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# THE MERGER CONTROL REVIEW

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FOURTH EDITION

EDITOR  
ILENE KNABLE GOTTS

LAW BUSINESS RESEARCH

# THE MERGER CONTROL REVIEW

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This article was first published in  
The Merger Control Review, 4th edition  
(published in July 2013 – editor Ilene Knable Gotts).

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# THE MERGER CONTROL REVIEW

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Fourth Edition

Editor  
ILENE KNABLE GOTTS

LAW BUSINESS RESEARCH LTD

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Published in the United Kingdom  
by Law Business Research Ltd, London  
87 Lancaster Road, London, W11 1QQ, UK  
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ISBN 978-1-907606-73-1

Printed in Great Britain by  
Encompass Print Solutions, Derbyshire  
Tel: 0844 2480 112

# ACKNOWLEDGEMENTS

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The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ACCURA ADVOKATPARTNERSELSKAB

ADVOKATFIRMAN CEDERQUIST KB

ALI BUDIARDJO, NUGROHO, REKSODIPUTRO

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# EDITOR'S PREFACE

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Pre-merger competition review has advanced significantly since its creation in 1976 in the United States. As this book evidences, today almost all competition authorities have a notification process in place – with most requiring pre-merger notification for transactions that meet certain prescribed minimum thresholds. This book provides an overview of the process in 45 jurisdictions as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. 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 exceptions 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. However, 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 in 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 within which the parties must file their notification. For instance, Cyprus requires filing within one week of signing of the relevant documents and agreements; and Hungary, Ireland 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, Serbia) for mandatory pre-merger review by federal antitrust authorities. Most jurisdictions have the ability to impose significant fines for failure to notify or for closing before the end of the waiting period, or both (e.g., United States, Ukraine, Greece, and Portugal).

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 ('the 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 Brazil's CADE, which in turn has worked with Chile and with Portugal. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia and Slovenia similarly maintain close ties and cooperate on transactions. Taiwan is part of the Asia-Pacific Economic Cooperation Forum, which shares a database. 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.

Some jurisdictions (e.g., the EU and Ireland currently) have as their threshold test for pre-merger notification whether there is an acquisition of control. Such jurisdictions will often consider relevant joint control (e.g., the EU) or negative (e.g., veto) control rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey). 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). This past year, several agencies analysed partial ownership acquisitions on a stand-alone basis as well as in connection with joint ventures (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also the subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Canada, China, Sweden and Taiwan). Portugal even viewed as an 'acquisition' subject to notification the non-binding transfer of a customer base.

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 Brazil and China can be as important as the approval of the EU or US. Moreover, the need to coordinate is

particularly acute to the extent that multiple agencies decide to impose conditions on the transaction. Although most jurisdictions indicate that 'structural' remedies are preferable to 'behavioural' conditions, a number of jurisdictions in the past year imposed a variety of such behavioural remedies (e.g., China, EU, Netherlands, Norway, South Africa, Ukraine and the US). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

**Ilene Knable Gotts**

Wachtell, Lipton, Rosen & Katz

New York

July 2013

## Chapter 23

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# JAPAN

*Yusuke Nakano, Vassili Moussis and Kiyoko Yagami<sup>1</sup>*

### 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 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,<sup>2</sup> joint share transfers, business transfers and corporate splits (or demergers) are subject to prior notification under the AMA if they exceed certain thresholds. Mergers and acquisition (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 regime in 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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1 Yusuke Nakano is a partner, 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.

controlling company of such partnership should file a prior notification if the filing thresholds are otherwise satisfied.<sup>3</sup>

Generally speaking, no notification is required for transactions that amount to internal reorganisations of companies within a combined business group.<sup>4</sup>

### *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,<sup>5</sup> is used as a decisive factor in the calculation of thresholds. The same thresholds will apply to both domestic and foreign companies, whereas the old system (up to 2009) applied different thresholds for foreign and domestic companies.

According to the Merger Notification Rules,<sup>6</sup> 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:<sup>7</sup>

- 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 for which 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 but for which 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.

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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 policies are '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. This concept of 'control' aligns Japanese merger control with the merger rules of other jurisdictions, especially those of the EU.

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 2011).

