THE MERGER CONTROL REVIEW

ELEVENTH EDITION

Editor
Ilene Knable Gotts

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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, such as Malaysia, are currently considering imposing mandatory pre-notification regimes, and in the meantime can assert some jurisdiction to review certain transactions under their conduct laws and for specific sectors (e.g., aviation, communications). Also, the book includes chapters devoted to such 'hot' M&A sectors as pharmaceuticals, high technology and media, as well as a chapter on merger remedies, to provide a more in-depth discussion of recent developments. The intended readership of this book comprises both in-house and outside counsel who may be involved in the competition review of cross-border transactions.

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. In the United Kingdom, the Competition and Markets Authority (CMA) has effectively blocked transactions in which the parties question its authority. It is, therefore, imperative that counsel develop a comprehensive plan before, 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 30 jurisdictions, as well as a discussion of recent decisions, strategic considerations and likely upcoming developments.

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 in 2018. 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 amended its law to ensure that it has the opportunity to review transactions in which the parties' turnovers do not reach the threshold, but the value of the transaction is significant (e.g., social media, new economy, internet transactions). The focus on 'killer acquisitions' (i.e., acquisitions by a dominant company of a nascent competitor), particularly involving digital or platform offerings, has been a driver in the expansion of jurisdiction and focus of investigations. Some jurisdictions have adopted a process to 'call in' transactions that fall below the thresholds, but where the transaction may be of competitive significance. For instance, the Japan Federal Trade Commission (JFTC) has the ability of reviewing and taking action in non-reportable transactions, and has developed guidelines for voluntary filings. 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 is similarly no 'local' effect 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., in 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 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, competition law provides that the government can prohibit a merger if it determines that such merger could have a potential impact on national security.

Covid-19 and the current economic environment have provided new challenges to companies and enforcement agencies. Many jurisdictions have extended the review times to account for covid-19 disruptions at the agencies. At the same time, some of the transactions are distress situations, in which timing is key to avoid the exit of the operations and termination of employees. Regardless of the speed at which the economic recovery occurs, it is very likely that for the next couple of years the agencies will be faced with reviews of companies in financial distress, if not at the point of failure. Some jurisdictions exempt from notification (e.g., Ecuador) or have special rules for the timing of bankrupt firms (e.g., Brazil, Switzerland and the Netherlands where firms can implement before clearance if a waiver is obtained; Austria, India, Russia and the United States have shorter time frames). Also, in some jurisdictions, the law and precedent expressly recognise the consideration of the financial condition of the target and the failing firm doctrine (e.g., Canada, China and the United States). In Canada, for instance, the Competition Bureau explicitly permitted the *AIM/TMR* transaction to proceed on the basis of the failing company defence. Similarly, the Netherlands has recently recognised the defence in a couple of hospital mergers. In a major matter in the United Kingdom, *Amazon/Deliveroo*, the CMA provisionally allowed the transaction to proceed due to the target being a failing firm. This topic is likely to be an area to watch in other jurisdictions, particularly in some of the newer merger regimes.

The potential consequences for failing to file in jurisdictions with mandatory requirements vary. Almost all jurisdictions require that the notification process be concluded before completion (e.g., pre-merger, suspensory regimes), rather than permitting the transaction to close as long as notification is made before 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.

The United States and the European Commission (EC) both have a long history of focusing on interim conduct of the transaction parties, which is commonly referred to as 'gun-jumping', even fining companies that are found to be in violation. For example, the EC imposed the largest gun-jumping fine ever of €124.5 million against Altice. Other jurisdictions have more recently been aggressive. 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 before approval appears to be considered an element of gun-jumping. Also, for the first time, France imposed a fine of €20 million on the notifying party for failure to implement commitments fully within the time frame imposed by the authority.

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 Competition Bureau can challenge mergers that were not required to be notified under the pre-merger statute, as well as challenge notified transactions within the first year of closing. 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 addition, the EC has fined companies on the basis that the information provided at the outset was misleading (for instance, the EC fined Facebook €110 million for providing incorrect or misleading information during the *Facebook/WhatsApp* acquisition).

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 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. Even within the EC, there remain some jurisdictions 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 antitrust 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 US, 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 competition authority, 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 EC 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 is very evident. For instance, the transaction parties in *Applied Materials/Tokyo Electron* ultimately abandoned the transaction following 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
Wachtell, Lipton, Rosen & Katz
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Part II

Jurisdictions

Chapter 21

JAPAN

Yusuke Nakano, Takeshi Suzuki, Kiyoko Yagami and Kenichi Nakabayashi[1]

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]

1 Yusuke Nakano, Takeshi Suzuki and Kiyoko Yagami are partners, and Kenichi Nakabayashi is an 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.

