The Merger Control Review

Fifth Edition

Editor
Ilene Knable Gotts

Law Business Research

The Merger Control Review

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EDITOR'S PREFACE

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. 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 entire merger even though less than 10 per cent of each of the undertakings was attributable to Germany. It is, therefore, imperative that counsel for a transaction develops a comprehensive plan prior to, or immediately upon, execution of the agreement concerning where and when to file notification with competition authorities regarding the transaction. In this regard, 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.

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, for instance, provides for a *de minimis* exception for transactions occurring in markets with sales of less than €15 million. There are some 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.

The potential consequences for failing to file in jurisdictions with mandatory requirements varies. 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 of these jurisdictions can impose a significant fine for failure to notify before closing even where the transaction raises no competition concerns (e.g., Austria, Cyprus, India, 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, India and Serbia). Most jurisdictions also 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). Brazil issued its first 'gun jumping' fine this year. In Macedonia, the failure to file can result in a misdemeanour and a monetary fine of up to 10 per cent of the worldwide turnover.

In almost all jurisdictions, very few transactions undergo a full investigation, although some require that the notification provide detailed information regarding the markets, competitors, competition, suppliers, customers and entry conditions. Most jurisdictions that have filing fees specify a flat fee or state in advance a schedule of fees based upon the size of the transaction; some jurisdictions, however, determine the fee after filing or provide different fees based on the complexity of the transaction. For instance, Cyprus is now considering charging a higher fee for acquisitions that are subjected to a full Phase II investigation.

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 merger hearings before the Competition Tribunal, 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 to a clearance decision.

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 of one year for challenging a notified transaction (see the recent *CSC/Complete* transaction). Norway is a bit unusual, in that the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation.

It is becoming the norm in large cross-border transactions raising competition concerns for the US, Canadian, Mexican and EU authorities to work closely together 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. Competition authorities in Bosnia and Herzegovina, Bulgaria, Croatia, Macedonia, Montenegro, Serbia, Slovenia and Turkey 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. The US also has recently entered into a cooperation agreement with India.

Although some jurisdictions have recently raised the size threshold at which filings are mandated, others have broadened the scope of their legislation to include, for instance, partial ownership interests. Some jurisdictions continue to have as their threshold test for pre-merger notification whether there is an 'acquisition of control'. Many of these jurisdictions, however, will include as a reportable situation the creation of 'joint control', 'negative (e.g., veto) control' rights to the extent that they may give rise to *de jure* or *de facto* control (e.g., Turkey), or a change from 'joint control' to 'sole control' (e.g., EU and Lithuania). Minority holdings and concerns over 'creeping acquisitions', in which an industry may consolidate before the agencies become fully aware, have become the focus of many jurisdictions. Some jurisdictions will consider as reviewable acquisitions in which only a 10 per cent or less interest 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). Others use as the benchmark the impact that the partial shareholding has on competition; Norway, for instance, can challenge a minority shareholding that creates or strengthens a significant restriction on competition. Several agencies in the past few years have analysed partial ownership acquisitions on a standalone 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.

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, International Merger Remedies, 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 have imposed a variety of such behavioural remedies (e.g., China, the EU, France, 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 2014

Chapter 23

JAPAN

Yusuke Nakano, Vassili Moussis and Kiyoko Yagami[1]

I INTRODUCTION

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

i Pre-merger notification

Types of regulated mergers and thresholds

Share acquisitions (including joint ventures), mergers,[2] joint share transfers, business transfers and corporate splits (or demergers) are subject to prior notification under the AMA if they exceed certain thresholds. Mergers and acquisitions (M&A) transactions whose schemes involve more than one of these transactions (e.g., 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

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.[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 calculation of thresholds. The same thresholds will apply to both domestic and foreign companies.

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

More precisely, domestic turnover is the total amount of the following three categories of sales:[7]

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

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

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

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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 more than 50 per cent of the voting rights of a company are held by another company, but also if its financial and business policies are 'controlled' by the other company. The Merger Notification Rules specify detailed thresholds for 'control' to exist, which might be found even in cases where the ratio of beneficially owned voting rights is 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.[8]

Notification thresholds for each type of transaction

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

For share acquisitions (including joint ventures), the thresholds are based both on domestic turnover and the level of shareholding in the target. First, the aggregate domestic turnover of all corporations within the combined business group of the acquiring corporation must exceed ¥20 billion, and the aggregate domestic turnover of the target corporation and its subsidiaries must exceed ¥5 billion to meet the filing requirement.[9] Second, such acquisition 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).[10] 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,[11] the thresholds are based on domestic turnover. The aggregate domestic turnover of the combined business group of one of the merging companies, or of one of the companies intending to conduct the joint share transfer, must exceed ¥20 billion to meet the filing requirement. Furthermore, the aggregate domestic turnover of the combined business group of one other participating company must exceed ¥5 billion.[12]

For business 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.[13]

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.[14]

In the case of a merger, corporate split or joint share transfer, both companies intending to effect such transactions have to jointly file.[15] On the other hand, in the case of a share acquisition or business transfer, only the acquiring company is responsible for the filing. There are no filing fees under the AMA.

