

THE MERGER
CONTROL
REVIEW

NINTH EDITION

Editor
Ilene Knable Gotts

THE LAWREVIEWS

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Ilene Knable Gotts

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CONTENTS

PREFACE.....	vii
<i>Ilene Knable Gotts</i>	

Part I: General Papers

Chapter 1	CHINA'S MERGER CONTROL IN THE PHARMACEUTICAL SECTOR.....	1
	<i>Susan Ning and Ting Gong</i>	
Chapter 2	EU MERGER CONTROL.....	8
	<i>Nicholas Levy and Patrick Bock</i>	
Chapter 3	EU MERGER CONTROL IN THE MEDIA SECTOR.....	26
	<i>Jérémie Marthan</i>	
Chapter 4	INTERNATIONAL MERGER REMEDIES.....	32
	<i>John Ratliff, Frédéric Louis and Cormac O'Daly</i>	
Chapter 5	US MERGER CONTROL IN THE HIGH-TECHNOLOGY SECTOR.....	46
	<i>C Scott Hataway, Michael S Wise, Noah B Pinegar and Sabin Chung</i>	
Chapter 6	US MERGER CONTROL IN THE MEDIA SECTOR.....	53
	<i>Gary W Kubek and Michael Schaper</i>	

Part II: Jurisdictions

Chapter 7	AUSTRALIA.....	69
	<i>Peter Armitage, Ross Zaurrini and Amanda Tesvic</i>	
Chapter 8	AUSTRIA.....	85
	<i>Dieter Zandler and Linda Marterer</i>	
Chapter 9	BELGIUM.....	98
	<i>Carmen Verdonck and Daniel Muheme</i>	

Chapter 10	BOSNIA AND HERZEGOVINA	115
	<i>Nihad Sijerčić</i>	
Chapter 11	BRAZIL.....	124
	<i>Cecilia Vidigal M de Barros, Paula Beeby M de Barros Bellotti and Antônio José D R da Rocha Frota</i>	
Chapter 12	CANADA.....	138
	<i>Julie A Soloway, Cassandra Brown and Julia Potter</i>	
Chapter 13	CHINA.....	150
	<i>Susan Ning</i>	
Chapter 14	COSTA RICA.....	158
	<i>Edgar Odio</i>	
Chapter 15	CROATIA	167
	<i>Goran Durmiš, Ivana Ostojić and Tea Radmilo</i>	
Chapter 16	CYPRUS.....	178
	<i>Anastasios A Antoniou and Christina McCollum</i>	
Chapter 17	ECUADOR.....	186
	<i>Diego Pérez-Ordóñez, Luis Marín-Tobar and Mario Navarette-Serrano</i>	
Chapter 18	FRANCE.....	196
	<i>Hugues Calvet, Olivier Billard and Guillaume Fabre</i>	
Chapter 19	GERMANY.....	211
	<i>Alexander Rinne</i>	
Chapter 20	HONG KONG	220
	<i>Marc Waba, Pearl Yeung and Sophie Chen</i>	
Chapter 21	INDIA	230
	<i>Rahul Rai, Shashank Sharma and Shivam Jha</i>	
Chapter 22	ITALY	244
	<i>Rino Caiazza and Francesca Costantini</i>	

Chapter 23	JAPAN <i>Yusuke Nakano, Takeshi Suzuki and Kiyoko Yagami</i>	253
Chapter 24	KOREA <i>Sai Ree Yun, Seuk Joon Lee, Cecil Saehoon Chung, Kyoung Yeon Kim and Kyu Hyun Kim</i>	264
Chapter 25	MACEDONIA <i>Tatjana Popovski-Buloski</i>	272
Chapter 26	MALAYSIA <i>Shanthy Kandiah</i>	278
Chapter 27	MEXICO <i>Rafael Valdés Abascal and Enrique de la Peña Fajardo</i>	290
Chapter 28	MOROCCO <i>Corinne Khayat and Maija Brossard</i>	297
Chapter 29	NETHERLANDS <i>Gerrit Oosterhuis and Weyer VerLoren van Themaat</i>	305
Chapter 30	NEW ZEALAND <i>Ross Patterson, Oliver Meech and Kristel McMeekin</i>	316
Chapter 31	POLAND <i>Małgorzata Sz waj and Wojciech Podlasin</i>	327
Chapter 32	PORTUGAL <i>Rita Leandro Vasconcelos and Inês Ferrari Careto</i>	337
Chapter 33	RUSSIA <i>Maxim Boulba and Maria Ermolaeva</i>	350
Chapter 34	SERBIA <i>Rastko Petaković and Bojana Miljanović</i>	359
Chapter 35	SINGAPORE <i>Daren Shiau, Elsa Chen and Scott Clements</i>	369

