The Merger Control Review

Third Edition

Editor

Ilene Knable Gotts

Law Business Research

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EDITOR'S PREFACE

Perhaps one of the most successful exports from the United States has been the adoption of mandatory pre-merger competition notification regimes in jurisdictions throughout the world. Although adoption of pre-merger notification requirements was initially slow – with a 13-year gap between the enactment of the United States' Hart-Scott-Rodino Act in 1976 and the adoption of the European Community's merger regulation in 1989 – such laws were implemented at a rapid pace in the 1990s, and many more were adopted and amended during the past decade. China and India have just implemented comprehensive pre-merger review laws, and although their entry into this forum is recent, it is likely that they will become significant constituencies for transaction parties to deal with when trying to close their transactions. Indonesia also finally issued the government regulation that was needed to implement the merger control provisions of its Antimonopoly Law. Many of the jurisdictions that were 'early adopters' have either refined their processes and procedures in substantial ways or have proposals pending to do so, typically to conform their regime with the pre-merger regimes of other jurisdictions (e.g., Brazil, Canada and the UK). This book provides an overview of the process in each of the jurisdictions as well as a discussion of recent decisions, strategic considerations and likely upcoming developments in each of these. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

As shown in further detail in the chapters, some common threads in institutional design underlie most of the merger review mandates, although there are some outliers as well as nuances that necessitate careful consideration when advising clients on a particular transaction. Almost all jurisdictions either already vest exclusive authority to transactions in one agency or are moving in that direction (e.g., Brazil, France and the UK). The US and China may end up being the outliers in this regard. Most jurisdictions provide for objective monetary size thresholds (e.g., the turnover of the parties, the size of the transaction) to determine whether a filing is required. Germany provides for a *de minimis* exception for transactions occurring in markets with sales of less than €15 million. There are a few jurisdictions, however, that still use 'market share' indicia (e.g., Bosnia

and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the UK). Most jurisdictions require that both parties have some turnover or nexus to their jurisdiction. But, there are some jurisdictions that take a more expansive view. For instance, Turkey recently issued a decision finding that a joint venture ('JV') that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. Germany also takes an expansive view, by adopting as one of its thresholds a transaction of 'competitively significant influence'. Although a few merger notification jurisdictions remain 'voluntary' (e.g., Australia, Singapore, the UK and Venezuela), the vast majority impose mandatory notification requirements.

Almost all jurisdictions require that the notification process be concluded prior to completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made prior to closing. Many jurisdictions can impose a significant fine for failure to notify before closing even where the transaction raises no competition concerns (e.g., Austria, the Netherlands, Romania, Spain and Turkey). Some jurisdictions impose strict time frames by which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; Brazil requires that the notification be made within 15 business days of execution of the agreements; and Hungary and Romania have a 30-calendar-day time limit from entering into the agreement for filing the notification. Some jurisdictions that mandate filings within specified periods after execution of the agreement also have the authority to impose fines for 'late' notifications (e.g., Bosnia and Herzegovina and Serbia) for mandatory pre-merger review by federal antitrust authorities.

Most jurisdictions more closely resemble the European Union model than the US model. In these jurisdictions, pre-filing consultations are more common (and even encouraged), parties can offer undertakings during the initial stage to resolve competitive concerns, and there is a set period during the second phase for providing additional information and for the agency to reach a decision. In Japan, however, the Japanese Federal Trade Commission ('JFTC') announced in June 2011 that it would abolish the prior consultation procedure option. When combined with the inability to 'stop the clock' on the review periods, counsel may find it more challenging in transactions involving multiple filings to avoid the potential for the entry of conflicting remedies or even a prohibition decision at the end of a JFTC review. Some jurisdictions, such as Croatia, are still aligning their threshold criteria and process with the EU model. There remain some jurisdictions even within the EU that differ procedurally from the EU model. For instance, in Austria the obligation to file can be triggered if only one of the involved undertakings has sales in Austria as long as both parties satisfy a minimum global turnover and have a sizeable combined turnover in Austria.

