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Japan: Merger Control

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The regulation of mergers in Japan is achieved through the combination of a relatively complex set of legislative and non-legislative rules. Following the most recent amendment (the Amendment) of the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (Law No. 54 of 1947), as amended (the Anti-Monopoly Act, AMA), which was effective from 1 January 2010, the enforcement of competition rules in Japan has been strengthened. Following the Amendment, the Merger Rules[1] and the Merger Guidelines[2] of the Japan Fair Trade Commission (the JFTC) were also amended to correspond with the Amendment; they came into force on the same date. These amendments further align the Japanese merger control review standards with those of the EU.

Some of the significant changes introduced by the Amendment concern merger control. In particular, the new rules introduce the concept of the 'combined business group', and make 'aggregate domestic sales' rather than 'total assets' the decisive factor in determining the threshold for prior notification.

Furthermore, the introduction of a prior notification obligation for share acquisitions has removed a distinctive feature of Japanese merger control. Under the old system, share acquisitions were subject to a post-acquisition notification obligation, with another notification only necessary if certain pre-determined levels of shareholdings (10 per cent, 25 per cent or 50 per cent) were attained. The Amendment simplifies the thresholds with the result that, if a company (including the group of companies to which it may belong) acquires more than 20 per cent or 50 per cent of the voting rights of another company, such transaction will be subject to a prior notification obligation and to a stand-still obligation during the period of review.[3]

Introduction

Merger control was introduced in Japan by the AMA at the same time as Japan's first competition rules were enacted in 1947. Merger control is enforced by the JFTC, which was established by the AMA as an independent administrative office and is composed of a chairman and four commissioners who possess broad enforcement powers with respect to the AMA.

Merger control and the interrelation between sector-specific regulators and the JFTC

The JFTC is an independent agency which has primary jurisdiction over the enforcement of merger control under the AMA. The JFTC regularly holds 'informal' consultations with relevant ministries and other sector-specific regulators and, in practice, when ruling on a given transaction, the JFTC takes into consideration relevant public and industrial policy issues. Among the various government ministries, it is generally considered that the Ministry of Economy, Trade and Industry (the METI) has a strong influence over competition policy but, depending on the specifics of each case, other ministries may have greater involvement.

Types of regulated mergers and thresholds

Mergers, business transfers, corporate splits (or demergers), joint share transfers and share acquisitions are subject to notification under the AMA. M&A transactions that involve more than one of these transactions (eg, an acquirer merges with a target after acquiring shares in the target) are separately analysed at each various step of the transaction, so separate filings may be required for each. Joint ventures are also analysed in the same way.

Depending on whether they exceed certain thresholds (described below), mergers, business transfers, corporate splits, joint share transfers and share acquisitions are subject to a prior notification obligation. The new regime of merger control is applicable to transactions which close on or after 31 January 2010. Generally speaking, no notification is required for transactions which amount to internal reorganisations of companies within the combined business group. It should be noted, however, that the JFTC has a general power to review any M&A transaction for compliance with the substantive test, described below, even where the jurisdictional thresholds are not fulfilled.

The combined business group, introduced as a concept by the Amendment, consists of all of the subsidiaries of the ultimate parent company. It should be noted that a company will be considered to be part of the combined business group not only when 50 per cent or more of the voting rights of a company are held by another company, but also if its management is 'controlled' by the other company.[4] The Merger Rules specify a detailed threshold for 'control' to exist, demonstrating that it might be found even in cases where the ratio of beneficially-owned voting rights is 40 per cent or more. 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, and thus is not entirely new under Japanese law. These changes align the Japanese merger control with the regulations of other countries, especially those of the EU.

The Amendment also requires notification when a controlling company is acquiring stock of another company through a partnership (including a limited-liability partnership) formed under Japanese law or foreign laws. The controlling company should file a prior notification if the filing thresholds are otherwise met.[5]

Domestic sales as a decisive factor in thresholds

The Amendment has also redefined the concept of 'domestic sales', which is used as a decisive factor in the new thresholds. The same thresholds will be used for both domestic and foreign companies, whereas the old system applied different thresholds for foreign and domestic companies. Domestic sales are defined as the total value of goods and services purchased in Japan during the latest fiscal year.[6] This is also different from the old AMA, under which domestic sales were defined as the amount of sales booked in the profit-and-loss statement of the target company's Japanese branch office, and its directly-held Japanese subsidiaries and their branch offices in Japan (thus, a merger filing was only required if the foreign target company had a subsidiary or branch office in Japan).

