japan, depending upon the international nature of the relevant business. Following the 2007 amendment, there have been several JFTC cases where the JFTC defined the relevant geographical market to extend beyond Japan.

26 Article 9 of the Rules on the Procedures of Hearing of Opinions.

vii Safe harbours

In the safe harbour analysis, if any of the following conditions is satisfied, the JFTC is likely to consider that the notified transaction does not substantially restrain competition in a relevant market:[27]

a horizontal transactions:
- the HHI after the notified transaction is not more than 1,500;
- the HHI after the notified transaction exceeds 1,500 but is not more than 2,500, and the increased HHI (delta) is not more than 250; or
- the HHI after the notified transaction exceeds 2,500 and the delta is not more than 150; and

b vertical and conglomerate transactions:
- the merging parties' market share after the notified transaction is not more than 10 per cent; or
- the merging parties' market share after the notified transaction is not more than 25 per cent and the HHI after the notified transaction is not more than 2,500.

In addition to the safe harbour above, the JFTC is highly unlikely to conclude that transactions falling within the following threshold would substantially restrain competition in any particular market: the HHI after the notified transaction is not more than 2,500, and the merging parties' market share is not more than 35 per cent.[28]

If the notified transaction does not satisfy the requirements for any of the above, the JFTC will likely conduct more in-depth analysis of the unilateral and coordinated effects of the notified transactions.

IV OTHER STRATEGIC CONSIDERATIONS

i Coordination with other jurisdictions

Cooperation between the JFTC and foreign competition authorities

In principle, the JFTC is entitled to exchange information with competition authorities of other jurisdictions based on the conditions set out in the AMA.[29] In addition, the JFTC has entered into bilateral cooperation agreements with the competition authorities of the United States, the European Union, Canada, the Philippines, Vietnam, Brazil, Korea, Australia, China, Kenya and Mongolia.[30] Furthermore, the JFTC propounded the establishment of an international cooperative framework for merger review at the 11th ICN Annual Conference held in April 2012, which was approved at that Conference. Under these agreements and frameworks, it is expected that various levels of information exchanges and discussions will be carried out between the participating authorities.

27 Part IV, 1(3) and Part V, 1(3) of the Merger Guidelines.

28 In practice, if a transaction satisfies the safe harbour conditions at (a) and (b) (Section III.vii, *supra*), the JFTC does not conduct any further substantive review of the transaction.

29 Article 43-2 of the AMA.

30 Recently, the JFTC concluded bilateral cooperation arrangements with the Competition Authority of Kenya on 9 June 2016, with the Authority for Fair Competition and Consumer Protection of Mongolia on 15 March 2017, and with the Canadian Competition Bureau on 12 May 2017 (this being solely related to communication of information as rules subordinate to the existing bilateral agreement between the two countries), respectively.

The JFTC has a good track record of closely working with other competition authorities. It is reported that the JFTC exchanged information with various authorities, including its counterparts in the US and EU, for example, in the review of two *HDD* cases in 2012, of the *ASML and Cymer* and the *Thermo Fisher and Life Technologies* case in 2013, the *Zimmer and Biomet* case in 2015 and the *Lam Research and KLA-Tencor* case in 2016 (see Section II.iii, *supra*).

Coordination among attorneys from various jurisdictions

As explained in Section IV.ii, *infra*, the JFTC abolished the voluntary consultation procedure (prior consultation procedure) as of 1 July 2011, which means that the substantive review of a proposed transaction would only start at the formal notification stage. In addition, as explained in Section III.i, *supra*, each of the Phase I and Phase II review periods cannot be extended even in cases where parties submit a remedy proposal to the JFTC; nor can the JFTC stop the clock. This might cause difficulties, especially in global merger notifications where the management of the filing schedule is important to avoid conflicting remedies or prohibition decisions at the end of the merger review procedure in various jurisdictions. Thus, coordination among Japanese and foreign attorneys is of even greater importance following the abolition of the prior consultation procedure.

ii Pre-filing consultation with the JFTC

Upon the abolition of the prior consultation procedure in July 2011, the JFTC no longer provides its formal opinion at the pre-notification stage, and the review officially starts at the formal notification stage.

In practice, the JFTC is flexible about having informal discussions with potential notifying parties upon request or voluntary submission of relevant materials prior to formal filings. Interestingly, in almost all cases that the JFTC cleared recently after Phase II review, including the *Idemitsu and Showa Shell* case, the *JXHD and TG* case and the *NSSMC and Nisshin Steel* case (see Section II.i and ii, *supra*), the JFTC made specific notes in its announcements that the parties had submitted supporting documents and opinions to the JFTC on a voluntary basis prior to officially filing the notifications. It is understood that parties to complicated mergers make use of that informal procedure to try and alleviate any potential concerns early. The JFTC seems to be receptive to such informal prior communications.

iii Special situations

Failing company doctrine

The Merger Guidelines recognise the 'failing company doctrine', and state that the effect of a horizontal merger would not be substantial if a party to the merger has recorded continuous and significant ordinary losses, has excess debt or is unable to obtain finance for working capital, and it is obvious that the party would be highly likely to go bankrupt and exit the market in the near future without the merger, and so it is difficult to find any business operator that could rescue the party with a merger that would have less impact on competition than the business operator that is the other party to the merger.