Contents

Chapter 36	SOUTH AFRICA	384
	<i>Candice Upfold</i>	
Chapter 37	SPAIN.....	409
	<i>Pedro Callol</i>	
Chapter 38	SWITZERLAND	418
	<i>Pascal G Favre and Marquard Christen</i>	
Chapter 39	TAIWAN.....	428
	<i>Victor I Chang, Margaret Huang and Rose Lin</i>	
Chapter 40	TURKEY.....	437
	<i>Gönenç Gürkaynak and K Korhan Yıldırım</i>	
Chapter 41	UNITED KINGDOM	446
	<i>Jordan Ellison and Paul Walter</i>	
Chapter 42	UNITED STATES	459
	<i>Ilene Knable Gotts</i>	
Appendix 1	ABOUT THE AUTHORS.....	467
Appendix 2	CONTRIBUTING LAW FIRMS' CONTACT DETAILS.....	501

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. Additional jurisdictions, most recently in South America, have added pre-merger notification regimes. In our endeavour to keep our readers well informed, we have expanded the jurisdictions covered by this book to include the newer regimes as well. Also, the book now includes chapters devoted to such ‘hot’ M&A sectors as pharmaceuticals, and high technology and media in key jurisdictions to provide a more in-depth discussion of recent developments. Finally, the book includes a chapter on the economic analysis applied to merger review.

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. For instance, in 2009, China blocked the Coca-Cola Company’s proposed acquisition of China Huiyuan Juice Group Limited and imposed conditions on four mergers involving non-China-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 such a transaction develops a comprehensive plan prior to, or immediately upon, execution of an agreement concerning where and when to file notification with competition authorities regarding such a transaction. To this end, this book provides an overview of the process in 36 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments. Given the number of recent significant M&A transactions involving media, pharma and high-technology companies, we have included chapters that focus on the enforcement trends in these important sectors. In addition, as merger review increasingly includes economic analysis in most, if not all, jurisdictions, we have added a chapter that discusses the various economic tools used to analyse transactions. 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 a client on a particular transaction. Almost all jurisdictions vest exclusive authority to review transactions in one agency. The United States is now the major exception in this regard since China consolidated its three antitrust agencies into one agency

this year. 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 has recently amended its law to ensure that it has the opportunity to review transactions in which the parties' turnover do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). Please note that the actual monetary threshold levels can vary in specific jurisdictions over time. There are some jurisdictions that still use 'market share' indicia (e.g., Bosnia and Herzegovina, Colombia, Lithuania, Portugal, Spain, Ukraine and the United Kingdom). 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, in Poland, a notification may be required even though only one of the parties is present and, therefore, there may not be an impact on competition in Poland. Turkey recently issued a decision finding that a joint venture (JV) that produced no effect on Turkish markets was reportable because the JV's products 'could be' imported into Turkey. In Serbia, there similarly is no 'local' effects required. 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 United Kingdom and Venezuela), the vast majority impose mandatory notification requirements. Moreover, in Singapore, the transaction parties are to undertake a 'self-assessment' of whether the transaction will meet certain levels, and, if so, should notify the agency to avoid potential challenge by the agency.