According to the new Merger Rules, the domestic sales of a company include the sales amount accrued through importing goods directly into Japan, regardless of whether the company has any presence in Japan or not. More precisely, domestic sales include the total amount of the following three categories of sales:[7]

- sales amount derived from the sale of goods to domestic consumers (individuals excluding those who are transacting business);
- sales amount derived from the sale of goods in Japan to corporations, other business entities or individuals who are transacting business, but excluding sales of goods intended for shipment out of Japan for which it is known at the time of entering into the contract that they will be shipped out of Japan without any change to their nature or characteristics; and
- sales amount derived from the sale of goods to be supplied outside Japan but for which it is known at the time of entering into the contract that they will be shipped into Japan without any change to their nature or characteristics.

The Merger Rules allow some flexibility where the calculation of domestic sales cannot be made in strict compliance with these rules, in which case it is permitted to use a different method to calculate the amount of the domestic sales, as long as it is in line with the purpose of the above specified method and in accordance with the generally accepted accounting principles (GAAP).[8]

The thresholds

For mergers and joint share transfers, the thresholds are based on domestic sales. The aggregate domestic sales of the combined business group of one of the merging companies, or one of the companies intending to conduct the joint share transfer, must exceed ¥20 billion in order to require a filing. Furthermore, the aggregated domestic sales of the combined business group of one other participating company must exceed ¥5 billion.[9]

For business transfers, the thresholds are based on domestic sales. The aggregate domestic sales of the combined business group of the acquiring corporation must exceed ¥20 billion to be required to file. Furthermore, the separate thresholds are applied for the transferring corporation, depending on whether the transfer includes the whole business or a substantial part of the business (or the whole or a substantial part of fixed assets used for the business). In the former, a threshold of ¥3 billion of domestic sales is applied on the transferring corporation and, in the latter, the threshold of ¥3 billion of domestic sales applies to the business to be transferred.[10]

For corporate split,[11] the threshold is based on the domestic sales. There are two types of corporate split that are subject to the filing requirement – namely, a split-type and an absorption-type. Under the spilt-type, which consists of jointly establishing a new company by corporate split, the threshold will be met when:

- the aggregate domestic sales of the combined business group of one of the participating companies which intends to split the whole business thereof exceeds ¥20 billion, and
  - the aggregate domestic sales of the combined business group of another participating company which intends to split the whole business thereof exceeds ¥5 billion, or
  - the domestic sales of the business to be split of another participating company which intends to split a substantial part of the business thereof exceeds ¥3 billion; or
- the domestic sales of the business to be split of one of the participating companies which intends to split a substantial part of the business thereof exceeds ¥10 billion, and
  - the aggregate domestic sales of the combined business group of another participating company which intends to split the whole business thereof exceeds ¥5 billion, or
  - the domestic sales of the business to be split of another participating company which intends to split a substantial part of the business thereof exceeds ¥3 billion.[12]

Under the absorption-type of corporate split, which consists of transferring a business to an existing company by corporate split, the threshold will be met if:

- the aggregate domestic sales of the combined business group of the absorbing company exceeds ¥20 billion, and
  - the aggregate domestic sales of the combined business group of one of the participating companies which intends to split the whole business thereof exceeds ¥5 billion, or
  - the domestic sales of the business to be split of one of the participating companies which intends to split a substantial part of the business thereof exceeds ¥3 billion; or
- the aggregate domestic sales of the combined business groups of one of the absorbing company exceeds ¥5 billion, and
  - the aggregate domestic sales of the combined business group of one of the participating companies which intends to split the whole business thereof exceeds ¥20 billion, or
  - the domestic sales of the business to be split of one of the participating companies which intends to split a substantial part of the business thereof exceeds ¥10 billion.[13]

For share acquisitions, the thresholds are based both on domestic sales and shareholding. First, the aggregate domestic sales of the combined business group of the acquiring corporation must exceed ¥20 billion and the domestic sales of the target corporation and its subsidiaries must exceed ¥5 billion.[14] Second, such acquisition must result in the acquirer holding more than 20 or 50 per cent of the total voting rights of all the stockholders of the target (so that an acquisition that increases a shareholding from 19 per cent to 21 per cent requires a filing, but an acquisition that increases a shareholding from 21 per cent to 49 per cent does not require one).[15]

Expansion of the exemption from filing requirements

Under the old AMA, only cases of business combinations between a parent company and a directly-held subsidiary or between fellow subsidiaries were exempted from filing. The Amendment expands the exemptions to include mergers, corporate splits, joint share transfers and business transfers between companies within the same combined business group.[16] Share acquisitions within the same combined business group are also not subject to filing requirement.