The role of third parties also varies across jurisdictions. In some jurisdictions (e.g., Japan) there is no explicit right of intervention by third parties, but the authorities can choose to allow it on a case-by-case basis. In contrast, in South Africa, registered trade unions or representatives of employees are even to be provided with a redacted copy of the merger notification and have the right to participate in Tribunal merger hearings and the Tribunal will typically permit other third parties to participate. Bulgaria has announced a process by which transaction parties even consent to disclosure of their confidential information to third parties. In some jurisdictions (e.g., Australia, the EU and Germany), third parties may file an objection against a clearance.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The US is one significant outlier with no bar for subsequent challenge, even decades following the closing, if the transaction is later believed to have substantially lessened competition. Canada, in contrast, provides a more limited time period for challenging a notified transaction.

As discussed below, it is becoming the norm in large cross-border transactions raising competition concerns for the US, EU and Canadian authorities to work closely with one another during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. Regional cooperation among some of the newer agencies has also become more common; for example, the Argentinian authority has worked with that in Brazil, and Brazil's CADE has worked with Chile and with Portugal. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Serbia, Montenegro and Slovenia similarly maintain close ties and cooperate on transactions. In transactions not requiring filings in multiple EU jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EU threshold can nevertheless be referred to the Commission in appropriate circumstances. In 2009, the US signed a memorandum of understanding with the Russian Competition Authority to facilitate cooperation; China has 'consulted' with the US and EU on some mergers and entered into a cooperation agreement with the US authorities in 2011, and the US has also announced plans to enter into a cooperation agreement with India.

Minority holdings and concern over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, seem to be gaining increased attention in many jurisdictions, such as Australia. Some jurisdictions will consider as reviewable acquisitions in which only 10 per cent interest or less is being acquired (e.g., Serbia for certain financial and insurance mergers), although most jurisdictions have somewhat higher thresholds (e.g., Korea sets the threshold at 15 per cent of a public company and otherwise 20 per cent of a target; and Japan and Russia, at any amount exceeding 20 per cent of the target). Jurisdictions will often require some measure of negative (e.g., veto) control rights, to the extent that it may give rise to *de jure* or *de facto* control (e.g., Turkey).

Given the ability of most competition agencies with pre-merger notification laws to delay, and even block, a transaction, it is imperative to take each jurisdiction – small or large, new or mature – seriously. China, for instance, in 2009 blocked the Coca-Cola Company's proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-Chinese domiciled firms. In *Phonak/ReSound* (a merger between a Swiss undertaking and a Danish undertaking, each with a German subsidiary), the German Federal Cartel Office blocked the merger worldwide even though less than 10 per cent of each of the undertakings was attributable to Germany. Thus, it is critical from the outset for counsel to develop a comprehensive plan to determine how to navigate the jurisdictions requiring notification, even if the companies operate primarily outside some of the jurisdictions.

For transactions that raise competition issues, the need to plan and to coordinate among counsel has become particularly acute. As discussed in the last chapter, it is no longer prudent to focus merely on the larger mature authorities, with the expectation that other jurisdictions will follow their lead or defer to their review. In the current

environment, obtaining the approval of jurisdictions such as China and Brazil can be as important as the approval of the US or EU. This book should provide a useful starting point in this important aspect of any cross-border transaction being contemplated in the current enforcement environment.

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New York
July 2012

Chapter 26

JAPAN

Yusuke Nakano, Vassili Moussis and Tatsuo Yamashima[1]

I INTRODUCTION

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

Mergers,[2] business transfers, corporate splits (or demergers), joint share transfers and share acquisitions (including joint ventures) are subject to prior notification under the AMA if they exceed certain thresholds. M&A transactions whose schemes involve more than one of these transactions (e.g., an acquirer merges with a target after acquiring 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 EU, Japanese law does not make a distinction between full-function and non-full-function joint ventures. A notification is 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

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

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]

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 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.

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

More precisely, domestic turnover is the total amount of the following three categories of sales:[6]

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

b sales amount derived from the sale of goods (including services) supplied in Japan to purchasers who are corporations or other business entities or individuals who are transacting business ('business entities'); but excluding sales of goods (or services) that it is thought, at the time of entering into the contract, would be shipped outside Japan, or shipped to branch offices in foreign countries of such business entities, without any change to their nature or characteristics; and

c sales amount derived from the sale of goods (including services) to be supplied outside Japan to business entities but for which it is thought, at the time of entering into the contract, would be shipped into Japan, or shipped to the branch offices in Japan of such business entities, without any change to their nature or characteristics.

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3 Article 10, Paragraph 5 of the AMA.

