GLOBAL COMPETITION REVIEW

The Guide to Merger Remedies

Editors

Ronan P Harty and Nathan Kiratzis

GCR
GLOBAL COMPETITION REVIEW

The Guide to Merger Remedies

Editors

Ronan P Harty and Nathan Kiratzis

Reproduced with permission from Law Business Research Ltd
This article was first published in August 2018
For further information please contact Natalie.Clarke@lbresearch.com

GCR
GLOBAL COMPETITION REVIEW

Published in the United Kingdom
by Global Competition Review

Law Business Research Ltd
87 Lancaster Road, London, W11 1QQ, UK

www.globalcompetitionreview.com

First edition

To subscribe contact subscriptions@globalcompetitionreview.com

Enquiries concerning reproduction should be sent to Law Business Research, at the address above. Enquiries concerning editorial content should be directed to the Publisher – clare.bolton@globalcompetitionreview.com

ISBN 978-1-78915-105-3

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

Acknowledgements

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

ANDERSON MŌRI & TOMOTSUNE

AXINN

BROAD & BRIGHT LAW FIRM

CLEARY GOTTLIEB STEEN & HAMILTON LLP

COMPASS LEXECON

CRAVATH, SWAINE & MOORE LLP

CROWELL & MORING LLP

DANIEL P DUCORE

DAVIS POLK & WARDWELL LLP

DIANA L MOSS/AMERICAN ANTITRUST INSTITUTE

JONES DAY

MCCARTHY TÉTRAULT LLP

MATTOS FILHO, VEIGA FILHO, MARREY JR
E QUIROGA ADVOGADOS

MAZARS

SHARDUL AMARCHAND MANGALDAS & CO

SHEARMAN & STERLING LLP

SULLIVAN & CROMWELL LLP

VON WOBESER Y SIERRA, SC

WACHTELL, LIPTON, ROSEN & KATZ

WEIL, GOTSHAL & MANGES LLP

Contents

Part III: Process and Implementation

Part IV: Compliance

Part V: Remedy Negotiations: Practical Considerations

Part VI: Merger Remedies Insights from around the Globe

Part VI

Merger Remedies Insights from around the Globe

18

Japan

Vassili Moussis and Yoshiharu Usuki[1]

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 currently composed of a chair and four commissioners. The JFTC has primary jurisdiction over the enforcement of merger control under the AMA. The JFTC's basic stance towards merger remedies is set out in a series of Guidelines published by the JFTC, including 'Policies Concerning Procedures of Review of Business Combination' (the Policies) and 'Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination' (the Guidelines).[2]

Parties can propose remedies to the JFTC at any stage of the JFTC's review, including during either the Phase I or the Phase II review, or both. The AMA does not set out any specific procedural steps in relation to remedies.

While the number of cases involving merger remedies is smaller than in the EU and the US, the JFTC takes a broadly similar attitude to its EU and US counterparts towards assessing both competition issues and proposed remedies. Typically the JFTC prefers that merger remedies be put in place prior to the completion of the transaction, and monitors parties' compliance with such remedies by requesting periodical reports from the parties.

---

1 Vassili Moussis is a senior foreign counsel and Yoshiharu Usuki is a partner at Anderson Mōri & Tomotsune. The authors wish to thank Alice Boughton for her assistance with the preparation of this chapter.

2 See www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/pcbr.pdf (the Policies); www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines.files/110713.2.pdf (the Guidelines). Please note that English language translations are tentative, and that the Japanese versions of the Policies and the Guidelines remain the authoritative guides.

Remedies: basic framework

The JFTC will consider, on a case-by-case basis, approving the proposed transaction based, where relevant, on voluntary undertakings proposed by the transaction parties. Broadly speaking, the Guidelines are in line with the European Commission's 2008 Notice on Remedies[3] (although less detailed in their content), and share the general objective of ensuring a competitive market structure through appropriate remedies to competition issues. The JFTC's willingness to consider such remedies is set out in Part IV of the Guidelines, which stipulates that appropriate remedies will be considered based on the facts of individual cases.