The practical impact of the amendments to the merger control thresholds

The amendments to the thresholds for merger control have a significant impact in practice. First, it is certain that substantially more foreign-to-foreign stock acquisitions need to be notified to the JFTC now than under the previous merger-control regime. Second, in order to determine whether or not the transaction satisfies the threshold, especially in determining the scope of subsidiaries and the amount of domestic sales, it will be necessary to conduct a substantive assessment (eg, as to whether a corporation is 'controlled' by another corporation) in addition to the check on more formal requirements (eg, whether 50 per cent or more voting rights are held).

The nature of the substantive test for the assessment of mergers

The substantive test for clearance is whether the proposed merger, business transfer, corporate split, joint share transfers, share acquisition, shareholding or interlocking directorate (including M&A

transaction) may result in a 'substantial restraint of competition in a particular field of trade'. As mentioned above, it is important to note that the JFTC can theoretically review any M&A transaction under the substantive test, regardless of whether or not the thresholds described above are met. In this regard, the JFTC issued a reporting order in relation to the proposed acquisition of all issued shares of Rio Tinto Ltd and Rio Tinto plc by BHP Billiton Ltd and BHP plc, which was announced by BHP Billiton on 6 February 2008 (the transaction was ultimately abandoned). The JFTC opened a formal investigation into the proposed acquisition at the end of July 2008 due to suspicions that the proposed acquisition, if implemented, would have substantially restrained competition in some fields of trade where iron ore and coal (coking or metallurgical coal) have been supplied by seaborne trade. The JFTC conducted its investigation based upon information provided by BHP Billiton following the issuance by the JFTC of a reporting order, as well as based on information provided by competitors and customers inside and outside Japan in response to the JFTC's requests. This case is noteworthy because, in the past, the JFTC had not commenced a formal investigation of a share acquisition, especially a foreign-to-foreign share acquisition, until after the closing of the transaction. Although the JFTC has consistently stated that it has the power to review any merger which could substantially restrain competition in a particular field of trade in Japan, this is the first high-profile instance of it using that power in relation to a purely foreign-to-foreign transaction. The *Rio Tinto/BHP Billiton* case therefore demonstrates that the JFTC is willing to take a more aggressive approach to asserting its competence to review mergers that it believes will have a substantial effect on competition in Japan.

On 31 May 2004, the JFTC published the Merger Guidelines, which abolished the previous guidelines' interpretation of when 'the effect may be substantially to restrain competition in a particular field of trade', and which are significantly clearer and more thorough despite relying more heavily on economic concepts. On 28 March 2007, the JFTC adopted new Merger Guidelines (the 2007 Merger Guidelines) which amend the safe harbour rules, adopt the so-called 'small but significant and non-transitory increase in price test' (SSNIP test) for the purposes of analysing demand and supply substitution when defining the markets, and provide for additional factors to be considered in the analysis of the relevant transactions. The JFTC has thereafter updated the Merger Guidelines on 1 January 2010 to reflect the most recent amendment to the AMA.

The 2007 Merger Guidelines clarify the category of M&A transactions whose impact on competition should be reviewed. Detailed rules are provided for market definition ('particular field of trade'). Importantly, the 2007 Merger Guidelines clarify that the geographic market may be wider than the geographic boundaries of the territory of Japan, depending upon the international nature of the relevant business. This means it is now much more likely that consolidation within certain sectors of the Japanese economy faced with competition from foreign imports, for example, will be easier since the widening of the actual geographical market may dilute their national market shares. Following implementation of the 2007 Merger Guidelines, there have been several JFTC merger decisions in which the JFTC defined the relevant geographic market to extend beyond Japan. One example involved TDK Corporation's acquisition from Alps Electric Co Ltd of assets used for the manufacturing of magnetic heads. The JFTC ultimately determined under Article 16 of the AMA that the proposed merger 'would not substantially restrain competition in any particular field of trade'. This decision was reached on the basis of a number of factors, including the consideration that TDK would not be able to control prices because of the presence in the relevant market of a number of other significant competitors with excess supply capacity. Significantly, the JFTC decided that the relevant market consisted of the global market for magnetic heads, based on its finding that magnetic head manufacturers sell their products at similar prices regardless of geographic origin.

In addition, the 2007 Merger Guidelines explain the factors that will be taken into account when assessing whether a certain M&A transaction substantially restrains competition. The substantive test is analysed for each horizontal, vertical and conglomerate M&A transaction. Another indication of the sophistication of the 2007 Merger Guidelines is that they provide that the JFTC will closely analyse market conditions both before and after the transaction with a view to establishing the actual impact on competition of the transaction, including by analysing whether it is likely that such transaction may facilitate cooperation between market players (actively or tacitly).