4 A combined business group consists of all of the subsidiaries of the ultimate parent company. It should be noted that a company will generally be considered to be part of a 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 financial and business policy is 'controlled' by the other company. The Merger Notification Rules specify a detailed threshold for 'control' to exist, which might be found even in cases where the ratio of beneficially owned voting rights is as low as 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 and thus is not an entirely new concept under Japanese law. In addition, these changes align the Japanese merger control with the merger rules of other countries, especially those of the EU.

5 Article 10, Paragraph 2 of the AMA.

6 Article 2, Paragraph 1 of the Merger Notification Rules.

In relation to this, the Merger Notification Rules allow some flexibility where the calculation of domestic turnover cannot be made in strict compliance with those rules, in which case it is 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.[7]

Notification thresholds for each type of transaction

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[8] to meet the filing requirement. Second, such acquisition 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 (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).[9] It should be noted that a minority ownership of 20 per cent will be caught regardless of whether the acquirer will take control of the target company.

For mergers and joint share transfers,[10] 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.

For business transfers, the thresholds are based on domestic turnover. The aggregate domestic turnover of all corporations within the combined business group of the acquiring corporation must exceed ¥20 billion to meet the filing requirement. Furthermore, 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 case, a threshold of ¥3 billion of domestic turnover applies to the transferring corporation; in the latter, a threshold of ¥3 billion of domestic turnover attributable to the target business applies.

For corporate splits, there are a number of relevant thresholds but essentially the ¥20 billion and ¥5 billion thresholds described above apply here also (although in some cases the thresholds can be lower).

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7 Article 2, Paragraph 2 of the Merger Notification Rules.

8 Article 10, Paragraph 2 of the AMA.

9 Article 16, Paragraph 3 of the Implementation Rules of the AMA.

10 This refers to a specific structure under the Japanese law, which involves two or more companies transferring their shares into a new holding company in exchange of shares from that holding company.

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

Up until the end of June 2011, M&A transactions were usually[11] submitted to the JFTC under the voluntary consultation procedure ('the Prior Consultation') prior to the formal statutory filing of a proposed transaction under the AMA, pursuant to the Prior Consultation Guidelines. Under the Prior Consultation, the JFTC would make up its mind about a particular case at this early stage and would usually keep to that opinion in the formal notification procedure thereafter.

However, the JFTC announced in June 2011 that it would abolish the Prior Consultation as of 1 July 2011, and thus it would no longer provide its conclusion on substantive issues at the pre-notification stage. The abolition of the Prior Consultation means that the review of a proposed transaction would only start at the formal notification stage and would last 30 calendar days with a possible 90 calendar days extension (from the date of the receipt of all of the additional information requested by the JFTC) in complex cases.

Also, in order to increase the transparency of the formal review process, the JFTC publicised its Policy for Merger Review[12] in June 2011 (effective 1 July 2011) and made clear in the policy that it will provide the notifying parties with an explanation of any issues it has identified during the Phase I or Phase II investigation, when requested by the notifying party or when the JFTC finds such explanation necessary. Further, the JFTC made clear in the Policy for Merger Review that the notifying parties can submit opinions (including proposed remedies) at any time during the review period. The parties will still have the opportunity to consult with the JFTC prior to the formal notification but according to the JFTC's stated policy, only with regard to non-substantive issues such as the method of completing the notification form.

Concurrently with the publication of the Policy for Merger Review, the Merger Guidelines[13] have also been amended to increase the transparency of the substantive review.

II YEAR IN REVIEW

During the fiscal year 2011 (1 April 2011 to 31 March 2012) the JFTC publicly announced that it had opened Phase II reviews during the Prior Consultation stage in three cases.

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11 In many cases not involving the Prior Consultation procedure under the Prior Consultation Guidelines described in this section, the notifying parties, nevertheless, informally approached the JFTC before submission to discuss substantive issues such as market definition or calculation of market shares. In general, complex cases were submitted to the JFTC through the Prior Consultation procedure.