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

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.<sup>8</sup>

*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 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.<sup>9</sup> Second, such acquisition must result in the acquirer holding more than 20 per cent 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 per cent to 21 per cent is subject to a filing, while an acquisition that increases a shareholding from 21 per cent to 49 per cent does not require one).<sup>10</sup> It should be noted that 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,<sup>11</sup> 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.<sup>12</sup>

For business 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 is the whole business of the company or a substantial part of the business 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.<sup>13</sup>

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

9 Article 10, Paragraph 2 of the AMA.

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

11 Under Japanese law, 'joint share transfer' refers to a specific structure 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.

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.<sup>14</sup>

In the case of a merger, corporate split or joint share transfer, both companies intending to effect such transactions are jointly responsible for the filing. 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

There were no significant legislative or regulatory developments in the field of merger control in 2012.

## II YEAR IN REVIEW

During the fiscal year 2012 (from 1 April 2012 to 31 March 2013) (FY 2012), the JFTC opened Phase II reviews in six cases and cleared five Phase II cases (three with conditions, two without any conditions). These cases are described below.

### i Significant transactions in FY 2012

#### *Acquisition of Osaka Securities Exchange by Tokyo Stock Exchange Group*

In July 2012, the JFTC cleared the acquisition (with conditions) of Osaka Securities Exchange Co, Ltd ('OSE') by Tokyo Stock Exchange Group, Inc, one of whose subsidiaries is Tokyo Stock Exchange, Inc ('TSE').<sup>15</sup> In the course of the review, the JFTC identified three relevant markets as being of concern:

- a* services relating to listing stocks in markets for emerging companies;
- b* services relating to actual stock trading; and
- c* services relating to trading index futures of Japanese stocks. The combined market share of TSE and OSE in each of those markets amounted to nearly 95 per cent, 95 per cent and 70 per cent, respectively.

The parties thereafter offered remedies in each of the relevant markets. Specifically, in the market for services relating to listing stocks in markets for emerging companies (above (a)), the parties offered, among other things, to delegate approval decisions for the listing charges to an independent committee and to report to the JFTC on pricing decisions for the period of 10 years. For services relating to actual stock trading (above (b)), the parties offered to ensure equal treatment of their clearing services to all users and to relax usage rules. For services relating to trading index futures of Japanese stocks (above (c)), the parties offered less stringent licence terms as well as reduced licence fees to NYSE Liffe (another company dealing with Tokyo Stock Price Index futures under the licence from its competitor, TSE).

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

15 JFTC press release of 5 July 2012, available at: [www.jftc.go.jp/en/pressreleases/yearly-2012/jul/individual-000490.files/130201.pdf](http://www.jftc.go.jp/en/pressreleases/yearly-2012/jul/individual-000490.files/130201.pdf).

The JFTC finally concluded that the offered remedies could be sufficient to eliminate the competitive concern that could arise with the proposed acquisition. Importantly, the JFTC indicated in its announcement that, although remedies shall be structural in principle (as stated in the Merger Guidelines<sup>16</sup>), behavioural remedies may be adopted in this particular case, as it would seem unlikely that any third party could operate the same service profitably as the parties do, and proposed remedies, such as delegation of certain decisions to an independent committee, coupled with supervision by the financial regulators, will effectively restrict the parties from inappropriately increasing the listing charges (above (a)).

### *Acquisition of Best Denki by Yamada-Denki*

In December 2012, the JFTC cleared the acquisition of the majority of shares of electrical appliance retailer Best Denki Co, Ltd ('Best Denki') by Japan's leading electrical retailer, Yamada-Denki Co, Ltd ('Yamada-Denki') with the condition that the remedies offered by Yamada-Denki will be implemented upon the acquisition.<sup>17</sup>

Yamada-Denki and Best Denki both operate directly owned and franchised electrical appliance retail stores all over Japan. The JFTC found that the parties were competing with each other in 253 geographical areas in which stores of both parties are located within a 10-kilometre radius.<sup>18</sup> An examination of the competitive situation in each area (interestingly, the JFTC did not use an orthodox market share analysis, but focused on the competitive behaviour of the parties in each area) indicated competitive concerns in 10 areas out of the 253. Yamada-Denki thereafter offered to enter into a contract to divest, in principle, one store in each of the 10 areas (either the store of Yamada-Denki or Best Denki) to a third party and to report the progress thereof to the JFTC on a regular basis. Yamada-Denki further offered to complete the signing of such contracts within around seven months of the acquisition and to promptly resort to bidding procedures after such deadline.<sup>19</sup>