Although in most jurisdictions the focus of the competition agency is on competition issues, some jurisdictions have a broader mandate. For instance, the 'public interest' approach in South Africa expressly provides for consideration of employment matters, local enterprises and procurement, and for economic empowerment of the black population and its participation in the company. Many of the remedies imposed in South Africa this year have been in connection with these considerations. Although a number of jurisdictions have separate regulations and processes for addressing foreign entity acquisitions when national security or specific industrial sectors are involved, in Romania, for example, the competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. 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). In France, for instance, the competition authority imposed a €4 million fine on Castel Frères for failure to notify its acquisition of part of the Patriache group. In Ukraine and Romania, the competition authorities have focused their efforts on discovering consummated transactions that had not been notified, and imposing fines on the parties. Chile's antitrust enforcer recommended a fine of US\$3.8 million against two meat-packing companies, even though the parties had carved the Chilean business out of the closing.

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; Serbia provides for 15 days after signing of the agreement; and Hungary, Ireland and Romania have a 30-calendar-day time limit for filing the notification that commences with entering into the agreement. 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, Indonesia, 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., Austria, Canada, China, Greece, Portugal, Ukraine and the United States). 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 Belgium, the competition authority fined a party for late submission of information.

In addition, other jurisdictions have joined the European Commission (EC) and the United States in focusing on interim conduct of the transaction parties, commonly referred to as 'gun jumping'. Brazil, for instance, issued its first gun-jumping fine in 2014 and recently issued guidelines on gun-jumping violations. Since then, Brazil has continued to be very active in investigating and imposing fines for gun-jumping activities. In addition, the sharing of competitively sensitive information prior to approval appears to be considered an element of gun jumping. And the fines that are being imposed has increased. For example, the EC imposed the largest gun-jumping fine ever of €124.5 million against Altice.

In most jurisdictions, a transaction that does not meet the pre-merger notification thresholds is not subject to review or challenge by the competition authority. In Canada – like the United States – however, the Canadian Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute. In Korea, Microsoft initially filed a notification with the Korea Fair Trade Commission (KFTC), but when it faced difficulties and delays in Korea the parties restructured the acquisition to render the transaction non-reportable in Korea and consummated the transaction. The KFTC, however, continued its investigation as a post-consummation merger investigation and eventually obtained a consent order.

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 EC model than the United States 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 Japan 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 processes with the EC model. Some jurisdictions even within the EC remain that differ procedurally from the EC 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 must be provided with a redacted copy of the merger notification from the outset and have the right to participate in merger hearings before the Competition Tribunal: the Tribunal will typically also 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 EC and Germany), third parties may file an objection to a clearance decision. In some jurisdictions (including Canada, the EC and the United States), third parties (e.g., competitors) are required to provide information and data if requested by the antitrust authority. In Israel, a third party that did not comply with such a request was recently fined by the authority.

In almost all jurisdictions, once the authority approves the transaction, it cannot later challenge the transaction's legality. The United States 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, where the authority has the ability to mandate notification of a transaction for a period of up to three months following the transaction's consummation. In 'voluntary' jurisdictions, such as Australia and Singapore, the competition agency can investigate and challenge unnotified transactions.

It is becoming the norm in large cross-border transactions raising competition concerns for the United States, Canadian, Mexican and EC authorities to work closely together during the investigative stages, and even in determining remedies, minimising the potential of arriving at diverging outcomes. The KFTC has stated that it will engage in even greater cooperation with foreign competition authorities, particularly those of China and Japan, which are similar to Korea in their industrial structure. 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 the Chilean authority. 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 European jurisdictions, Member States often keep each other informed during the course of an investigation. In addition, transactions not meeting the EC threshold can nevertheless be referred to the European Commission in appropriate circumstances. The United States has signed cooperation agreements with a number of jurisdictions, including most recently Peru and India. China has 'consulted' with the United States and the EC on some mergers and entered into a cooperation agreement with the United States authorities in 2011.

The impact of such multi-jurisdictional cooperation was very evident this year. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction due to the combined objections of several jurisdictions, including the United States, Europe and Korea. In *Office Depot/Staples*, the FTC and the Canadian Competition Bureau cooperated and both jurisdictions brought suits to block the transaction (although the EC had also cooperated on this transaction, it ultimately accepted the undertakings offered by the parties). In the *GE/Alstom* transaction, the United States and the EC coordinated throughout, including at the remedies stage. Additionally, in the *Halliburton/Baker Hughes* transaction, the United States and the EC coordinated their investigations, with the United

States suing to block the transaction while the EC's investigation continued. Also, in *Holcim/Lafarge*, the cooperation between the United States and Canada continued at the remedies stage, where both consents included assets in the other jurisdiction's territory. The United States, Canada and Mexico coordinated closely in the review of the *Continental/Veyance* transaction. In fact, coordination among the jurisdictions in multinational transactions that raise competition issues is becoming the norm.