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

Approval of the Amendment Bill of the Antimonopoly Act

In December 2013, the amendment bill of the AMA, which abolished the hearing procedure of the JFTC for administrative appeals, passed the Diet of Japan. This fundamentally revises the appeal procedure for JFTC decisions by:

a abolishing the JFTC's hearing procedure for administrative appeals;

b abolishing the exclusive jurisdiction of the Tokyo High Court as the court that reviews at first instance any appeal suits pertaining to administrative hearing decisions of the JFTC;

c introducing a system where any first instance appeals pertaining to cease-and-desist orders, etc., shall be to the Tokyo District Court only (with a panel of three or five judges); and

d developing procedures for a hearing prior to issuing a cease-and-desist order, etc., to ensure due process.

The amendment bill must become effective by June 2015, but the actual date of entry into effect has not yet been determined. Related regulations and guidelines that will be affected by the amendment are expected to be amended by the effective date of the bill.[16]

Amendment of the Guidelines on Authorisation of Acquisition and Holding of Voting Rights by Banking and Insurance Companies

The AMA stipulates that no banking or insurance companies may hold more than 5 per cent (10 per cent in the case of insurance companies (hereinafter the same)), respectively, of the outstanding shares of a domestic company engaged in non-financial business (the 5 per cent rule), unless the acquisition of more than 5 per cent of the shares is exempted by the JFTC's approval. The standards for such approval are stipulated in Article 11, paragraph 1 of the AMA and relevant guidelines, namely, the Guidelines concerning Authorisation of Acquisition and Holding of Voting Rights by Banking and

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

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

16 The Bill to Amend the Act Concerning Prohibition of Private Monopolisation and Maintenance of Fair Trade, promulgated on 13 December 2013. See also the JFTC press release of 9 December 2013, available at www.jftc.go.jp/en/pressreleases/yearly-2013/Dec/individual131209.files/131209FT.pdf.

Insurance Companies under the Provisions of Article 11 of the AMA and the Guidelines concerning Authorisation of Debt-for-Equity Swap under the Provisions of Article 11 of the AMA. In March 2014, these Guidelines were amended by the JFTC so as to expand the exceptions to the 5 per cent rule. This amendment was adopted in tandem with the recent deregulation of the banking and insurance regulations, which aims to stimulate investment by banks and insurance companies. The new amendment came into effect on 1 April 2014.[17]

II YEAR IN REVIEW

During the 2013 fiscal year (from 1 April 2013 to 31 March 2014) (FY 2013), the JFTC conducted Phase II reviews in three cases and cleared all three (one with conditions, two without any conditions). These cases are described below.

i Significant transactions in FY 2013

Business combination between ASML US Inc (ASML US) and Cymer Inc (Cymer)

In May 2013, the JFTC cleared the business combination of ASML US, which is a subsidiary of ASML Holding NV (ASML)) and Cymer with conditions.[18] ASML manufactures and sells lithography systems used in the front-end process of semiconductor manufacturing, while Cymer manufactures and sells light sources that compose an important part of the lithography systems. ASML procures light sources from Cymer for manufacturing the lithography systems. The JFTC's focus was on the market for the manufacturing and selling of light sources (upstream market) and a separate market for the manufacturing and selling of lithography systems (downstream market). Cymer and ASML were leading manufacturers in the upstream and downstream markets, respectively. Prior to the combination, Cymer had only one competitor, while ASML had two competitors. The JFTC's main concerns related to potential input foreclosure or customer foreclosure that could arise from the closed nature of the market following the proposed merger, and such concerns were disclosed to the parties at the Phase I review. The parties then offered the following remedies: Cymer would continue its business with competitors of ASML under fair, reasonable and non-discriminatory terms of trade; and ASML would continue to procure light sources from suppliers including Cymer on non-discriminatory terms. In addition, the parties agreed that Cymer would keep sensitive information about its customers (who are competitors of ASML) confidential from ASML, and that ASML would keep sensitive information about its supplier (who is a competitor of Cymer) confidential from Cymer. The parties also offered to report to the JFTC on the status of their compliance with the remedies once a year for a five-year period, which shall be prepared by an independent auditing team. In the Phase II review, the JFTC took these offered remedies into consideration and finally concluded that the

17 JFTC press release of 31 March 2014 (Japanese only), available at www.jftc.go.jp/houdou/pressrelease/h26/mar/140331.html.