We understand that the JFTC, having considered these offers in addition to the competitive pressures from neighbouring markets (including geographically neighbouring markets and markets for internet shopping),<sup>20</sup> concluded that the offered

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

17 JFTC press release of 10 December 2012, available at: [www.jftc.go.jp/en/pressreleases/yearly-2012/dec/individual-000510.files/121210YAMADA\\_BEST.pdf](http://www.jftc.go.jp/en/pressreleases/yearly-2012/dec/individual-000510.files/121210YAMADA_BEST.pdf).

18 This finding of a 10-kilometre radius as one geographic market is consistent with a precedent of an acquisition of electronic retailers; the acquisition of Midori Denka by Edion in 2004.

19 This is the first ever case in Japan where the offered remedies mention the use of a bidding procedure to divest assets in the case that a voluntary divestment is not successful within a time limit.

20 Yamada-Denki also made an assertion that Best Denki would possibly go bankrupt if the proposed acquisition did not happen, and thus there would be no effect of restraint of competition (for more information regarding the failing company doctrine, see Section IV.iii, *infra*). However, the JFTC rejected such assertion.

remedies would be sufficient to eliminate the competitive concern that could arise from the proposed acquisition.

*Acquisition of SII NanoTechnology by Hitachi High-Technologies*

In December 2012, the JFTC cleared Hitachi High-Technologies Corporation's proposed acquisition of all the shares in SII NanoTechnology Inc.<sup>21</sup> Both companies manufacture and distribute analytical instruments (i.e., machines, instruments or devices that are used for qualitative and quantitative measures of the composition, nature, structure or condition of substances).

After its review, the JFTC concluded that, although the combined share of the parties would exceed 50 per cent in the markets of three types of analytical instruments, the notified acquisition would not substantially restrain competition on any such markets.

This is reported to be the first Phase II case after the Policies for Merger Review<sup>22</sup> were issued in June 2011 in which the JFTC did not express competitive concerns and therefore did not require any remedies.

*Acquisition of C&H by Daiken*

In January 2013, the JFTC cleared a proposed acquisition of majority shares of C&H Co, Ltd ('C&H') by Daiken Corporation ('Daiken') on the premise of the remedies offered by Daiken.<sup>23</sup> Daiken is a manufacturer of wood-based materials including medium density fibreboard ('MDF'), while C&H is a wholly-owned subsidiary of Hokushin Co, Ltd ('Hokushin'), an MDF manufacturer, and a distributor of Hokushin's products. Simultaneously with the proposed acquisition of C&H, Daiken also contemplated increasing its shareholding ratio in Hokushin to approximately 15 per cent. Although such minority acquisition itself is not technically subject to a notification requirement under the AMA, the JFTC took the position that, after these two acquisitions, a 'joint relationship' would be formed between Daiken group and Hokushin group and that such a broad 'joint relationship' shall be reviewed.

In the course of its review, the JFTC found that the acquisitions would create vertical market foreclosure for a particular type of MDF manufactured by Hokushin and sold to third-party interior material manufacturers, and would thus hamper competitive behaviours by those competing with Daiken. Daiken thereafter offered remedies to address the JFTC's concern, under which Daiken will have C&H supply the particular type of MDF to such interior material manufacturers on terms that are reasonable and substantively equivalent to those applied to products supplied to Daiken for five years after the completion of the notified acquisition, and will report the details of C&H's sales results to the JFTC every six months for a five-year period. The JFTC accepted

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21 JFTC press release of 10 December 2012, available at: [www.jftc.go.jp/en/pressreleases/yearly-2012/dec/individual-000511.files/121210HHI\\_SIINT.pdf](http://www.jftc.go.jp/en/pressreleases/yearly-2012/dec/individual-000511.files/121210HHI_SIINT.pdf).