Perhaps the most interesting feature of the 2007 Merger Guidelines is the use of 'safe harbours' for each of the three categories of M&A transactions identified above (specific harbours apply to each category), as part of the substantive test analysis. These are cases where the JFTC normally considers that there is no possibility there may be a substantial restriction of competition, or that such possibility is small and therefore it is not necessary to conduct a detailed examination of the M&A transaction. Each case, however, is reviewed on its own merits, and the application of the harbours needs to be analysed carefully within the specific context of each transaction.

The substantive test for horizontal M&A transactions

Safe harbours

First, for horizontal M&A transactions, the 2007 amendments to the Merger Guidelines identify three common safe harbours. If any of these safe harbours is met (and there are no other competitive restrictions) the JFTC is likely to consider that the M&A transaction does not substantially restrain competition, namely:

- the Herfindahl-Herschmann Index (HHI) (a commonly accepted measure of market concentration, calculated by summing the squares of the individual market shares of all the firms in the market) after the M&A transaction is not more than 1,500;
- the HHI after the M&A transaction exceeds 1,500 but does not exceed 2,500, and the HHI does not increase the 'delta' by more than 250; or
- the HHI after the M&A transaction exceeds 2,500 and the delta is not more than 150.

If neither of the above safe harbours is met, the JFTC will proceed with the separate analysis of the non-coordinated (unilateral) and coordinated effects of the horizontal M&A transaction. However, the 2007 Merger Guidelines clarify that, based on the JFTC's past experience, if the HHI after the completion of the M&A transaction is not more than 2,500 and the combined market share does not exceed 35 per cent, it is generally considered that there is a low possibility that the M&A transaction will substantially restrain competition.

Analysis of unilateral effects

As to the unilateral effects of the horizontal M&A transaction, the following are the main factors that will be taken into account as part of the comprehensive examination:

- the status of the merging parties – market shares, market share ranks, pre-merger rivalries among the parties;
- the competitive pressures from non-merging firms – market shares, differences in market share between a merged firm and

its competitors, excess capacity for supply, the degree of product differentiation;
- the potential and actual competitive pressures – import and entry, the presence of adjacent product and geographic markets, competitiveness in vertically related markets; and
- the efficiency and viability of merging parties.

It should be noted that the 2007 amendments to the Merger Guidelines specify that import and entry to the market over the coming two years may be considered.

Analysis of coordinated effects

As to the coordinated effects, the aim of the JFTC is to identify M&A transactions where, due to the structure of the market, the parties to an M&A transaction may find it economically rational to coordinate their behaviour and raise prices without entering into an agreement or other concerted practice that could contravene the AMA's prohibition of unreasonable restraint of trade (ie, of cartels and other collusive behaviour among competitors). The specific factors that the JFTC will examine when undertaking its comprehensive examination of the coordinated effects of a horizontal M&A transaction are the following:
- the status of the merging parties and their competitors – the number of participants, similarity in product and cost structure, pre-merger rivalries among the merging parties, excess capacity for supply;
- the relevant market environment – transparency in business transactions, frequency and size of orders, stability and maturity in demand, the speed of technological development, pre-merger competitiveness;
- the potential and actual competitive pressures – import and entry, the presence of adjacent products or adjacent geographic markets, competitiveness in vertically related markets; and
- efficiency and viability of merging parties.

Failing-firm defence

Another clarification in the 2007 Merger Guidelines is the JFTC's policy as to the failing state of a firm as a defence to a horizontal M&A transaction. The (cumulative) requirements for the defence to be accepted under the 2007 Merger Guidelines are that it is clear that one of the concerned parties is a failing firm, or one party's concerned division is a failing division (and it is highly likely that the failing firm or division will otherwise exit the market); and that there is no other alternative that is less influential on competition than the proposed transaction with the other concerned party. If the above two requirements are met, it can be expected that the failing-firm defence will operate as a type of safe harbour for the companies that wish to combine their businesses.

The substantive test for vertical and conglomerate M&A transactions

As to vertical and conglomerate M&A transactions, the 2007 Merger Guidelines' approach is to consider that such M&A transactions have less of an impact on competition than horizontal M&A transactions, since the number of competitors in the relevant market is not reduced as a result. Provided such vertical or conglomerate M&A transaction does not result in vertical or horizontal market foreclosure, facilitate coordinated effects or eliminate potential competition, it can be expected that such M&A transaction will not pose any significant competition issues.

The 2007 Merger Guidelines identify two safe harbours for vertical and conglomerate M&A transactions. If either of these safe harbours is met (and there are no other competitive restrictions) the JFTC is likely to consider that the M&A transaction does not substantially restrain competition:
- the merging parties' market share after the M&A transaction is not more than 10 per cent; or
- the merging parties' market share after the M&A transaction is not more than 25 per cent and the HHI after the M&A transaction is not more than 2,500.