As in many other jurisdictions, the JFTC prefers that remedies should, in principle, be structural, such as the transfer of all or part of a particular business, with the aim of restoring competition lost as a result of the transaction in order to prevent the resultant group from controlling pricing or other market factors. However, the JFTC acknowledges that there may be cases where behavioural remedies are appropriate. For example, in 2011 the JFTC considered a proposed merger between Nippon Steel Corporation and Sumitomo Metal Industries, a transaction that resulted in the formation of the world's second-largest steel maker. Following a Phase II review, the JFTC approved the merger (which reduced the number of competitors in some product markets from three to two), following the submission of proposed behavioural remedies by the parties. These remedies included obligations to supply a third-party market entrant on conditions that were reasonable and equivalent to those offered to the group's affiliates in relation to the high-pressure gas pipeline engineering business, and to provide to third parties trading rights for non-oriented electrical steel sheets at a price equivalent to the production cost.[4] Behavioural remedies were also accepted in the case of a vertical business combination between ASML US Inc and Cymer Inc. A detailed explanation of the behavioural remedies used in this vertical integration is set out below.

Procedural issues

Consultation prior to notification

As in many other jurisdictions, parties have the ability to engage with the JFTC in consultations (including possible remedial commitments) well before formal notification is due. In practice, the pre-notification consultation system in Japan differs from that of many other jurisdictions in terms of the depth of feedback that the JFTC may provide at this early stage. Rather than having to wait until competition concerns have been identified by the authority before initiating remedy discussions, parties can (and are advised to) approach the JFTC to discuss a potential solution well in advance of filing a formal notification.

Experience suggests the JFTC adopts quite a flexible approach towards topics to be discussed during the prior consultation stage, and the scope of discussion has not changed

3 Commission Notice on remedies acceptable under the Council Regulation (EC) No. 139/2004 and under Commission Regulation (EC) No. 802/2004.

4 In this case, among other factors, the JFTC took into account the ease of importing products from Korea and China, which it believed would prevent the merged group from attempting to increase prices. See www.jftc.go.jp/en/pressreleases/yearly-2011/dec/individual-000457.files/2011_Dec_14.pdf.

drastically following the abolition of the more formal 'voluntary consultation' in 2011. The scope of the JFTC's pre-notification review remains relatively wide. This is in part influenced by the fact that the JFTC, like the transacting entities, cannot 'stop the clock' of the Phase I review period once formal notification has been received (as explained below). The JFTC therefore often prefers to commence discussions prior to formal notification, in order to permit itself sufficient time to analyse complex cases.

Indeed, the JFTC may engage in market testing during the pre-notification period. The case team conducts market testing by issuing questionnaires to competitors, customers and other interested third parties. The JFTC has been known to conduct hearings and interviews even at this stage. This permits the JFTC to address relatively substantive issues promptly, allowing the transacting parties time to prepare counterarguments or rebuttals to any negative feedback received from third parties during the market testing, and to prepare further remedial measures to propose to the JFTC. The informal pre-notification consultation process relies on a reciprocal relationship of trust and cooperation, as the JFTC may, depending on the case, invest significant resources in a transaction even prior to receiving formal notification of the proposed merger, and the transacting parties will be expected to engage fully and provide significant amounts of information at this preliminary stage. The system relies on the close working relationship between the JFTC and Japanese counsel, who work together to ensure that viable solutions are agreed in a timely fashion.

The JFTC will not issue binding guidance as to its substantive review of the case during the pre-notification phase. However, in practice, provided that the companies in question have fully cooperated with the JFTC in providing the fullest amount of information possible, and that the JFTC is able to gather enough data on the industry and market liable to be affected, the JFTC rarely diverges from the advice it provided at the pre-notification stage, unless some material difference comes to light that necessitates a re-evaluation of the potential effect of the transaction on competition.

Consultation with the JFTC at an early stage is vital for the smooth process of the review. This is particularly important given the inflexibility of review timetables in Japan, as outlined in the following section.