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

23 JFTC press release of 24 January 2013, available at: [www.jftc.go.jp/en/pressreleases/yearly-2013/jan/individual-000515.files/130124CHset.pdf](http://www.jftc.go.jp/en/pressreleases/yearly-2013/jan/individual-000515.files/130124CHset.pdf).

the remedies, and concluded that they would be sufficient to eliminate the competitive concern that could arise from the transaction.

*Furukawa-Sky/Sumitomo Light Metal merger*

In February 2013, the JFTC cleared a proposed merger between Furukawa-Sky Aluminum Corp ('FSA') and Sumitomo Light Metal Industries, Ltd ('SLM'), both of which are manufacturers of rolled aluminium products, without any condition.<sup>24</sup>

The JFTC considered the aluminium board products and aluminium foil products that both parties manufacture as the product markets relevant to the proposed merger. In addition, the JFTC also looked into the market of copper tube products, since the parent company of FSA and one of the subsidiaries of SLM each engage in the manufacture of those products, although the products are not subject to business consolidation through the proposed merger. The relevant geographic market of these products was defined as the Japanese market despite the fact that the parties asserted a wider geographic region, including East Asian countries other than Japan.

The combined market shares of FSA and SLM in two subcategories of aluminium board products amounted to 50 per cent or more. However, as a result of the review the JFTC found that, in addition to the existence of other significant competitors, strong competitive pressures exist from neighbouring markets (e.g., other substitutable products and imported products), and concluded that the proposed merger would not substantially restrain competition in any particular fields of trade.

**ii Statistics of the JFTC's activity**

According to the JFTC, the total number of merger notifications for FY 2012 was 349. Among five cases that the JFTC cleared after Phase II review, three cases were cleared subject to conditions, while two cases were cleared without any conditions. There were no formal prohibition decisions during FY 2012.

**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 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 the Phase I period.

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<sup>24</sup> JFTC press release of 21 February 2013, available at: [www.jftc.go.jp/en/pressreleases/yearly-2013/feb/20130221.files/130220.pdf](http://www.jftc.go.jp/en/pressreleases/yearly-2013/feb/20130221.files/130220.pdf).

**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*

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<sup>25</sup>). 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 major merger notification cases as part of its annual review.

*Rights to challenge mergers*

Interventions by interested parties in JFTC proceedings have not historically been common. This practice has, however, started to change, as exemplified by interventions 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 there is no formal appeal procedure against the JFTC's clearance by third parties under the AMA, 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;<sup>26</sup> another way 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<sup>27</sup> 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 it believes that a proposed transaction has the effect of substantially restraining competition in a particular field of trade (i.e., a relevant market). When issuing a cease-and-desist order, the JFTC will explain the contents of the supporting evidence to the potential recipients of such order in advance in order to give them an opportunity to submit opinions as to the possible 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

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25 The Policies for Merger Review.

26 Article 45, Paragraph 1 of the AMA.

27 Article 42 of the AMA.

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.

**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 have an involvement.

**vi Substantive review**

The Merger Guidelines explain 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). 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, in order 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. One involved TDK Corporation's acquisition of Alps Electric Co, Ltd's magnetic heads business in 2007, in which the JFTC found that the relevant geographical market consisted of the worldwide market for magnetic heads since magnetic head manufacturers sell their products at the same price regardless of the customers' geographical locations. The JFTC reached a similar conclusion in its review of the merger of NEC Electronics and Renesas Technology in 2009 and two HDD cases of 2012, namely, the acquisition of Viviti Technologies by Western Digital Ireland and the acquisition of the HDD business of Samsung Electronics by Seagate Technology International. It is likely that the JFTC will continue to define geographical markets that extend beyond Japan when assessing notified transactions, depending on the actual conditions of competition.

## 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.<sup>28</sup> In addition, the JFTC has entered into bilateral cooperation agreements with the competition authorities of the United States, the European Union and Canada. 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 the Conference. Under these agreements and frameworks, it is expected that various levels of information exchanges and discussions will be made between the participating authorities.