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., the EC 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 at 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. The United Kingdom also focuses on whether the minority shareholder has 'material influence' (i.e., the ability to make or influence commercial policy) over the entity. Several agencies during the past few years have analysed partial ownership acquisitions on a stand-alone basis as well as in connection with JVs (e.g., Canada, China, Cyprus, Finland and Switzerland). Vertical mergers were also a subject of review (and even resulted in some enforcement actions) in a number of jurisdictions (e.g., Belgium, 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. Multi-jurisdictional cooperation facilitates the development of cross-border remedies packages that effectively address competitive concerns while permitting the transaction to proceed. The consents adopted by the United States and Canada in the *Holcim/Lafarge* merger exemplify such a cross-border package. As discussed in the 'International Merger Remedies' 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 enforcement environment, obtaining the approval of jurisdictions such as Brazil and China can be as important as the approval of the EC or the United States. 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 few years have imposed a variety of such behavioural remedies (e.g., China, the EC, France, the Netherlands, Norway, South Africa, Ukraine and the United States). For instance, some recent decisions have included as behavioural remedies pricing, sales tariffs and terms of sale conditions (e.g., Korea, Ukraine and Serbia), employee retrenchment (South Africa) and restrictions on bringing anti-dumping suits (e.g., Mexico).

Many recent decisions have imposed behavioural remedies to strengthen the effectiveness of divestitures (e.g., Canada's decision in the *Loblaw/Shoppers* transaction, China's MOFCOM remedy in *Glencore/Xstrata*, and France's decision in the *Numericable/SFR* transaction). This book should provide a useful starting point in navigating cross-border transactions in the current enforcement environment.

Ilene Knable Gotts

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JAPAN

Yusuke Nakano, Takeshi Suzuki and Kiyoko Yagami¹

I INTRODUCTION

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

i Pre-merger notification

Types of regulated mergers and thresholds

Share acquisitions, mergers,² joint share transfers, business or asset 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., reverse triangular mergers that involve a merger between a target and a subsidiary of an acquirer and an acquisition by the acquirer of 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 subject to the notification requirement if they satisfy the thresholds for the type of transactions used to form a joint venture, such as share acquisitions and asset acquisitions. Unlike the regime in the EU, Japanese law does not distinguish between full-function and non-full-function joint ventures. Notification may be also required when a partnership (including a limited liability partnership) formed under Japanese law or under foreign laws acquires shares in another company through partnership. The 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

1 Yusuke Nakano and Takeshi Suzuki are partners, 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 an 'amalgamation' in many other jurisdictions.

3 Article 10, Paragraph 5 of the AMA.

4 A combined business group consists of all of the subsidiaries of the ultimate parent company. 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 another company. The Merger Notification Rules specify detailed thresholds

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.

To be precise, 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.

In the 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 or asset 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

for 'control' to exist, which might be found even in cases where the ratio of beneficially owned voting rights is even slightly higher than, 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' generally (there are still some differences) aligns Japanese merger control with the merger rules of other jurisdictions, especially the EU rules as to the identification of the undertaking concerned.

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 2015).

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

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

9 Article 10, Paragraph 2 of the AMA.

must result in the acquirer holding more than 20 or 50 per cent of the total voting rights of all of the shareholders of the target (i.e., an acquisition that increases a shareholding from 19 to 21 per cent is subject to a filing, while an acquisition that increases a shareholding from 21 to 49 per cent does not require one).¹⁰ A minority ownership of over 20 per cent will 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 or asset 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 or asset is the whole business or asset of the company or a substantial part of the business or asset 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 or asset.¹³

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 By contrast, in the case of a share acquisition or business transfer, only the acquiring company is responsible for filing.