Procedure after notification

Phase I review

When a company submits a notification form to the JFTC, that company is prohibited from effecting the contemplated transaction until the expiration of a 30-calendar day review period. The JFTC may permit a shortening of the Phase I review period in response to the formal request of a company; however, once the review period has begun, it cannot be extended by either the JFTC or a notifying party. A request for further information from the JFTC as part of a Phase I review does not stall or restart this review period.

Instead, where discussion with the JFTC suggests that the transaction will not be cleared under the Phase I review, practice is for the parties to withdraw the notification, and refile it at a later date once further appropriate remedies have been agreed between the parties. As well as the ubiquitous benefits of avoiding a lengthy Phase II review, under the Japanese system this has the additional benefit of protecting the confidentiality of the transaction and of the remedies agreed. While the JFTC has been publishing a quarterly summary of cases that it has cleared since November 2017, this summary does not include transactions that are not otherwise in the public domain. However, the JFTC will publicly announce the beginning of any Phase II review, thereby making the proposed transaction public, even if it is not yet in the public domain. Because of this, where confidentiality of the transaction is important, companies often prefer to withdraw their notification and conduct private discussions with the JFTC regarding further remedies, in an attempt to ensure that the transaction is cleared under a Phase I review so as to maintain the confidential nature of the transaction.

Remedies are proposed by the parties rather than the JFTC. Usually, the JFTC will first indicate its competitive concerns to the parties, who will then offer merger remedies to address the concerns set out by the JFTC. However, in some cases, the parties will pre-emptively offer merger remedies themselves, without the JFTC having to raise concerns about the transaction, thus increasing the chances of the JFTC being able to clear the transaction within the 30-day Phase I review period. Pre-notification consultation assists parties in preparing merger remedies in this way.

It is also worth noting that the JFTC's quarterly register provides no information regarding remedies that contributed to the transaction's clearance, though some limited information of Phase II cases that involved merger remedies is disclosed as part of the information contained in the JFTC's annual review. Therefore, notifying corporations often find a lack of public precedents to indicate the remedies that have been acceptable to the JFTC in past cases. This lack of publicly available information increases the importance of both: (1) involving experienced Japanese counsel early in the discussions of proposed remedies where the transaction is likely to be caught by the AMA; and (2) timely pre-notification consultation with the JFTC.

Phase II review

At the close of the 30-day Phase I review period, the JFTC will normally either: (1) judge that the business combination in question is not problematic and give a notification to the effect that it will not issue a cease-and-desist order; or (2) indicate that a more detailed review is necessary. In the latter case, the JFTC will usually request that the notifying entity submit further reports and documentation. When the JFTC requires the notifying party to submit these reports, it will release a statement to the public to that effect. The JFTC will confirm to the notifying party when it has received all the information it requires.

The Phase II review period will conclude at the expiry of the later of: (1) 120 calendar days from the JFTC's receipt of the formal notification of the proposed transaction; or (2) 90 calendar days from the JFTC's confirmation that it has received all required information.[5] Because (2) is conditional on the JFTC being satisfied that it has all of the necessary information, there is always some uncertainty at the outset of a filing as to the latest date on which clearance (or notice of a cease-and-desist order) can be received. Clients are often keen to establish the maximum possible time frame for the JFTC's review, particularly where the transaction involves multiple jurisdictions (as the parties will usually wish to coordinate their applications and the likely clearance dates with the various authorities involved). However, as a practice, the JFTC has discretion as to when it feels that it

5 See Policies Concerning Procedures of Review of Business Combination, p. 11.

has received all of the information it requires. As Phase II is limited only by the later of the dates described in options (1) and (2) above, the inability to predict when the 90-day period will begin casts uncertainty over the overall long-stop date for a Phase II review. Such uncertainty adds to the importance of pre-notification discussions with the JFTC, to ensure that as much information as possible is provided early to allow the JFTC to review as swiftly as it can.