Generally speaking, no notification is required for transactions that amount to internal reorganisations of companies within a combined business group.[4]

Domestic turnover

Domestic turnover, which is defined as the total amount of the price of goods and services supplied in Japan during the latest fiscal year,[5] is used as a decisive factor in the calculation of thresholds. The same thresholds will apply to both domestic and foreign companies.

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

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 that 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 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]

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 (see footnote 6) specify detailed thresholds 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).

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

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

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 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 (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.

9 Article 10, Paragraph 2 of the AMA.

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

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

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

In December 2019, the JFTC amended the Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination Merger Guidelines (the Merger Guidelines)[16] in response to, among other things, the increased necessity of dealing with M&A transactions in the digital market. The key amendments to the Merger Guidelines are as follows.

a Market definition: the amended Merger Guidelines clarify that, in the case of a two-sided market, the JFTC will basically define a relevant market for each user segment and then determine how the proposed transaction will affect competition in light of the characteristics of the two-sided market, such as network effects and economies of scale.

b Competition analysis for horizontal business combination: according to the amended Merger Guidelines, both direct and indirect network effects may be taken into consideration in a merger review of a two-sided market.

c Competition analysis for vertical and conglomerate business combinations: the amended Merger Guidelines provide the JFTC's views on theory of harm, including: (1) input, customer foreclosure and exchange of confidential information in a vertical business combination; and (2) foreclosure through bundling or tying, and access to confidential information in a conglomerate business combination.

In addition to the Merger Guidelines, the JFTC simultaneously amended the Policies Concerning Procedures of Review of Business Combination (the Policies for Merger Review).[17] This amendment is significant because the JFTC, in a manner clearer than ever before, indicates its willingness to review M&A transactions that have a large value that will likely affect Japanese consumers, but that do not meet the reporting threshold based on the (aggregate) domestic turnover of the target (non-reportable transactions). Further, the amendment encourages voluntary filing for non-reportable transactions with an acquisition value exceeding ¥40 billion, if one or more of the following factors are met:

a the business base or research and development base of the acquired company is located in Japan;

b the acquired company conducts sales activities targeting Japanese consumers, such as providing a website or a pamphlet in Japanese; or

c the aggregate domestic turnover of the acquired company and its subsidiaries exceeds ¥100 million.

Given that the JFTC recently opened a review of the acquisition by M3, Inc (M3) of shares in Nihon Ultmarc Inc (Ultmarc), presumably after the closing, even though that case did not meet the notification thresholds (see Section II.i), companies engaging in non-reportable transactions for which any of the above three factors are applicable should pay close attention to the potential need to make a voluntary filing with the JFTC.

16 English translation of the amended Merger Guidelines is available at www.jftc.go.jp/en/pressreleases/yearly-2019/December/1912173GL.pdf.

17 English translation of the amended Policies for Merger Review is available at www.jftc.go.jp/en/pressreleases/yearly-2019/December/1912174Policy.pdf.

II YEAR IN REVIEW

During the 2019 fiscal year (from 1 April 2019 to 31 March 2020; hereafter FY 2019), the JFTC opened one Phase II case that is still under review: the share acquisition by Korea Shipbuilding & Offshore Engineering Co, Ltd of Daewoo Shipbuilding & Marine Engineering Co, Ltd. Among the cases closed during FY 2019, the JFTC has published the review results of M3's share acquisition of Ultmarc (see Section II.i) and the share acquisition by Matsumotokiyoshi Holdings Co, Ltd of Cocokara Fine Inc (see Section II.ii).

i M3's share acquisition of Ultmarc

In 2019, the JFTC initiated the review of M3's acquisition of all of the shares in Ultmarc, even though the acquisition did not meet the domestic turnover thresholds for mandatory filing.[18]

M3 is one of the major operators of online platforms providing doctors with free information and advertising relating to prescription drugs. Statistics showed that at least 85 per cent of doctors in Japan were registered with M3's platform. Pharmaceutical companies paid certain fees to M3 for the ability to provide doctors with drug information for marketing purposes on M3's platform. Ultmarc is the operator of medical information databases known as medical databases (MDBs), which are composed of information on medical institutions and the doctors working at those medical institutions. The MDB is recognised as the de facto standard database among pharmaceutical companies and drug information platform operators as the advertising of medical drugs to the general public is prohibited in Japan.

Focusing on the medical information database market (x), and the drug information platform market (y), for pharmaceutical companies (a), and doctors (b), the JFTC characterised the transaction in two ways:

a a vertical business combination (upstream market: (x); downstream markets: (y), (a) and (b)); and

b a conglomerate business combination ((x) on one hand and (y), (a) and (b) on the other hand).