There are no filing fees under the AMA.

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

During FY2017, there were no significant amendments made to regulations or guidelines relating to merger control.

II YEAR IN REVIEW

During the 2017 fiscal year (from 1 April 2017 to 31 March 2018, hereafter FY 2017), the JFTC opened a Phase II review only in one case: the joint share transfer by the Daishi Bank, Ltd (Daishi Bank) and the Hokuetsu Bank, Ltd (Hokuetsu Bank), which was cleared by

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

11 Under Japanese law, 'joint share transfer' refers to a specific structure stipulated by the Companies Act of Japan that involves two or more companies transferring their shares into a new holding company in exchange for shares of 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.

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.

the JFTC in December 2017, without any condition. At the time of writing, *The Fukuoka Financial Group and the Eighteenth Bank* case, in which a Phase II review was initiated in July 2016,¹⁶ is still pending before the JFTC.

i The Daishi Bank and the Hokuetsu Bank case¹⁷

The Daishi Bank and the Hokuetsu Bank are the top two regional banks based in Niigata prefecture. In April 2017, the two banks reached a basic agreement to integrate their businesses by establishing a joint holding company through a joint share transfer, aiming to address the worsening business environment.

Under the merger control regime in Japan, no special rule applies to the review of mergers that involve financial institutions. The Secretary General of the JFTC recently stated in a press conference that the JFTC would apply the same Merger Guidelines¹⁸ to review the impact of mergers involving financial institutions, particularly with respect to whether the consumers' choices will be restricted as a result of the contemplated merger.¹⁹ This case is remarkable because the JFTC demonstrated how the 'restraints of trade' were assessed in a merger between regional banks in a manner that was significantly more detailed than ever before.

In defining the product market, the JFTC segmented the provision of loans into two markets: loans provided to enterprises for business purposes; and loans provided to individuals for non-business purposes (typically used for the purchase of residential properties and education). This segmentation reflects the absence of demand substitutability between those two markets since the purpose and consumers of those loans are distinctive. Likewise, there is no supply substitutability between the two markets since the business know-how and resources (such as branches and personnel) required for the two types of loans are different. Furthermore, in consideration of the differences in business scale, targeted ranges and characteristics of businesses the JFTC sub-segmented the market for loans for business purposes into three sub-markets: loans for large-sized and middle-tier enterprises; loans for small and medium-sized enterprises (SMEs); and loans for local public agencies. In these sub-markets, the JFTC conducted an in-depth review of the following two areas, loans for large-sized and middle-tier enterprises, and loans for SMEs.

In defining the geographic market, the JFTC conducted a survey using questionnaires to assess the geographical scope of the business activities of enterprises located in Niigata prefecture and the distance that these enterprises will search for lenders of loans.²⁰

16 JFTC press release of 8 July 2016, whose abbreviated version is available in English at www.jftc.go.jp/en/pressreleases/yearly-2016/July/160708.files/160708.pdf.

17 JFTC press release of 15 December 2017, whose abbreviated version is available in English at www.jftc.go.jp/en/pressreleases/yearly-2017/December/171215.files/171215.pdf.

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

19 JFTC press conference on 6 December 2017. A summary (Japanese only) of that press conference is available at www.jftc.go.jp/houdou/teirei/h29/oct_dec/kaikenkiroku171206.html. According to the Secretary General, there have been 14 merger notifications for the integration of regional banks in the past 10 years.

20 It is reported that the JFTC sent the questionnaires to over 7,000 enterprises located in Niigata prefecture and received responses from half of these respondents.

Consequently, the JFTC defined the geographic market for (1) loans to large-sized and middle-tier enterprises throughout the entire Niigata prefecture, and (2) loans to SMEs in each of the 10 business districts within Niigata prefecture.

The JFTC noted that as a result of the notified concentration, the combined firm would have a relatively high market share: approximately 55 per cent for loans to large-sized and middle-tier enterprises in Niigata prefecture, and approximately 40–60 per cent for loans to SMEs in the 10 business districts within Niigata prefecture. The combined firm, therefore, would become the largest player in all of these markets. In addition, there would be no competitive pressure from new entrants since no bank has established a new branch in Niigata prefecture in the past five years.