At the end of the Phase II review period, the JFTC will either:

- decide, based on the additional information or as a result of additional remedies proposed, that the merger in question will not be problematic and notify the parties that it does not intend to issue a cease-and-desist order (although the JFTC reserves the right to issue such an order at a later date if remedies are not properly implemented); or
- provide 'prior notice' of a cease-and-desist order. Such prior notice (which was implemented in April 2015 as part of a series of AMA reforms aimed at increased transparency of the review process) is provided by the JFTC to the transaction parties in order to permit them increased rights of defence; the receipt of the notice allows the parties to discuss and rebut the JFTC's arguments in favour of issuing a cease-and-desist order, see evidence used in forming these arguments, and engage in formal meetings with a separate officer of the JFTC.

In practice, where the JFTC has indicated during discussions that it is likely not to approve the transaction, parties often opt to withdraw their filing application rather than await the JFTC's prior notice of a cease-and-desist order. For example, in the case of Lam Research Corporation and KLA-Tenor Corporation in 2016, the JFTC informed the parties of a concern that the proposed business integration would substantially restrain competition in the field of the production and sale of semiconductor fabrication equipment, because of Lam's potential ability to foreclose its competitors by reducing their timely access to KLA-Tenor Corporation's metrology and inspection equipment and related services.[6] The transaction also received unfavourable feedback from the Antitrust Division of the US Department of Justice and other competition authorities with whom the JFTC cooperated closely. The parties announced that they abandoned their proposed business integration plan and withdrew the submission on 6 October 2016.

Types of merger remedies

The Guidelines set out the basic forms of remedies that are typically acceptable to the JFTC. These measures can be taken either independently or in combination, as appropriate in the circumstances.

The JFTC considers that the most effective remedies are those that either establish a new independent competitor or strengthen existing competitors, so that these competitors can serve as an effective check on competition. These measures include the transfer of all or part of the business of the post-merger group, the dissolution of an existing business combination (such as through the disposition of some or all of the voting rights held in another company) or the elimination of business alliances or agreements with third parties.

6 See JFTC press release: www.jftc.go.jp/en/pressreleases/yearly-2016/October/161007.html.

While where the remedy takes the form of a transfer the JFTC prefers that a buyer is found and identified to the case team prior to the JFTC's approval of the transaction, this is not always necessary.

However, the Japanese system differs from the European model in that a monitoring trustee is rarely used (for example, it was considered in the *Zimmer/Biomet* case of 2015).[7] Instead, it is the JFTC's case team that monitors the implementation of merger remedies, and, where a transfer has been proposed and accepted as a suitable remedy, the JFTC will assess the viability of a proposed third-party purchaser, whether they are identified before or after the conclusion of its review. The JFTC remains involved in the process, and retains the right to issue a cease-and-desist order if the merger remedies are not correctly implemented or it is the JFTC's belief that transfer to the proposed transferee will not sufficiently promote competition, notwithstanding that the formal review process concluded with the JFTC's approval.

Where it proves difficult to find a suitable transferee to participate in one of the above remedies (for instance, where there is declining demand in the relevant sector) other effective remedies may be used, such as setting up cost-based purchasing rights for competitors through the entry into long-term supply agreements. Other exceptional remedies include measures to promote imports and market entry, such as assisting imports by making group company facilities available to competitors, or granting licences in respect of company group-owned patents to competitors or new market entrants. Additional behavioural remedies such as prohibiting discriminatory treatment of non-affiliated companies with respect to the use of essential facilities for the business or 'firewalling' the exchange of information between various group companies will also be considered where appropriate. Where behavioural remedies are accepted, the JFTC will also often remain involved in the monitoring of the implementation and effectiveness of these remedies, such as by requiring regular reports by independent third parties.[8]

Multi-jurisdictional remedy coordination

Information exchange and collaboration

The JFTC works actively with other major competition authorities on specific cases, including through the exchange of information with its foreign counterparts, and is entitled to share with foreign competition authorities information that is deemed helpful and necessary for the performance of the foreign competition authority's duties where such duties are equivalent to those of the JFTC under the AMA. In addition, the JFTC has entered into bilateral cooperation agreements with various competition authorities, including the US, the EU and Canada, as well as the Philippines, Vietnam, Brazil, Korea, Australia, China, Kenya, Mongolia and Singapore.[9] It is reported that in respect of large-scale multi-jurisdictional transactions, the JFTC does participate in significant exchanges of information with other authorities, including its counterparts in the US and

7 In this case, the JFTC approved the following remedy; if buyer cannot be found a certain period of time, a third party as trustee will be given the authority to sell at a price without a lower limitation.