It is noteworthy that the JFTC defined two sets of two-sided markets ((x) and (y), (a); and (x) and (y),(b)). From the perspective of a vertical business combination, the JFTC was concerned that the firm post-merger would have the ability and incentive to refuse to provide M3's competitors with the MDB, and might take advantage of competitively confidential information of M3's competitors obtained by Ultmarc. Under a conglomerate business theory, the JFTC further expressed its concerns that the firm post-merger would have the ability and incentive to adopt a tying or bundling strategy for M3's online platform and the MDB, thereby excluding M3's competitors from the (y), (a) and (b) markets. Subsequently, to address the JFTC's concerns, the parties proposed the following remedies (all of which are intended for an infinite period of time, with the exception of (e)):

a not to refuse to provide M3's competitors with the MDB or other databases;

b not to treat M3's competitors discriminatorily with respect to, among other things, the prices for, and quality of, the MDB and other similar databases;

c to take certain measures to prevent the parties from sharing confidential information of M3's competitors;

18 JFTC press release of 24 October 2019 is available in English at www.jftc.go.jp/en/pressreleases/yearly-2019/October/191024.html.

d not to adopt a tying or bundling strategy for the MDB and M3's services; and
e to report the parties' status of compliance with the proposed remedies once a year for a period of five years.

The JFTC concluded that if the parties implemented these remedies the transaction would not substantially restrain competition in any of the relevant markets.

ii Share acquisition by Matsumotokiyoshi of Cocokara Fine

Matsumotokiyoshi and Cocokara Fine both operate large drug stores in Japan. Their drug stores primarily sell over-the-counter (OTC) drugs, cosmetics, household goods and groceries to general consumers. Matsumotokiyoshi filed a notification with the JFTC of its intent to acquire shares of Cocokara Fine, whereby Matsumotokiyoshi would hold, post-acquisition, more than 20 per cent of Cocokara Fine's voting rights.

In defining relevant market, the JFTC first analysed substitutability of various services, namely, (1) drug stores and pharmacies (which primarily sell prescription drugs), (2) drug stores and other types of retail stores, such as supermarkets, convenience stores and discount stores, and (3) (bricks-and-mortar) drug stores and online sales of OTC drugs and other items. Having concluded that the respective substitutability of (1), (2) and (3) is limited, the JFTC defined the relevant service market for this case as (bricks-and-mortar) drug stores. Further, considering that drug store companies compete on a store-by-store basis, the JFTC defined the relevant geographic market as a circle with a radius of 0.5km to 2km, centred on each respective store of the parties, depending on their location, surrounding facilities, population and other factors.

In the course of its review, the JFTC mentioned that, among 295 geographic areas where Matsumotokiyoshi and Cocokara Fine compete, potential competitive concerns would arise in 84 geographic areas where the number of drug store groups would reduce 'from three to two' or 'from two to one'. However, given competitive pressure from competitors in the same or neighbouring areas, inactive competition between Matsumotokiyoshi and Cocokara Fine prior to the transaction and competitive pressure from other types of retail stores, such as supermarkets, and taking into account the result of economic analysis, the JFTC found that the impact of the notified transaction on competition in these 84 areas would be limited. The JFTC therefore concluded that the notified transaction would not substantially restrain competition in any of the relevant markets.

iii Statistics of the JFTC's activity

According to the JFTC, the total number of merger notifications filed in FY 2019 was 310.

In the past 10 years, there have been a few cases brought into Phase II review each year, while there have been no formal prohibition decisions made by the JFTC. According to the JFTC's statistics, the number of filings and the cases cleared after Phase II review are as follows.

	FY 2009	FY 2010	FY 2011	FY 2012	FY 2013	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019
No. of filings	985	265	275	349	264	289	295	319	306	321	310
No. of cases cleared after Phase II review	0	4	3	5	3	1	3	3	1	3	0

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). 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 expiry 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).[19] 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 these limited disclosures, 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.

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

19 Policies for Merger Review.

to the JFTC in the course of a merger review: to notify the JFTC's investigation bureau of a possible breach of the AMA;[20] or to submit complaints to the mergers and acquisitions division of the JFTC.

In addition, as stated in the Policies for Merger Review, in the event that a merger review moves on to Phase II, the JFTC will publicly invite opinions and comments from third parties. Public hearings can be held[21] 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 M3 acquisition of Ultmarc (see Section II.i).