18 JFTC press release of 7 May 2014, available at www.jftc.go.jp/en/pressreleases/yearly-2013/may/130507.files/full.pdf.

proposed acquisition would not substantially restrain competition in the particular fields of trade.

It was announced that the Antitrust Division of the US Department of Justice, the Korea Fair Trade Commission and other competition authorities also reviewed this case and cooperated with the JFTC through exchanging information with each other.

Acquisition of Shares of Daiei, Inc (Daiei) by AEON Co, Ltd (Aeon)

In July 2013, the JFTC cleared the planned acquisition by Aeon, which has subsidiaries and affiliates engaged in the supermarket business, of its competitor, Daiei, to make Daiei its subsidiary, without remedies.[19] The JFTC first found that the parties were competing with each other in 260 geographical areas in which supermarkets of both parties are located within a 500-metre to 3-kilometre radius. An examination of the competitive situation in each area indicated that scrutiny was necessary in 100 out of the 260 areas. Pursuant to a close review of the competitive situation in these concerned areas, the JFTC found that strong competitors and high entry pressures existed, as well as competitive pressure from neighbouring markets that included both geographically neighbouring markets and neighbouring service markets (convenience stores, pharmacies, etc.). The JFTC also considered Daiei's financial difficulties as one of the factors to find that competition between Aeon and other competitors was no less active than that between Aeon and Daiei.[20] The JFTC concluded that active competition would remain post acquisition in all of the 100 geographical areas requiring specific consideration.

Integration of the thermal power generation systems businesses of Mitsubishi Heavy Industries, Ltd (MHI) and Hitachi, Ltd (Hitachi)

In December 2013, the JFTC cleared the integration of the thermal power generation systems businesses of MHI and Hitachi without remedies.[21] In the course of its review, the JFTC identified four relevant markets of concern:

a supercritical pressure thermal power generation plants;
b supercritical pressure boilers;
c large steam turbines; and
d large gas turbine combined cycle (GTCC) power generation plants.

19 JFTC press release of 19 July 2013, available at www.jftc.go.jp/en/pressreleases/yearly-2013/july/130719.files/130819.pdf.

20 Interestingly, the JFTC officials made clear that this is not a case where the JFTC applied the 'failing company doctrine' as described in the Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (31 May 2004 (as amended): the Merger Guidelines) (see Section IV.iii, *infra*). (Isao Noguchi and Ayami Tanka, 'Regarding the Conclusion of the Review on the Proposed Acquisition of Shares of The Daiei, Inc. by AEON Co., Ltd.', *Kosei Torihiki* No. 755, p. 20 (2013)).

21 JFTC press release of 12 December 2013, available at www.jftc.go.jp/en/pressreleases/yearly-2013/Dec/individual131212.files/140120detail.pdf.

Among other matters, the JFTC examined the fact that the combined market share of MHI and Hitachi in the large GTCC power generation plants would become as high as 70 per cent after the transaction. The JFTC analysed the reports submitted by the parties as well as the results of hearings and research (questionnaires) obtained from competitors and customers. Based on this information, the JFTC found the presence of strong competitors in the concerned markets, the possibility of new entry, a sophisticated bidding system that can preclude bidders from concerting their behaviour with each other and strong pressure from customers. The JFTC concluded that there would still be active competition in the markets post transaction and therefore cleared it.

ii Statistics of the JFTC's activity

According to the JFTC, the total number of merger notifications filed in FY 2013 was 264. Of three cases that the JFTC cleared after a Phase II review, one case was cleared subject to conditions, while the other two were cleared without any conditions. There were no formal prohibition decisions during FY 2013.

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 the Phase I or Phase II review periods. It is, however, possible for the notifying party to 'pull and refile' the notification during the Phase I period, thereby effectively re-starting the clock, if that proves necessary.

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[22]). 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; however, there was one case in which interventions were made by Japanese steel manufacturers before the JFTC in relation to the proposed hostile takeover attempt by BHP Billiton of Rio Tinto, first announced in 2007.