8 See, for example, the analysis of ASML US Inc (a subsidiary of ASML Holdings NV) and Cymer Inc below.

9 See www.jftc.go.jp/en/int_relations/agreements.html.

the EU; for example, in the review of two HDD cases in 2012,[10] the *Zimmer and Biomet* case in 2015 and the *Lam Research and KLA-Tencor* case in 2016. It is therefore important that information given to and submissions made to the JFTC are consistent with those made to other competition authorities.

Timing considerations

As detailed above, in July 2011 the JFTC abolished the voluntary prior consultation procedure, meaning that the formal substantive review of the transaction only begins at the formal notification stage. In addition, as explained above, even in cases where the parties submit a proposed remedy to the JFTC early on, the review periods for either Phase I or Phase II reviews cannot be extended, nor can the JFTC 'stop the clock' while remedies are being discussed. This has the potential to cause difficulties in a multi-jurisdictional merger, where the timings for the filings of multiple notifications must be carefully managed to avoid conflicting remedies or prohibition decisions. Problems can also arise in situations where a client wishes to guarantee clearance by a particular date in order to coordinate with its applications in other jurisdictions, since, as detailed above, the latest possible date on which the review could finish if it progresses to Phase II cannot be ascertained at the time of filing.

Solutions to the above problems include engaging in in-depth pre-notification discussions with the JFTC in order to ascertain whether a Phase II review is likely to be necessary, and, if not, delaying filing of the formal notification until 30 days before a decision is required. This method relies on the provision of large amounts of information to the JFTC prior to filing, and is based on mutual trust and negotiation between Japanese counsel and the JFTC in order to establish whether a Phase II review is likely.

On the other hand, since neither the parties nor the JFTC can extend the amount of time for either a Phase I or a Phase II review, in the event that a decision in another jurisdiction is delayed or a review period is extended, it may be necessary to pull and refile the relevant application with the JFTC in order to coordinate the timing of the JFTC's and other authorities' decisions.

Each of these solutions requires an in-depth understanding of the Japanese system, and high levels of communication with the JFTC at a very early stage in the transaction. Early coordination between Japanese and counsel working on the transaction across the globe is therefore of great importance.

Foreign-to-foreign mergers

Foreign-to-foreign mergers are caught by the AMA in the same way as domestic mergers if they will have an impact on the Japanese market, and therefore must be notified in the same way. The JFTC's willingness to investigate foreign-to-foreign transactions was demonstrated by its 2008 investigation into the proposed acquisition of Rio Tinto by BHP Billiton. The proposed transaction (subject to the rules prior to the 2009 amendment) did not trigger a formal filing requirement, but the JFTC was concerned that the transaction

10 Namely, the acquisition of Viviti Technologies by Western Digital Ireland and the acquisition of the HDD business of Samsung Electronics by Seagate Technology International.

would have substantially restrained competition in some fields of trade where iron ore and coal have been supplied by seaborne trade. Although the review was abandoned as the transaction was aborted, the case clearly demonstrates the JFTC's willingness to investigate foreign-to-foreign transactions, stating at the termination of the review that it would 'continue to proactively respond to merger cases between foreign companies, as well as those between domestic companies, if they would have a great influence on competition in markets in Japan'. [11] Such investigations will necessitate careful coordination with expert local counsel across the other jurisdictions involved.