12 Policies Concerning Procedures of Review of Business Combination (14 June 2011).

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

i Significant transactions in 2011

Nippon Steel/Sumitomo Metal merger

On 31 May 2011, the JFTC opened a Phase I review in relation to the proposed merger[14] between Nippon Steel Corporation and Sumitomo Metal Industries, Ltd. The JFTC then initiated a Phase II review procedure and requested additional information from the parties on 30 June 2011. The JFTC confirmed receipt of all of the additional information and the remedy proposal on 9 November 2011, and granted conditional clearance to the proposed merger on 14 December 2011, following the submission of proposed remedies by the parties.[15] The proposed remedies included an obligation to provide the trading rights for non-oriented electrical steel sheets to a third party at a price equivalent of the production cost and to supply a new entrant on reasonable conditions equivalent to those offered to the parties' affiliates in relation to the high-pressure gas pipeline engineering business. These remedies corresponded to the JFTC's concern that the proposed merger would substantially restrain competition in the above two businesses, as the JFTC's investigation found that, post-transaction, the parties would hold market shares of 55 to 60 per cent with only one competitor in each of those markets. It is important to note in relation to the duration of the Phase II proceedings that although the AMA requires the JFTC to notify the parties of its decision within 90 calendar days from the date it receives all the requested additional information, in practice, the 90 calendar-day period may be significantly shortened. In this particular case, the JFTC cleared the transaction five weeks after the initiation of the Phase II proceedings.

Mergers in the hard disk drive sector

Other notable transactions notified under the new notification procedure concerned the two proposed mergers in the hard disk drive ('HDD') sector: the acquisition of the HDD business of Samsung Electronics Co Ltd by Seagate Technology International ('Seagate') and the acquisition of the shares of Viviti Technologies Ltd by Western Digital Ireland, Ltd ('WDI'). In relation to the acquisition by Seagate, the JFTC opened a Phase I review on 19 May 2011 and a Phase II review on 17 June 2011. The JFTC confirmed receipt of all the requested additional information on 27 October 2011 and cleared the proposed acquisition unconditionally on 15 December 2011. In relation to the acquisition by WDI, the JFTC opened a Phase I review on 10 June 2011 and a Phase II review on 4 July 2011. The JFTC confirmed receipt of all the requested additional information on 26 August 2011, and granted conditional clearance to the proposed acquisition on 24 November 2011 following the proposal of remedies by the parties.[16]

Importantly, the JFTC expressly stated that because the transactions were planned to take place at around the same time, the JFTC's review of each transaction would take into account the other transaction. In this regard, the JFTC expressed concern that the proposed mergers would substantially restrain competition with regard to

14 After the JFTC's clearance, the scheme was later changed to an acquisition of shares by Nippon Steel in Sumitomo Metal.

15 www.jftc.go.jp/en/pressreleases/uploads/2011_Dec_14.pdf.

16 www.jftc.go.jp/en/pressreleases/uploads/2011_Dec_28.pdf.

3.5-inch HDDs for PCs and consumer electronic devices because post-transaction there would remain only two competitors having market shares of approximately 50 per cent each. The remedies offered by WDI included the divesture of manufacturing facilities representing approximately 10 per cent of its market share in 2010 for 3.5-inch HDDs to a new entrant, together with the use of IP rights required for the manufacture and sale of such HDDs. The JFTC considered that the above remedies would ensure sufficient competition in the market so that not only unilateral but also coordinated behaviour were not likely to substantially restrain competition in the market post-transactions. No remedies were offered by Seagate.

ii Statistics of the JFTC's activity

According to the JFTC, the total number of merger notifications for the fiscal year 2011 was 275. Two cases were cleared subject to conditions under Phase II review, while one case was cleared without any conditions under Phase II review. There were no formal prohibition decisions during the fiscal year 2011.

III THE MERGER CONTROL REGIME

i Waiting periods and time frames

In the case of a merger (or corporate split or joint share transfer), both companies intending to effect such a transaction 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 time frames, 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 (see Section III.ii, *infra*). 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 if such period is shortened, within the shortened period), or if the JFTC has requested additional information within the 30-day waiting period, 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 additional information. It should be noted that the JFTC does not have the power to 'stop the clock' in either of the Phase I or Phase II review periods, although it is possible for the notifying party to 'pull and refile' the notification during Phase I.

ii Parties' ability to accelerate the review procedure

It is generally possible to accelerate the review process by way of submitting a written request to the JFTC. The Merger Guidelines 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.

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

Access to the file

Complainants have no right to access the merger notification files. Further, according to the Policy for Merger Review, the JFTC will disclose a short summary of the proposed merger only if the review moves on to Phase II. This means that third parties cannot confirm whether a merger has actually been notified, unless such disclosure from the JFTC happens.

Rights to challenge mergers

Interventions by interested parties in the JFTC proceedings have not historically been common in Japan. This practice has, however, started to change as exemplified by interventions made before the JFTC in relation to the proposed *BHP Billiton/Rio Tinto* joint venture case by Japanese steel manufacturers, as reported by the Japanese press.