Nevertheless, with respect to unilateral conduct, the JFTC concluded that the integration would not result in restricting the consumers' choices for loans for business purposes because of the following reasons:

- a* competitors (banks) have sufficient excess supply capacity which would continue to function as competitive pressure;
- b* for large-sized and middle-tier enterprises, there is also a certain degree of competitive pressure from adjacent markets (including neighbouring geographic areas and lenders other than banks, such as agricultural cooperative associations); and
- c* the survey results show that the majority of enterprises would consider borrowing loans from banks other than the combined parties and that 60 per cent of the parties' customers have actually borrowed from other banks simultaneously, it would be relatively easy for both large-sized and middle-tier enterprises and SMEs to switch their lenders if the parties raised their loan interest rate.

Similarly, the JFTC found that the likelihood of coordinated conduct among the combined parties and competitors in each of the relevant markets would be low, given the difficulty in predicting the competitive conduct owing to the differing loan conditions for each enterprise depending on the type of business and financial situation.

The JFTC, thus, concluded that the notified concentration would not substantially restrain competition in each of the relevant markets neither by unilateral conduct nor cooperative conduct.

v Statistics of the JFTC's activity

According to the JFTC, the total number of merger notifications filed in FY 2017 was 306.

There are a few cases that were brought into Phase II review every year, while there were no formal prohibition decisions made by the JFTC. According to the JFTC's statistics, the number of filings and the cases cleared after a Phase II review is as follows:

	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017
No. of filings	985	265	275	349	264	289	295	319	306
No. of cases cleared after Phase II review	0	4	3	5	3	1	3	3	1

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, below). 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 re-file' the notification during the Phase I period, thereby effectively restarting the clock.

ii Parties' ability to accelerate the review procedure

There is no provision in the law and there are no regulations regarding the ability to accelerate the review process. However, in practice, it may be possible to put pressure on the JFTC by submitting a written request to the JFTC in cases where a filing is made less than 30 calendar days before the planned closing date. 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 (which means when the JFTC closes its review prior to the expiration of the 30-calendar-day review period).

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).²¹ 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 some major merger notification cases as part of its annual review. Such disclosure is generally subject to obtaining approval for publication from the notifying parties.

Rights to challenge mergers

Interventions by interested parties in JFTC proceedings have not historically been common. Nevertheless, there was one case in which Japanese steel manufacturers intervened in relation to the proposed hostile takeover attempt by BHP Billiton of Rio Tinto, first announced in 2007.

Although third parties may file a lawsuit to ask the court to order the JFTC to issue a cease-and-desist order, the legal path to successfully do so is extremely narrow and does not merit a detailed explanation here. There are two ways for third parties to submit complaints

21 Policies Concerning Procedures of Review of Business Combination (14 June 2011; Policies for Merger Review, as amended in 2015).

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;²² and the other 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 held²³ if deemed necessary, but they have been extremely rare to date. The JFTC sometimes conducts informal hearings, and market tests by way of questionnaires, with third parties, including competitors, distributors and customers, in the course of its review, as it did in the review of the *Daishi Bank and Hokuetsu Bank* case (see Section II, above).

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). Prior to issuing a cease-and-desist order, the JFTC will provide, in advance, information about, *inter alia*, the outline of the contemplated order as well as the underlying facts and the list of supporting evidence to the potential recipients of such order. The JFTC does so to give the potential recipients an opportunity to review and make copies of the evidence (to the extent possible) and to submit opinions as to the possible order.²⁴

When the JFTC issues a cease-and-desist order, the parties to the transaction can appeal to the Tokyo District Court (instead of resorting to the JFTC administrative hearing procedure, as was the case in the past) for annulment of the JFTC order.

v Effect of regulatory review

The JFTC frequently holds consultations with sector-specific regulators concerning 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 considers 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 set out the 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). One of the important parts of the substantive test analysis is the use of 'safe harbours' measured by the Herfindahl-Herschman Index (HHI) for each of the above three categories (see Section III.vii, below). It is also suggested in the Merger Guidelines that, both before and after

22 Article 45, Paragraph 1 of the AMA.

23 Article 42 of the AMA.

24 Article 9 of the Rules on the Procedures of Hearing of Opinions.

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 notified transaction's actual impact on competition.