Recent trends

The combined approach: the Idemitsu and Showa Shell case, and the JXHD and TonenGeneral case

Idemitsu, Showa Shell, JXHD and TonenGeneral (TG) are Japan-based major oil refiners. In December 2015, Idemitsu notified the JFTC of its proposed acquisition of more than a 20 per cent share in Showa Shell. Shortly after, JXHD also notified its intention to acquire more than a 50 per cent share in TG. As the proposed acquisitions would be implemented around the same time, the JFTC took a 'combined approach', meaning that each assessment was based on the assumption that the other transaction had already been implemented. This is in contrast to a 'priority rule', whereby cases are assessed separately and the increased market share resulting from the earlier of the two transactions is taken into account in the review of the second one only.[12]

The JFTC focused on an in-depth review of the refinery and wholesale of fuel oil and liquefied petroleum (LP) gases, where the parties had a relatively higher share in the respective market.

Refinery and wholesale of fuel oils

The JFTC was concerned that the proposed transactions would create a highly oligopolistic market. For example, 50 per cent and 30 per cent of the gasoline market share would be held by the combined JXHD/TG group and the combined Idemitsu/Showa Shell group respectively, while 10 per cent would be held by a third-party competitor whose excess supply capacity was limited. The JFTC found that the high level of pressure from competition between JXHD and Idemitsu meant that neither the JXHD group nor the Idemitsu group would be able to unilaterally act in such a way as to raise prices of fuel oil. However, the combination of the proposed acquisitions would create a situation where the refineries could easily coordinate their conduct to restrain competition.

Production and wholesale of LP gases

The JFTC established that there were four major producers of LP gases in Japan, whose combined market share would amount to 80 per cent, and each of the transaction parties held shares in one or two of these wholesalers. In particular, following the proposed

11 www.jftc.go.jp/en/pressreleases/yearly-2008/dec/individual_000067.html.

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

transactions, each of the combined JXHD/TG group and the combined Idemitsu/Showa Shell group would hold 25 per cent of the shares in the LP gas producer Gyxis Corporation (Gyxis), with the remaining shares held by two other competitors. Having examined various factors, including the status of joint shareholding and interlocking directorates, the JFTC found that, after the acquisitions, these producers of LP gases could easily anticipate the activities of other competitors. The JFTC thus concluded that the proposed acquisitions would create a 'joint relationship' among these four producers of LP gases, thereby resulting in a situation where the combined JXHD/TG group and the combined Idemitsu/Showa Shell group could restrain competition through coordination among the four producers.

Remedies

The parties proposed the following main remedies.

With respect to fuel oil, it was proposed that the parties assume the responsibility of other oil importers to store fuel oil until such time that the volume of fuel oil imported by the competitors reaches 10 per cent of the entire domestic demand. The parties further undertook not to treat the downstream distributors, which import fuel oil on their own, differently from other distributors.

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

The JFTC approved the transactions based on these remedies. This case is notable because the JFTC concluded that a substantial restraint of competition could exist solely on the basis of the likelihood of coordinated conduct, whereas historically it tended to find a substantial restraint of competition only based on unilateral conduct.

Remedies for vertical integration: ASML US Inc (a subsidiary of ASML Holdings NV) and Cymer Inc

In 2013, the JFTC received notice that ASML (a world leader in the manufacture and provision of lithography tools used in the front-end process of semiconductor manufacturing) intended to acquire the full share capital of its key supplier, Cymer Inc (whose business involved the manufacturing and sale of excimer lasers and extreme ultraviolet light sources, which compose an important part of the above lithography tools). The acquisition fell under the category of a 'vertical business combination', with the upstream market manufacturing and selling light sources, and the downstream market manufacturing and selling lithography systems.

Historically, the JFTC has mainly focused its attention on the detailed review of horizontal mergers and acquisitions rather than on vertical integration. However, the *ASML and Cymer* case may mark the beginning of a trend of the JFTC paying increasing attention to vertical business combinations, resulting in the acceptance of a wide range of behavioural remedies that are more appropriate to vertical integrations. The JFTC considered the following possible competition law issues and remedies.

Upstream refusal of sale of light sources

The JFTC considered the fact that Cymer occupied a high market share of the upstream market, in which there were few competitors. Therefore, if Cymer (following the acquisition) were to refuse to sell krypton fluoride or argon fluoride light sources to ASML's competitors, or sell such products on less advantageous terms, ASML's competitors would potentially lose the primary procurement sources of the necessary light sources, which could result in market foreclosure or exclusivity.