There are two ways for complainants to make a submission to the JFTC in the course of a merger review: to notify the investigation bureau of a possible breach of the AMA and to notify the mergers and acquisitions divisions. With regard to notifications to the investigation bureau, anyone can submit notifications of a possible breach of the AMA.[17] In addition, actual practice indicates that in some cases complaints have been made with the mergers and acquisitions division, although there is no explicit provision in the AMA for such submissions.

Also, the Policy for Merger Review states that, in case a merger review moves on to Phase II, the JFTC will invite opinions and comments from third parties. Public hearings can be held[18] if deemed necessary, but they have been extremely rare to date.

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

The JFTC can issue a cease-and-desist order when the JFTC believes that a proposed transaction's effect may be to substantially restrain competition in a particular field of trade (a relevant market). In a case of issuing a cease-and-desist order, the JFTC is required to explain the contents of the supporting evidence to the potential recipients of such order, and give them an opportunity to submit opinions as to the order.

When the JFTC issues a cease-and-desist order, the parties to the transaction can appeal this before the JFTC through an administrative hearing procedure. The parties can further appeal to the Tokyo High Court for annulment of the JFTC decision confirming the order, should the order be confirmed by the administrative hearing decision. A bill to amend the appeals' process is under discussion in the Diet (see Section V, *infra*).

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

17 Article 45, Paragraph 1 of the AMA.

18 Article 42 of the AMA.

on a given transaction, without prejudice to the independence of its competition policy review and merger review. Among the various government ministries, it is broadly believed that 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 have an involvement.

vi Substantive review

The 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 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.

This means that it is much more likely that consolidation within certain sectors of the Japanese economy that are faced with competition from foreign imports, for example, will be easier because the widening of the actual geographical market may dilute their national market shares. Following the 2007 amendment to the Merger Guidelines, there have been several JFTC merger decisions where the JFTC defined the relevant geographical market to extend beyond Japan. One example involved TDK Corporation's acquisition from Alps Electric Co Ltd of fixed assets used for the manufacturing of magnetic heads. The JFTC ultimately determined that the proposed acquisition '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, post-acquisition, 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. It is understood that the JFTC reached this conclusion based on its finding, among others, that magnetic head manufacturers sell their products at the same price regardless of the customers' geographical location. The JFTC reached a similar conclusion in the *HDD* case (see Section II, *supra*). It is likely that the JFTC will continue to define geographical markets that extend beyond Japan when assessing future transactions, depending on the actual conditions of competition.

In addition, the Merger Guidelines explain the factors that will be taken into account when assessing whether a certain M&A transaction's effect may be to substantially restrain competition. The Merger Guidelines provide an analysis of the substantive test for each of horizontal, vertical and conglomerate M&A transactions. Another indication of the sophistication of the JFTC's merger review can be found in the Merger Guidelines, which 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).

IV OTHER STRATEGIC CONSIDERATIONS

i Coordination with other jurisdictions

Cooperation between the JFTC and foreign competition authorities

The JFTC has entered into bilateral cooperation agreements with the competition authorities of the United States, the European Union and Canada. Under these agreements, various levels of information exchanges and discussions can be made between the participating authorities. The JFTC is entitled to exchange information with other authorities as well, based on the conditions set out in the AMA.[19]

Among the recent cases for which the JFTC publicised the results of its review the JFTC worked with the Australian Competition & Consumer Commission, the European Commission, the German Federal Cartel Office and the Korea Fair Trade Commission in the *BHP Billiton/Rio Tinto* joint venture case. Moreover, in the *Panasonic/Sanyo* case, 10 competition authorities reviewed the transaction and the JFTC cleared the case in 2009 after working with authorities in the US and the EU. Most recently, in the *HDD* case, the JFTC exchanged information with the European Commission, the Federal Trade Commission of the US, and the Korea Fair Trade Commission.

Coordination among attorneys from various jurisdictions

As explained in Section I, *supra*, the JFTC announced that it would abolish the Prior Consultation as of 1 July 2011, which means that the substantive review of a proposed transaction would only start at the formal notification stage. Also, as explained at Section III, *supra*, each of the Phase I and Phase II review periods cannot be extended even in the 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 so as 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.

ii 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 or 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, so it is difficult to find any business operator that can 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.