If none of the above safe harbours is met, the JFTC will proceed with the separate analysis of the non-coordinated (unilateral) and coordinated effects of a vertical or conglomerate M&A transaction in the same way as for horizontal M&A transactions. However, the 2007 Merger Guidelines clarify that, if HHI after the M&A transaction is not more than 2,500 and the merging parties' market share after the M&A transaction is not more than 35 per cent, it is generally considered that the possibility of the M&A transaction substantially restraining competition is low.

A chart illustrating the substantive analysis undertaken by the JFTC for the assessment of M&A transactions is provided at the end of the chapter.

The informal prior consultation procedure

M&A transactions are usually submitted to the JFTC under the voluntary informal consultation procedure, prior to the formal statutory filing of a proposed transaction under the AMA. Using the informal prior consultation procedure presents the advantage that, as a general rule, the JFTC will make up its mind about a particular case at this early stage and will almost always keep to that opinion in the formal notification procedure. Amendments to the informal consultation procedure (the Informal Consultation Guidelines) were published alongside the 2007 Merger Guidelines. The Informal Consultation Guidelines were later amended on 1 January 2010 to reflect changes introduced by the Amendment and the amended Merger Guidelines, although no substantial changes were made.

Following the amendments to the Informal Consultation Guidelines, the JFTC will start its phase 1 examination within 20 days from the initiation of the informal consultation procedure – or upon receiving all the requested information, in case the JFTC requests such additional information. The amended Informal Consultation Guidelines provide detailed examples of documents that will be considered for the JFTC's competitive analysis.

Within 30 days from the start of the phase 1 examination, the JFTC will indicate either that the proposed transaction does not raise AMA issues or that a phase 2 examination is necessary. In the latter case, the JFTC will explain to the notifying party its issues of concern on the basis of specific product or services markets, as well as in terms of geographic markets. If the notifying company decides to proceed with (rather than withdraw) its application, the application will be made public and the JFTC will commence its phase 2 examination, which includes inquiries to competitors, retailers and end-users. The JFTC will also receive opinions from the public for a period of 30 days after disclosure of the proposed transaction. At this stage of the procedure, the notifying party has an opportunity to make amendments to the proposal in order to address the JFTC's issues of concern.

The JFTC will then issue its informal decision within 90 days of receiving the necessary documents and information and will inform the notifying party of the result of its examination, including the reasoning behind its decision.

If the JFTC indicates to the notifying company that informal approval of its proposed transaction is unlikely to be given, the notifying company may decide to withdraw the submission if it believes that the possibility of ultimately securing approval under the statutory procedure is small. If the JFTC concludes that the proposed transaction poses competition problems, and the applicant has offered some remedies to resolve the problem, the JFTC will provide its answer, taking into account the notifying parties' offer.

If the JFTC states that there are no competition issues, either at the end of the 30-day phase 1 examination or at the end of the phase 2 examination, the parties can file the official statutory notification on the basis that an unconditional approval will be obtained, provided that there is no material change in circumstances.

Finally, for merger investigations in corporate and industrial revitalisation cases, in certain situations not likely to restrain competition (similar to the safe harbour cases mentioned above), the JFTC has announced that it will review such cases at the informal consultation stage, within an accelerated timetable of 15 days after the start of the phase 1 examination.

Formal notification procedure: filing and timing issues

In the case of a merger (or corporate split or joint share transfer), both companies intending to effect a merger (or corporate split or joint share transfer) are jointly responsible for the filing. In the case of a business transfer, the receiving company is responsible for the filing. In the case of a share acquisition, the acquiring party is responsible for making the filing. There are no filing fees.

In terms of timing, the standard 30-day waiting period will apply, during which the JFTC may request additional information in the form of reports, data, etc. In certain cases, the JFTC may shorten the 30-day waiting period (for example, because at the informal consultation stage it indicated that the case raises no competition concerns). If the JFTC intends to order necessary measures regarding the M&A transaction, it will notify the parties within the 30-day waiting period (or within the shortened period, if applicable) or, where that the JFTC has requested additional information, within the longer period of either 120 days from the date of receipt of the initial notification or 90 days from the date of the receipt of all of the additional information.