To eliminate this concern, ASML proposed that: (1) Cymer would continue to do business with both of ASML's main competitors under fair, reasonable and non-discriminatory terms of trade, and would set prices in a manner that had regard to and was consistent either with existing agreements (where such agreements existed), or (where no such agreements existed) with industry standard; (2) Cymer would implement joint development activities with both of ASML's competitors under reasonable terms of trade; and (3) for five years from the acquisition, a report on the status of compliance with these measures would be provided to the JFTC, to be prepared by an audit team independent from the parties (which would be appointed subject to the JFTC's prior approval).

Downstream refusal of purchase of light sources

The JFTC was similarly concerned that following the acquisition, ASML could refuse to deal with or deal on less advantageous terms with Cymer's competitors in the upstream market. If ASML behaved in this fashion, since it occupied a high market share of the downstream market (in which there were few competitors), competitors in the upstream market could lose sale destinations and eventually be excluded from the upstream market.

To eliminate this concern, ASML proposed that: (1) when ASML develops goods in partnership with either Cymer or its main competitor in the upstream market (Company A) or places orders for products, parts or services, ASML would determine the supplier based on objective and non-discriminatory criteria; (2) ASML would continue to permit chipmakers to choose light sources of their choice and not unduly exert influence in favour of Cymer; (3) ASML would provide to both Cymer and Company A substantially and simultaneously the information necessary in research and development of light sources and order placements for light source products, parts and services; and (4) ASML would provide a report under the same conditions as set out in the subsection above on upstream refusal of sale of light sources.

Access to confidential information

The JFTC was concerned that, since manufacturers at different levels of production share confidential information (such as product development, specification and customer details) as part of their collaboration and developments, it was possible that Cymer would hold confidential information belonging to ASML's competitors and vice versa. There was a worry that this information may be shared within the combined business, placing competitors in a disadvantageous position.

To eliminate this concern, ASML proposed that: (1) directors or employees of either Cymer or ASML who held confidential information regarding the other's competitors would be prohibited from sharing this confidential information with the other entity and have to enter into non-disclosure agreements; (2) the parties would create a protocol of 'information blackout' for its employees; and (3) ASML would provide a report under the same conditions set out in the above subsections on upstream refusal of sale of light sources and downstream refusal of purchase of light sources.

The JFTC concluded that, taking into account the various remedies that ASML proposed implementing at both levels of the newly combined business, the acquisition would not substantially restrain competition.

Remedies for conglomerate integration: Broadcom Limited and Brocade Communications Systems Inc

In 2017, Broadcom Limited (a world leader in the manufacture and sales of semiconductors) notified the JFTC of its intention to acquire the entire share capital of Brocade Communications Systems Inc (whose business involved the manufacturing and sale of hardware and software for networks). The acquisition fell under the category of 'vertical business combination', with the upstream market being the manufacturing and selling of application-specific integration circuits for fibre channel storage area network (FCSAN) switches, and the downstream market being the manufacturing and selling of FCSAN switches. It was also considered to be a 'conglomerate business combination' because the FCSAN switch that is manufactured and sold by Brocade Group, for which it has a market share of approximately 75 per cent, and the fibre channel host bus adapter (FCHBA) manufactured and sold by Broadcom Group, for which it has a market share of approximately 45 per cent, are related products and sold to common customers who manufacture and sell servers. While the JFTC did not have concerns in respect of the vertical aspects of the integration, it had conglomerate-type issues with the business combination.

The JFTC's main concern

The JFTC was concerned that following the proposed acquisition, the combined company group could make the specification of the FCSAN switch exclusive to the FCHBA of the combined company group, and that by sharing competitors' confidential information on the FCHBA, the market could be foreclosed or lead to the combined group having exclusivity over the FCHBA market.