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.

vii Safe harbours

In the safe harbour analysis, if any of the following conditions is satisfied, the JFTC is likely to consider that the notified transaction does not substantially restrain competition in a relevant market:²⁵

a horizontal transactions:

- the HHI after the notified transaction is not more than 1,500;
- the HHI after the notified transaction exceeds 1,500, but is not more than 2,500, and the increased HHI (delta) is not more than 250; or
- the HHI after the notified transaction exceeds 2,500 and the delta is not more than 150; and

b vertical and conglomerate transactions:

- the merging parties' market share after the notified transaction is not more than 10 per cent; or
- the merging parties' market share after the notified transaction is not more than 25 per cent and the HHI after the notified transaction is not more than 2,500.

In addition to the safe harbour above, the JFTC is highly unlikely to conclude that transactions falling within the following threshold would substantially restrain competition in any particular market: the HHI after the notified transaction is not more than 2,500, and the merging parties' market share is not more than 35 per cent.

If the notified transaction does not satisfy the requirements for any of the above, the JFTC will likely conduct a more in-depth analysis of the unilateral and coordinated effects of the notified transactions.

viii Gun jumping

In the *Canon and Toshiba Medical* case in 2016, the JFTC approved Canon's acquisition of shares in Toshiba Medical, Toshiba Corporation's (Toshiba) medical equipment unit. However, the JFTC also issued a statement warning that the structure of the deal could be deemed to circumvent the law, including the prior notification obligation under the AMA because the parties had provided that Toshiba could receive the payment of the transaction price of ¥665.5 billion prior to the JFTC's clearance. Specifically, Canon acquired an equity warrant for which common shares in Toshiba Medical were the underlying securities. In

²⁵ Part IV, 1(3) and Part V, 1(3) of the Merger Guidelines. In practice, if a transaction satisfies the safe harbour conditions in (a) and (b), the JFTC does not conduct any further substantive review of the transaction.

return for that equity warrant, Canon paid to Toshiba an amount virtually equivalent to the consideration for common shares. Further, shares with voting rights in Toshiba Medical were acquired and held by an independent third-party owner up until the time Canon exercised the equity warrant. The JFTC found that the transaction structure formed part of a scheme that was aimed at Canon ultimately acquiring shares in Toshiba Medical.

The JFTC held that since there is no public precedent of its position as to such a transaction structure, it would not impose any sanctions in this case, but warned that similar transaction schemes will be considered to be in violation of the AMA in the future.

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.²⁶ In addition, the Japanese government has entered into bilateral agreements concerning cooperation on competition law with the United States, the European Union and Canada, and multinational economic partnership agreements with competition-related provisions with 13 other countries. Furthermore, the JFTC has entered into inter-agency bilateral cooperation memoranda with various competition authorities.²⁷ It also has 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, there have been various levels of information exchange and discussions carried out between the participating authorities.

The JFTC has a good track record of closely working with other competition authorities. It is reported that the JFTC exchanged information with various authorities, including its counterparts in the United States and the European Union, for example, in the recent review of the *Zimmer and Biomet* case in 2015 and the *Lam Research and KLA-Tencor* case in 2016.

Coordination among attorneys from various jurisdictions

As explained in Section IV.ii, below, because the JFTC abolished the voluntary consultation procedure (prior consultation procedure) as of 1 July 2011, the substantive review of a proposed transaction only begins at the formal notification stage. In addition, as explained in Section III.i, above, 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.

26 Article 43-2 of the AMA.

27 A list of all international agreements and memoranda concerning competition law is available at: http://www.jftc.go.jp/en/int_relations/agreements.html.

ii Pre-filing consultation with the JFTC

Upon the abolition of the prior consultation procedure in July 2011, the JFTC no longer provides its formal opinion at the pre-notification stage, and the review officially starts at the formal notification stage.