Merger remedies: policies and practices

The JFTC will grant conditional clearance to a proposed transaction on a case-by-case basis if, for example, one or both of the parties undertake to make certain divestments or take other measures to promote competition in the relevant market. The 2007 Merger Guidelines clarified the JFTC's policy regarding remedies by listing a number of remedies that can be offered by the parties to a transaction in order to solve competition concerns. Broadly speaking the 2007 Merger Guidelines, although less analytical and detailed in their content, are in line with the European Commission's 2008 notice on remedies, and in particular with the general objective to ensure competitive market structures through appropriate remedies to particular competition issues.

The 2007 Merger Guidelines list the following types of remedies:

- remedies to restore or minimise a change in market structure – divestiture of a part of business, reduction in the shareholding ratio, dissolution of joint ventures etetc;
- remedies to enhance competition – requiring access to essential inputs for import or entry, licensing know-how or intellectual property rights, etc; and
- remedies to exclude or limit actions by the merged entity aimed at taking advantage of its increased market power – a commitment to non-discriminatory behaviour, obligation to refrain from information exchange (which may lead to collusion among firms), etc.

A good example of the JFTC's policy regarding remedies can be found in its decision on 19 December 2008 with regard to the capital alliance between Kirin group and Kyowa Hakko, including the share acquisition by Kirin Holdings Co Ltd of Kyowa Hakko Kogyo Co Ltd. The JFTC considered that such capital alliance would create a substantial restraint of competition in the pharmaceutical market, and more particularly in the Granulocyte-colony stimulating factor (G-SCF) product market. However, the parties agreed to divest their rights for research and development as well as for the manufacture and sale of Neu-up, one of their products, to a third party. The JFTC considered that such divestment remedy would allow for a new competitor to enter the market, thereby maintaining the conditions of competition in the market. Another example is the JFTC's approval of Johnson & Johnson's proposed acquisition of Guidant in 2005 where the JFTC, in cooperation with the US FTC and the EC, approved the Japan portion of the global transaction on the condition that Johnson & Johnson divested a specific business, despite identifying a substantive restraint of competition in a certain market (the transaction has not closed).

The role of competitors in the merger control process

In comparison with the EU, and even more so in comparison with the US, there is less of a culture of using private actions in Japan to block M&A transactions. It can be safely said that such cases are the exception rather than the rule. Theoretically, any person may undertake a private action, or report what they believe to be a violation of the AMA to the JFTC. The JFTC is obliged to investigate the matter, but has full discretion as to whether to take any formal enforcement action or not.

The growing importance of economic analysis in merger cases

The JFTC is making increasing use of economists and economic analysis in its assessment of merger cases. First, the JFTC is holding joint staff meetings with the US and EU competition authorities to learn and absorb economic know-how in the area of merger cases. Second, the JFTC is hiring researchers and academics specialised in economic analysis in order to bolster the agency's economic analysis capacities. Third, the JFTC set up a new body in 2003, the Competition Policy Research Centre which, among other tasks, has the function of promoting the use of economics in the JFTC's decision-making. Finally, there is a clear focus on increased economic analysis in the 2007 Merger Guidelines, which introduce the SSNIP test, use the HHI as the sole measure of market concentration, and also use the notion of the delta as an additional economic requirement to meet the safe harbour.

Does the Japanese business community accept the policy and system? Are there movements for reform?

Comparatively, it took a longer time for the Japanese business community to accept merger control rules than in other jurisdictions such as the EU or US, mainly due to the circumstances that led to the introduction of the AMA. Since the late 1980s, however, merger control rules have been increasingly accepted and more strictly enforced by the JFTC. On 12 March 2010, a Bill for the amendment of the AMA was submitted to the Diet. The key proposed change is to abolish the JFTC's hearing procedure and to hand jurisdiction of appeal suits to the Tokyo District Court. The Bill also proposes to abolish the current rule which provides that the court is bound by the JFTC's fact finding.

Interface with other merger control regimes of foreign countries and technical assistance offered by the JFTC within the Asia-Pacific region

Prior to the Amendment, the information relating to international merger or cartel activities was exchanged with foreign competition agencies pursuant to bilateral agreements or on a reciprocal basis. For example, in relation to the Panasonic and Sanyo Electric merger, it was reported that the European Commission, the US Fair Trade Commission, and the JFTC closely cooperated during the review of the case in the framework of bilateral agreements between the respective authorities.[17] In responding to an increasing need to share information with foreign agencies, the Amendment provides the legal basis for such information exchange together with the requirements thereof.[18]

In addition, the JFTC has been providing competition law-related training courses for some specific Asia-Pacific countries (such as China, Thailand and, recently, Indonesia) and has entered into a specific economic partnership agreement with Singapore which includes cooperation on anti-competitive activities. In relation to China, the JFTC held 10 training sessions for Chinese officials (from the Chinese Ministry of Commerce, the National Development and Reform Commission, and the State Administration for Industry and Commerce) on competition law and policy, using the Japan International Cooperation Agency's scheme for technical assistance, following specific requests made by the Chinese government.