Remedies

To eliminate this concern, the combined company group (Broadcom Group and Brocade Group) proposed that: (1) the combined company group secures connectivity between the FCHBA of the competing companies and the FCSAN switch of the company group, unless it is difficult to secure connectivity because of technical restrictions of competitors; (2) the combined company group treats competitors' confidential information on FCHBA as strictly confidential information and does not use it to the advantage of its FCHBA business; (3) the activities related to the design and development of the FCHBA of the combined company group are firewalled from the support activities of the combined company group provided to competitors of the FCHBA; and (4) the combined company group reports to the JFTC every two years for a total of 10 years with respect to the compliance status of undertakings (1) to (3) above, which will be monitored by an independent third party (monitoring consignee).

The JFTC approved the transaction based on these remedies because it considered that remedy (1) ensures that the competitors' FCHBA will not be adversely affected as compared to the FCHBA of the combined company group, and that remedies (2) and (3) will ensure that competitors will be protected from adverse effects, and the combined company will not unfairly favour their own FCHBA business.

Conclusion

Although the JFTC process as to remedies has some specificities, by and large there is a lot of consistency with the approach to remedies in other major jurisdictions such as the EU and the United States.

As in other jurisdictions, there is a strong case for approaching the JFTC early with viable remedies. Unlike in many other regimes, however, the JFTC is prepared to conduct market testing at a very early stage, in some cases even before the formal notification, in an effort to accelerate the formal review procedure. This feature of the Japanese regime coupled with the JFTC's inability to 'stop the clock' during the formal review period means that effective and timely cooperation between the notifying parties and the JFTC case team can bring significant benefits, both in terms of the overall review period and the results achieved.

Appendix 1

About the Authors

Vassili Moussis
Anderson Mōri & Tomotsune

Vassili Moussis is an English-qualified lawyer whose practice focuses on EU and international competition law, with a particular emphasis on inbound and outbound merger control and international cartel matters. Having trained at the European Commission's DG Competition and practised in the competition teams of leading UK and US law firms in Brussels and London, Vassili has been based in Tokyo with Anderson Mōri & Tomotsune for over 10 years now.

Vassili is recognised as a leading individual for antitrust and competition law in Japan by *Chambers*, *The Legal 500: Asia Pacific* and *Who's Who Legal: Japan*.

Yoshiharu Usuki
Anderson Mōri & Tomotsune

Yoshiharu Usuki is a partner at Anderson Mōri & Tomotsune with broad experience in the area of antitrust/competition law. In the competition area, he is particularly experienced in Japan Fair Trade Commission cartel investigations and other foreign competition authority cartel investigations, bid rigging and other serious alleged violations. He is also broadly experienced in antitrust and competition matters relating to dominance regulations, mergers and acquisitions, joint ventures, distribution agreements and licence agreements. In addition to his professional experience at Anderson Mōri & Tomotsune, he worked for the London law firm Fieldfisher LLP as a foreign lawyer (2014–2015).

Anderson Mōri & Tomotsune
Otemachi Park Building
1-1-1 Otemachi, Chiyoda-ku
Tokyo 100-8136
Japan
Tel: +81 3 6775 1000
vassili.moussis@amt-law.com
yoshiharu.usuki@amt-law.com
www.amt-law.com

Successfully remedying the potential anticompetitive effects of a merger can be more of an art than a science. Not only is every deal specific, but, as noted by Ronan Harty in his introduction, every remedy contains an element of 'crystal ball-gazing'; enforcers need to look into the future and successfully predict outcomes.

As such, practical guidance for both practitioners and regulators in navigating this challenging environment is critical. *The Guide to Merger Remedies* – published by Global Competition Review – is unique in providing this detailed guidance and analysis. It examines remedies throughout their life cycle: from the fundamental principles; to the remedies available; through how remedies are structured and implemented; and including how enforcers ensure compliance. Insights from around the world, ranging from Brazil to China, supplement the global analysis to inform the reality of multi-jurisdictional deals.

Drawing on the wisdom and expertise of 47 distinguished practitioners from 18 firms, the Guide draws together unparalleled proficiency in the field and provides essential guidance for all competition professionals.

Visit globalcompetitionreview.com
Follow @gcr_alerts on Twitter
Find us on LinkedIn

ISBN 978-1-78915-105-3