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 almost all cases that the JFTC cleared recently after Phase II review, including the *Daishi Bank and Hokuetsu Bank* case, the JFTC made specific notes in its announcements 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 to try and alleviate any potential concerns early. 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’. They 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 financing 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.

Minority ownership interests

It should be noted that minority ownership of over 20 per cent of the voting rights in a company is a notifiable event regardless of whether the acquirer will take control of the target company (see Section I.i, above). 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. For example, the HHI would also be calculated based on the sales data of the integrated group as a whole. In the *Idemitsu and Showa Shell* case in 2016, the JFTC made clear that its review assumed that these parties would be completely integrated as one group after the acquisition, although Idemitsu only intended to have a minority shareholding in Showa Shell after the acquisition. The joint relationship will be determined by taking into account various factors even though, according to the Merger Guidelines, a minority holding of voting rights of over 20 per cent and the absence of holders of voting rights with the same or higher holding ratios of voting rights would suffice to find such relationship.

iv 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 filing thresholds described

above are met. The JFTC has actually investigated transactions that had not been notified, including foreign-to-foreign transactions such as an attempt by BHP Billiton to take over Rio Tinto through a hostile bid in 2010.²⁸

V OUTLOOK & CONCLUSIONS

Seven 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 scope of disclosure, which the JFTC has made in relation to its review of Phase II cases and as part of its annual review about recent major cases, seems to have expanded. For example, in the *JXHD and TG* case and the *Idemitsu and Showa Shell* case in 2016, the JFTC disclosed specific details of the economic analysis it conducted, thereby giving greater transparency to its review. Although these disclosures have been generally welcomed by practitioners, when compared to the practice of other leading competition authorities, there is still a relative lack of available information as to the JFTC's decisional practice (e.g., few decisions are published), and there are some areas where further clarification or improvements seem necessary (e.g., as to market definition). It is hoped that the JFTC will take action, for example, through the publication of more decisions and of new or updated guidelines in the near future.

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

ABOUT THE AUTHORS

YUSUKE NAKANO

Anderson Mōri & Tomotsune

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 that was the subject of an investigation by the JFTC.

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 previously was a lecturer at Hitotsubashi University Law School. He is a co-author of *Leniency Regimes* (European Lawyer Reference, fifth edition, 2015) and the Japanese chapters of various other publications.

TAKESHI SUZUKI

Anderson Mōri & Tomotsune

Takeshi Suzuki is a partner at Anderson Mōri & Tomotsune, working mainly in the fields of antitrust and competition law, M&A transactions and other corporate legal affairs.

Mr Suzuki is a graduate of Kyoto University (LLB, 2006), and is admitted to the Bar in Japan. Prior to joining Anderson Mōri & Tomotsune, he engaged in cross-border M&A transaction matters as well as Japan and EU competition law in Tokyo and Brussels for approximately four years at a leading UK firm. Mr Suzuki then worked for the merger investigation division of the Japan Fair Trade Commission as a chief case handler of merger filings for approximately two years. At Anderson Mōri & Tomotsune, his practice focuses on Japan and international competition law with a particular emphasis on merger control.

KIYOKO YAGAMI

Anderson Mōri & Tomotsune

Kiyoko Yagami is a senior associate at Anderson Mōri & Tomotsune working mainly in the fields of antitrust and competition law, M&A, international dispute resolutions and other corporate legal affairs.

Ms Yagami is a graduate of Chuo University (LLB 2000), Temple University Beasley School of Law (LLM 2001), China University of Political Science and Law (LLM 2002) and Waseda Law School (JD 2007), and is admitted to the Bar in Japan and New York. She worked as a trainee in the Beijing office of a leading global firm and in the Economic Affairs Bureau of the Ministry of Foreign Affairs of Japan prior to joining Anderson Mōri & Tomotsune in 2008.

ANDERSON MŌRI & TOMOTSUNE

Otemachi Park Building
1-1-1 Otemachi, Chiyoda-ku
Tokyo 100-8136
Japan
Tel: +81 3 6775 1000
Fax: +81 3 6775 2049
yusuke.nakano@amt-law.com
takeshi.suzuki@amt-law.com
kiyoko.yagami@amt-law.com
www.amt-law.com/en



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