The purpose of the training programme was for Chinese officials to obtain knowledge of Japan's AMA and its implementation, with the wider objective of contributing to the development of competition legislation and the proper and steady implementation of competition law and policy in China. As is widely known, a comprehensive Chinese competition law was adopted by the Chinese Parliament and entered into force in August 2008. Although the framework of merger control under the Chinese law is mostly in line with international practices, many aspects, including the substantive test for review and the review procedures themselves, are still to be filled in by regulations and through actual enforcement.

There is a growing trend towards cooperation between the JFTC and other competition authorities of the Asia-Pacific region through multilateral agreements – mainly APEC, OECD and the East Asia Competition Policy Forum (as well as global forums such as the WTO and ICN).

In April 2008, the JFTC hosted the 7th Annual International Competition Network Conference in Kyoto. More than 500 participants from over 70 countries – mainly public officials from competition agencies, as well as academics and competition law practitioners – attended the event.

Notes

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1 Rules on the Application for Approval, Reporting, Notification, etc, pursuant to articles 9 through 16 of the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade.
2 Guidelines on the Application of the AMA Concerning Review of Business Combinations.
3 Article 10, paragraph 2 of the AMA and article 16, paragraph 3 of the Order for Enforcement of the AMA.
4 Article 10, paragraph 6 of the AMA.
5 Article 10, paragraph 5 of the AMA.
6 Article 10, paragraph 2 of the AMA.
7 Article 2, paragraph 1 of the Merger Rules.
8 Article 2, paragraph 2 of the Merger Rules.
9 Article 15, paragraph 2 and article 15-3, paragraph 2 of the AMA.
10 Article 16, paragraph 2 of the AMA.
11 A corporate split is similar to a business transfer insofar as the assets and liabilities are transferred, whereas it differs insofar as the assets and liabilities are comprehensively transferred as an organisational transfer and therefore no individual consent for the transfer from the creditor is necessary.
12 Article 15-2, paragraph 2 of the AMA.
13 Article 15-2, paragraph 3 of the AMA.
14 Article 10, paragraph 2 of the AMA.
15 Article 16, paragraph 3 of the Implementation Rules of AMA.
16 Article 15, paragraph 2 (in case of mergers); article 15-2, paragraph 2 (in case of split-type corporate split); article 15-2, paragraph 3 (in case of absorption-type of corporate split); article 15-3, paragraph 2 (in case of joint share transfers) and article16, paragraph 2 of the AMA.
17 European Commission press release, 29 September 2009 (IP/09/1383).
18 Article 43-2 of the AMA.