The JFTC reported that it worked with the Australian Competition & Consumer Commission, the European Commission, the German Federal Cartel Office and the Korea Fair Trade Commission in its review of the *BHP Billiton/Rio Tinto* joint venture. In the review of the acquisition of Sanyo Electric by Panasonic in 2009, the JFTC reported that 10 competition authorities reviewed the transaction and that the JFTC worked with its counterparts in the US and the EU, in particular. In the two *HDD* cases mentioned in Section III.iv, *supra*, the JFTC exchanged information with the European Commission, the US Federal Trade Commission, and the Korea Fair Trade Commission. Moreover, in its most recent review on the acquisition of Cymer by ASML Holdings in May 2013, the JFTC exchanged information with the US Antitrust Division of the Department of Justice, the Korea Fair Trade Commission and other authorities in different jurisdictions.<sup>29</sup>

#### *Coordination among attorneys from various jurisdictions*

As explained in Section IV.ii., *infra*, the JFTC abolished the voluntary consultation procedure ('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. In addition, as explained at Section III, *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 in order 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.

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28 Article 43-2 of the AMA.

29 JFTC press release of 7 May 2013, available at: [www.jftc.go.jp/en/pressreleases/yearly-2013/may/130507.files/full.pdf](http://www.jftc.go.jp/en/pressreleases/yearly-2013/may/130507.files/full.pdf).

ii **Pre-filing consultation with the JFTC**

Until the end of June 2011, notification materials were usually submitted to the JFTC under the prior consultation, in which the substantive issues were discussed between the JFTC and the parties to the consultation before the formal statutory filing of a notifiable transaction. In contrast, upon the abolition of the prior consultation in July 2011, the JFTC no longer provides its opinion at the pre-notification stage, and the review officially starts at the formal notification stage.

At first, many practitioners considered that such rigid practice might cause difficulties, especially in global merger notifications. However, in practice, the JFTC seems to be flexible about having informal discussions with potential notifying parties upon request or voluntary submission of relevant materials prior to formal filings. Interestingly, in the *HHT/SIINT* and *Daiken/C&H* cases (see Section II, *supra*), the JFTC made a specific note in its announcement 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 in order to try and alleviate any potential concerns early, and so far 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.

The precedents in which the failing company doctrine was applied were the acquisition of Showa Aluminum Powder KK by Toyo Aluminium KK and the acquisition of Kishimoto Medical Science Laboratory by BML Inc in 2010. The JFTC cleared both transactions by taking into account, *inter alia*, the failing firm doctrine. More specifically, with respect to the *Showa/Toyo* case, the JFTC cleared the acquisition 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 to 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 (see Section 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 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 usually suffice to find such relationship.

**iv Foreign-to-foreign mergers**

The amendment to the AMA effective as of January 2010 has made foreign-to-foreign mergers between undertakings that have no Japanese subsidiary or branch office in Japan but that have substantial domestic turnover in Japan notifiable (see Section II, *supra*). As in BHP Billiton's attempt to take over Rio Tinto through a hostile bid, the JFTC will not hesitate to investigate fully foreign-to-foreign mergers that may have a substantial impact on competition in Japan by cooperating and exchanging information with foreign competition authorities as necessary (see Section IV.i, *supra*).

**v 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 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 the aforementioned attempt by BHP Billiton to take over Rio Tinto through a hostile bid.<sup>30</sup>

**V OUTLOOK AND CONCLUSIONS**

**i Proposed repeal of the administrative hearing procedure**

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.<sup>31</sup> The outline of the bill includes the following proposed changes: 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 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 levels of judicial appeal.

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. However, the bill did not pass by the end of 2012 when the Diet was dissolved, and it is not certain if the same bill will be submitted to the new Diet in the 2013 session.

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

31 JFTC press release of 12 March 2010, available at: [www.jftc.go.jp/en/pressreleases/yearly-2010/mar/individual-000030.html](http://www.jftc.go.jp/en/pressreleases/yearly-2010/mar/individual-000030.html).

**ii Developments following the introduction of the new Merger Review Rules and Policies**

Two 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 the merger review by the JFTC, while some clarifications were also made to the substance of the JFTC's review policies. Since these amendments, the JFTC has already cleared eight cases following Phase II reviews, and has made some disclosures in its annual review about recent major cases it has handled. These disclosures have been welcomed by practitioners, as they have made the new merger filing procedures clearer and more predictable. However, there are still some areas where further clarification or improvements seem necessary, and it is hoped that the JFTC will take action in those areas in the near future.

## Appendix 1

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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 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, fourth edition, 2012) and the Japanese chapters of various other publications.

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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.

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