In 2010, the JFTC reviewed the proposed acquisition of Showa Aluminum Powder KK by Toyo Aluminium KK and separately the proposed acquisition of Kishimoto Medical Science Laboratory by BML Inc and cleared both transactions taking

19 Article 43-2 of the AMA.

into account, *inter alia*, the failing firm doctrine. More specifically, the JFTC cleared the case on the grounds, *inter alia*, that Showa had excessive levels of debt and was unable to get finance for working capital, as well as because it was highly likely that Showa would withdraw from the relevant markets in the near future. The JFTC also mentioned that it would have been very difficult for Showa to enter into a merger with another candidate that would have a lesser impact on competition compared with that with Toyo.

Minority ownership interests

It should be noted that minority ownership of over 20 per cent of the issued shares in a company is notifiable regardless of whether the acquirer will take control of the target company. Also, in the JFTC's substantive review, any companies that are in a close relationship with an acquirer or a target shall be deemed to be in a 'joint relationship'. Accordingly, these companies will be treated as a totally integrated group for the purpose of the substantive analysis and, for example, the Herfindahl-Hirschman Index will also be calculated based on the sales data of the integrated group as a whole. The joint relationship will be determined by taking into account various factors although, according to the Merger Guidelines, a minority shareholding of over 20 per cent and the absence of shareholders with larger shareholding ratios would suffice.

iii Foreign-to-foreign mergers

The amendment to the AMA effective as of January 2010 has made foreign-to-foreign mergers, between undertakings which have no Japanese subsidiary or branch office in Japan but which have substantial domestic turnover in Japan, notifiable (see Section II, *supra*) for the notification threshold as of January 2010).

It appears from the JFTC's stance at the time of BHP Billiton's attempt to take over Rio Tinto through a hostile bid, that the JFTC will not hesitate to fully investigate foreign-to-foreign mergers that may have a substantial impact on competition in Japan, by cooperating and exchanging information with foreign competition authorities (see Section IV.i, *supra*).

iv Transactions below the notification thresholds

It is important to note that the JFTC can theoretically review any M&A transaction under the substantive test, regardless of whether the thresholds described above are met. Indeed, the JFTC has actually investigated transactions that had not been notified to it, including foreign-to-foreign transactions like the aforementioned attempt by BHP Billiton to take over Rio Tinto through a hostile bid.[20]

This case is of note as the JFTC showed its willingness to fully investigate a merger that could have the effect of substantially restraining competition in Japan, regardless of whether the formal notification thresholds were satisfied.

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

V OUTLOOK AND CONCLUSIONS

In March 2010, the Cabinet Office published a bill for the amendment of the AMA with the aim of abolishing the current administrative hearing procedure in favour of a more detailed judicial appeal procedure.[21]

The outline of the bill includes the following proposed changes: (1) repeal of the JFTC's administrative hearing procedure for appeals of JFTC orders, to be replaced by an enhanced hearing procedure prior to the issuance of orders; and (2) the introduction of a system in which addressees of the JFTC's orders can appeal to the Tokyo District Court, then to the Tokyo High Court, and finally to the Supreme Court, thereby giving addressees three different levels of judicial appeal.

Accordingly, if the bill passes, appeals against the JFTC's cease-and-desist orders will be dealt with by the Tokyo District Court instead of through the JFTC's administrative hearing procedure.

The bill did not pass in the 2011 Diet session and is being discussed in the 2012 session.

21 JFTC press release of 12 March 2010, available at www.jftc.go.jp/en/pressreleases/archives/individual-000030.html.

Appendix 1

ABOUT THE AUTHORS

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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 in regard 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 of this, 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 both Japan and New York, and is a lecturer at Hitotsubashi University Law School. He is a co-author of *Leniency Regimes* (European Lawyer Reference, third edition, 2010) and the Japanese chapters of various other publications.

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Vassili Moussis is a senior foreign counsel at Anderson Mōri & Tomotsune. He is an English-qualified solicitor and a registered foreign lawyer (*Gaikokuho jimu bengoshi*) 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.

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

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Tatsuo Yamashima is a senior associate at Anderson Mōri & Tomotsune working primarily in the field of antitrust and competition law, government regulations and other corporate legal affairs.

Mr Yamashima has assisted and represented many Japanese and foreign companies with antitrust cases and merger cases involving the JFTC as well as authorities in many foreign jurisdictions. In particular, he has significant experience with leniency applications for the JFTC.

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