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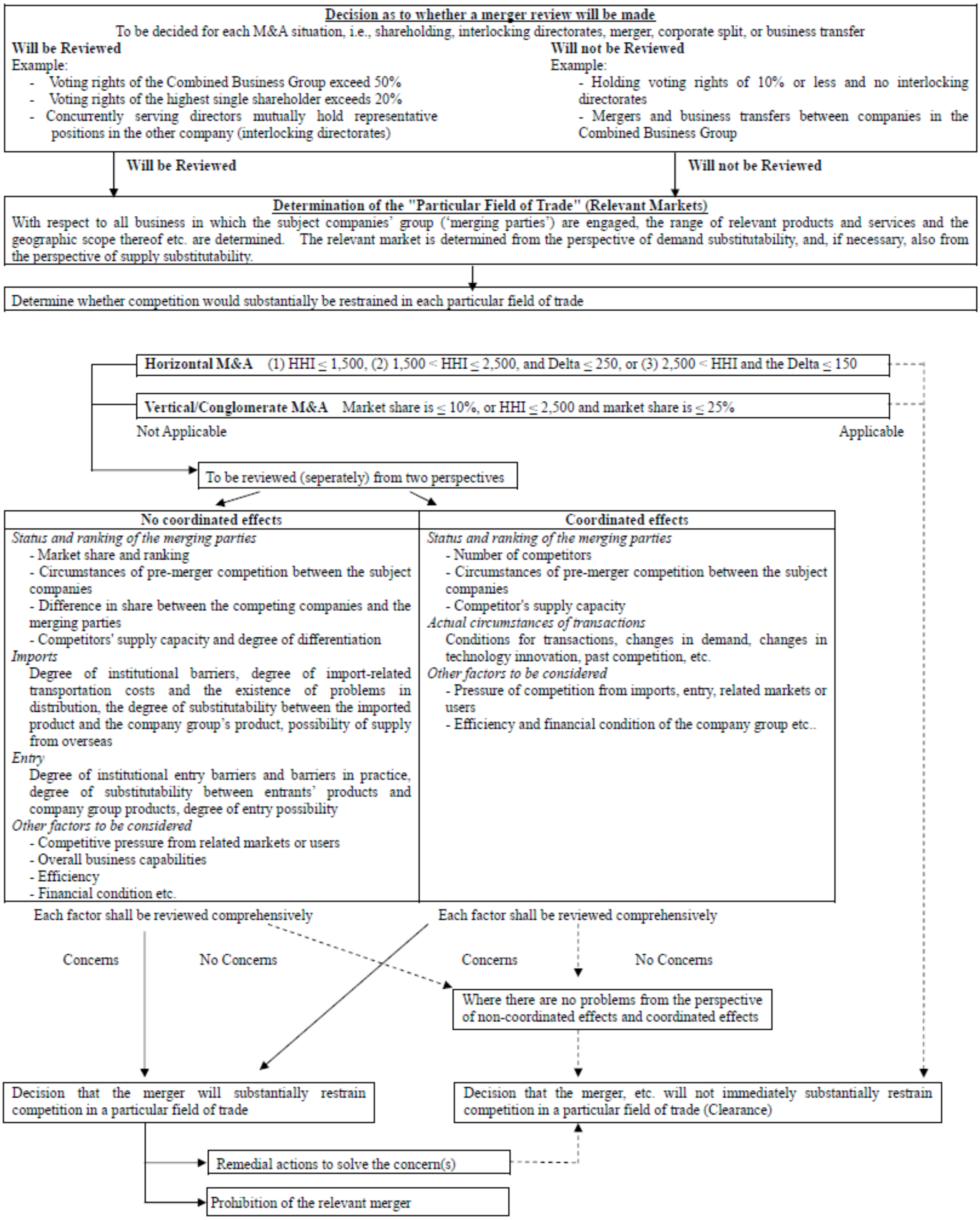
Anderson Mōri & Tomotsune is a leading Japanese law firm which, through its predecessor firms, traces its roots back to 1952. Since then, the growth of the firm in terms of size and diversity of practice has mirrored that of Japan and the Japanese financial market. Today, with a professional complement of over 310 and a support staff of more than 320, Anderson Mōri & Tomotsune is among the largest and most diversified law firms in Japan.

Anderson Mōri & Tomotsune has extensive experience providing advice on all aspects of competition regulation in Japan, including advising on competition issues of major M&A transactions, investigations and proceedings before the Japan Fair Trade Commission, IP-related issues and distribution arrangements, as well as litigation involving claims arising under competition laws.

The regulation and enforcement of Japanese competition law is changing, and this is why we believe it is of increasing importance for clients to receive timely and expert advice in this area. Our primary aim is to offer practical advice and solutions to even the most complex competition matters. A unique feature of Anderson Mōri & Tomotsune's competition regulation practice is the insight obtained by the head of the firm's practice during the seven years he worked as the first attorney appointed as special investigator with the Japan Fair Trade Commission.

JFTC's approach to the assessment of M&A transactions

The diagram below is based on that published by the JFTC in its press announcement of 1 January 2010 on the amendments to the Merger Guidelines.



Shigeyoshi Ezaki
Anderson Mōri & Tomotsune

Shigeyoshi Ezaki is a partner at Anderson Mōri & Tomotsune, with a general corporate practice which includes advising and assisting Japanese and foreign clients with respect to Japanese competition law, trade regulation, intellectual property law and corporate law. He represents many companies involved in cross-border mergers and acquisitions as well as joint venture arrangements. He also assists many clients in regulatory investigations with respect to price fixing and similar serious alleged violations before the Japan Fair Trade Commission, as well as overseas regulatory authorities such as the US Department of Justice and the European Commission. He also represents many companies in the area of distribution agreements and license agreements. He was educated in Japan and in the United States and is admitted in both Japan and New York.

Vassili Moussis
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Dr Vassili Moussis is an English-qualified lawyer and registered foreign lawyer (*Gaikokuho jimu bengoshi*) with the Japanese Bar. Prior to joining Anderson Mōri & Tomotsune, he practised in London, Brussels and Tokyo with a particular emphasis on EU competition law. He studied law in Belgium and the UK and holds a PhD on comparative EU and Japanese competition law. At Anderson Mōri & Tomotsune, his practice focuses on EU law and in particular EU competition law with a particular emphasis on merger control and international cartel matters. He also advises on distribution arrangements, corporate restructuring, intellectual property issues and other commercial matters, which often include an international element.