Although 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;[23] another 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[24] if deemed necessary, but they have been extremely rare to date. The JFTC sometimes conducts informal hearings with third parties, including competitors and customers, in the course of its review, as it did in the review of the *MHI and Hitachi* case (see Section II.i, *supra*).

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

The JFTC can issue a cease-and-desist order when it believes that a proposed transaction has the effect of substantially restraining competition in a particular field of trade (i.e., a relevant market). 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 to give them an opportunity to submit opinions as to the possible order.

Currently, 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. However, as explained in Section I.ii, *supra*, the JFTC's administrative hearing procedure will be abolished once the amendment of the AMA comes into force, no later than June 2015, and the parties will have to appeal to the Tokyo District Court if they wish to contest the order.

22 Policies Concerning Procedures of Review of Business Combination (14 June 2011; Policies for Merger Review).

23 Article 45, paragraph 1 of the AMA.

24 Article 42 of the AMA.

v Effect of regulatory review

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

vi Substantive review

The Merger Guidelines 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, 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 many subsequent cases, including the merger of *NEC Electronics and Renesas Technology* in 2009, two *HDD* cases (*Western Digital and Seagate Technology*) in 2012, and the *ASML and Cymer* case in 2013 (see Section II.i, *supra*). 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.[25] In addition, the

25 Article 43-2 of the AMA.

JFTC has entered into bilateral cooperation agreements with the competition authorities of the United States, the European Union, Canada, the Philippines, Vietnam and Brazil.[26] Furthermore, the JFTC propounded the establishment of an international cooperative framework for merger review at the 11th ICN Annual Conference held in April 2012, which was approved at that Conference. Under these agreements and frameworks, it is expected that various levels of information exchanges and discussions will be 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 in 2012, 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 business combination of *ASML and Cymer* 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 (see Section II.i, *supra*).

Coordination among attorneys from various jurisdictions

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

ii Pre-filing consultation with the JFTC

Until the end of June 2011, notification materials were usually submitted to the JFTC under the prior consultation procedure, in which the substantive issues were discussed

26 Recently, the JFTC concluded bilateral cooperation arrangements with the Department of Justice of the Republic of the Philippines and the Competition Authority of the Socialist Republic of Vietnam (VCA) on 28 August 2013, and with the Administrative Council for Economic Defense of the Federative Republic of Brazil (CADE) on 24 April 2014, respectively. See also the JFTC press releases available at www.jftc.go.jp/en/pressreleases/yearly-2013/august/13082802.files/13082802e.pdf (28 August 2013) and www.jftc.go.jp/en/pressreleases/yearly-2014/apr/140425.files/140425_1.pdf (25 April 2014).

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 procedure 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 is flexible about having informal discussions with potential notifying parties upon request or voluntary submission of relevant materials prior to formal filings. Interestingly, in all three cases that the JFTC cleared during FY 2013, 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 one to five months prior to officially filing the notifications. It is understood that parties to complicated mergers make use of that informal procedure to try and alleviate any potential concerns early, 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 with the merger 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.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 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 the same or higher shareholding ratios would 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 I.i, *supra*). As in BHP Billiton's attempt to take over Rio Tinto through a hostile bid, 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 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.[27]

V OUTLOOK AND CONCLUSIONS

i Proposed repeal of the administrative hearing procedure

As mentioned in Section I.ii, *supra*, the AMA amendment bill, which abolishes the hearing procedure of the JFTC for administrative appeals, was passed in December 2013. Although the actual date of entry into effect of the bill has not yet been determined, once the bill becomes effective, 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. This means that addressees of the JFTC's orders will be able to appeal to the Tokyo District Court, then to the Tokyo High Court and finally to the Supreme Court, thereby having potential access to three levels of judicial review.

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

Three years have passed since the amendments to the Merger Review Rules and the Policies for Merger Review were introduced in June 2011. These amendments primarily concern the procedural aspects of merger reviews by the JFTC, while some clarifications were also made to the substance of the JFTC's review policies. Since these amendments, the JFTC has already cleared 11 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

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

improvements seem necessary. One such example of an apparent lack of clarity is the reference to the terms 'input foreclosure' and 'customer foreclosure' in the publication made by the JFTC about the *ASML US and Cymer* business combination cleared in May 2013. Neither of those terms appears in any of the JFTC guidelines. It is hoped that the JFTC will take action, including through the publication of new or updated guidelines, in these areas in the near future.

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 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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