Minority ownership interests

It should be noted that minority ownership of over 20 per cent of the voting rights in a company is notifiable regardless of whether the acquirer will take control of the target company (see Section I.i, *supra*). In addition, in the JFTC's substantive review, any companies

that are in a 'close relationship' with an acquirer or a target may be deemed to be in a 'joint relationship'. Accordingly, these companies could be treated as an integrated group for the purpose of the substantive analysis and, for example, the HHI would also be calculated based on the sales data of the integrated group as a whole. In the *Idemitsu and Showa Shell* case, the JFTC made clear that its review assumed these parties would be completely integrated as one group after the acquisition, although Idemitsu only intended to have a minority shareholding in Showa Shell after the acquisition (approximately 33 per cent). The joint relationship will be determined by taking into account various factors although, according to the Merger Guidelines, a minority holding of voting rights of over 20 per cent and the absence of holders of voting rights with the same or higher holding ratios of voting rights would suffice to find such relationship.

iv Transactions below the notification thresholds

It is important to note that, under the AMA, the JFTC can theoretically review any M&A transactions under the substantive test, regardless of whether the filing thresholds described above are met. The JFTC has actually investigated transactions that had not been notified to it, including foreign-to-foreign transactions such as an attempt by BHP Billiton to take over Rio Tinto through a hostile bid in 2010.[31]

V OUTLOOK & CONCLUSIONS

Six years have passed since the amendments to the Merger Review Rules and the Policies for Merger Review were introduced in June 2011. These amendments primarily concern the procedural aspects of merger reviews by the JFTC, while some clarifications were also made to the substance of the JFTC's review policies. Since these amendments, the scope of disclosure, which the JFTC has made in relation to its review of Phase II cases and as part of its annual review about recent major cases, seems to have expanded. In particular, as to the *JXHD and TG* case and the *Idemitsu and Showa Shell* case (see Sections II.i and II.ii, *supra*), the JFTC disclosed specific details of the economic analysis it conducted, thereby giving greater transparency as to its review. Although these disclosures have been generally welcomed by practitioners, when compared to the practice of other leading competition authorities there is still a relative lack of available information as to the JFTC's decisional practice (e.g., few decisions are published), and some areas where further clarification or improvements seem necessary (e.g., as to market definition). It is hoped that the JFTC will take action, for example, through the publication of more decisions and of new or updated guidelines in the near future.

31 At the time, qualifying share acquisitions were subject to *ex post* facto reporting requirements.

YUSUKE NAKANO

Anderson Mōri & Tomotsune

Yusuke Nakano is a partner at Anderson Mōri & Tomotsune with broad experience in all aspects of antitrust and competition regulation. He has represented a variety of companies with respect to administrative investigations and hearing procedures conducted by the JFTC, as well as in criminal and civil antitrust cases. He has extensive knowledge and experience in merger control, and was involved in the first foreign-to-foreign merger case against which the JFTC launched an investigation.

Mr Nakano has assisted many Japanese companies and individuals involved in antitrust cases in foreign jurisdictions, in close cooperation with co-counsel in those jurisdictions. As a result, Mr Nakano has gained substantial experience in the actual enforcement of competition law by foreign authorities, such as the US Department of Justice and the European Commission.

Mr Nakano is a graduate of the University of Tokyo (LLB, 1994) and Harvard Law School (LLM, 2001). He is admitted to the Bar in Japan and New York, and used to be a lecturer at Hitotsubashi University Law School. He is a co-author of *Leniency Regimes* (European Lawyer Reference, fifth edition, 2015) and the Japanese chapters of various other publications.

VASSILI MOUSSIS

Anderson Mōri & Tomotsune

Vassili Moussis is an English-qualified solicitor and a registered foreign lawyer with the Japanese Bar. Prior to joining Anderson Mōri & Tomotsune in Tokyo, he practised EU, UK and international competition law in Brussels and London for close to 10 years at leading UK and US firms, mainly advising on merger control matters and international antitrust investigations.

Mr Moussis studied law in Belgium (Licence en droit, 1994) and in the UK, and holds an LLM (1995) as well as a PhD (2003) from University College London on comparative EU and Japanese competition law. He also worked for a year at the European Commission's Directorate General for Competition as an administrative trainee (1995–1996). At Anderson Mōri & Tomotsune, his practice focuses on EU and international competition law with a particular emphasis on merger control and international cartel matters.

TAKESHI SUZUKI

Anderson Mōri & Tomotsune

Takeshi Suzuki is a partner at Anderson Mōri & Tomotsune, working mainly in the fields of antitrust and competition law, M&A transactions and other corporate legal affairs.

Mr Suzuki is a graduate of Kyoto University (LLB, 2006), and is admitted to the Bar in Japan. Prior to joining Anderson Mōri & Tomotsune, he practised cross-border M&A transaction matters as well as Japan and EU competition law in Tokyo and Brussels for approximately four years at a leading UK firm and then worked for the Merger Investigation Division of the Japan Fair Trade Commission as a chief case handler of merger filings for approximately two years. At Anderson Mōri & Tomotsune, his practice focuses on Japan and international competition law with a particular emphasis on merger control.

KIYOKO YAGAMI

Anderson Mōri & Tomotsune

Kiyoko Yagami is a senior associate at Anderson Mōri & Tomotsune working mainly in the fields of antitrust and competition law, foreign direct investment and other corporate legal affairs.

Ms Yagami is a graduate of Chuo University (LLB 2000), Temple University Beasley School of Law (LLM 2001), China University of Political Science and Law (LLM 2002) and Waseda Law School (JD 2007), and is admitted to the Bar in Japan and New York. She worked as a trainee in the Beijing office of a leading global firm and in the Economic Affairs Bureau of the Ministry of Foreign Affairs of Japan prior to joining Anderson Mōri & Tomotsune in 2008.

ANDERSON MŌRI & TOMOTSUNE

Akasaka K-Tower
2-7, Motoakasaka 1-chome
Minato-ku, Tokyo 107-0051
Japan
Tel: +81 3 6888 1000
Fax: +81 3 6888 3065
yusuke.nakano@amt-law.com
vassili.moussis@amt-law.com
takeshi.suzuki@amt-law.com
kiyoko.yagami@amt-law.com
www.amt-law.com/en