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.[22]

When the JFTC issues a cease-and-desist order, the parties to the transaction can appeal to the Tokyo District Court 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). It is also suggested in the Merger Guidelines that, both before and after the transaction, the JFTC will closely analyse market conditions from various viewpoints, including whether the transaction may facilitate concentration between market players, to ultimately determine the notified transaction's actual impact on competition.

20 Article 45, Paragraph 1 of the AMA.

21 Article 42 of the AMA.

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

Additionally, the amended Merger Guidelines suggest that if the transaction parties are both engaged in research and development in competing markets, the proposed transactions will likely reduce potential competition between the parties. The amended Policies for Merger Review, which make clear that the JFTC may request the parties to submit their internal documents concerning the proposed transaction (e.g., minutes of the board of directors, documents used for analysis and decision-making), may be utilised by the JFTC to assess, among other things, the potential effects in terms of research and development activities of the parties.

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 indicate that the geographic market may be wider than the geographical boundaries of Japan, depending upon the international nature of the relevant business. 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 are satisfied, the JFTC is likely to consider that the notified transaction does not substantially restrain competition in a relevant market:

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.[23]

The amended Merger Guidelines indicate that even if one of the safe harbour thresholds is satisfied, the JFTC may conduct a substantive review of the proposed transaction if the market shares of the parties do not reflect their potential competitive significance (e.g., due to access to important data or intellectual property).

In addition to the safe harbour, 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.

23 Part IV, 1(3) Part V, 1(2) and Part VI, 1(2) 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.

viii Gun-jumping

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 before the JFTC's clearance. Specifically, Canon acquired an equity warrant for which common shares in Toshiba Medical were the underlying securities. In 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 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.[24] 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, including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. Furthermore, the JFTC has entered into inter-agency bilateral cooperation memoranda with various competition authorities.[25]

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, the European Union and South Korea, for example, in the recent review of the acquisition of Brocade by Broadcom in 2017 and the merger between Abbott Laboratories Group and St Jude Medical Group in 2016.

ii Pre-filing consultation with the JFTC

Upon the abolition of the prior consultation procedure in 2011, the JFTC no longer provides its formal opinion at the pre-notification stage, and the review officially starts at the formal notification stage. However, neither of the Phase I or Phase II review periods can be extended even where parties submit a remedy proposal to the JFTC; nor can the JFTC stop the clock.

In practice, the JFTC is flexible about having informal discussions with potential notifying parties upon request or voluntary submission of relevant materials before the formal filings. In fact, in almost all of the recent cases that the JFTC has cleared after Phase II review, the JFTC made specific notes in its announcements that the parties had

24 Article 43-2 of the AMA.

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

submitted supporting documents and opinions to the JFTC on a voluntary basis before officially filing the notifications. It is understood that parties to complicated mergers make use of the informal procedure to try and alleviate any potential concerns early. This is also true in multi-jurisdictional merger notifications where the management of the filing schedule is important to avoid conflicting remedies or prohibition decisions among various jurisdictions. In such pre-filing communications, coordination among Japanese and foreign attorneys is of great importance.

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.

Size of a relevant market

The amended Merger Guidelines indicate that in a case in which a relevant market is not large enough for the parties to efficiently compete even without a proposed transaction, such proposed transaction would not substantially restrain competition in the relevant market in general even if only the notifying parties will remain active in the relevant market after the transaction. This principle was applied for the first time to the acquisition by Fukuoka Financial Group Ltd of The Eighteenth Bank Ltd, for which the JFTC issued a press release in 2018 stating that it found no substantial restraint of competition even though the notifying party would remain as only one bank in certain rural areas because those areas were too small for the parties to make a profit regardless of rationalisation of their operations.

Minority ownership interests

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). In addition, under certain circumstances even minority acquisition may be subject to a Phase II review. Moreover, 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 acquisition of a partial share of Showa Shell by Idemitsu in 2016, the JFTC, for the purpose of its review, assumed that these parties would be completely integrated as one group after the acquisition, although, at the time, Idemitsu only intended to have a minority shareholding in Showa Shell. The joint relationship is 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

Under the AMA, the JFTC can theoretically review any M&A transaction under the substantive test, regardless of whether the filing thresholds are met. The JFTC has actually investigated transactions that had not been notified in the past, including in the case of M3 and Ultmarc and certain foreign-to-foreign transactions. To mitigate the risk of an investigation, even parties to a concentration that is below the threshold level may opt to consult with the JFTC and file notification on a voluntary basis. In practice, the JFTC applies the same rules and guidelines to substantively review such voluntary notifications.

V OUTLOOK AND CONCLUSIONS

Although the 2019 amendments to the Merger Guidelines and the Policies for Merger Review were significant, the majority of these simply reflected the developments of practice and case law since the 2011 amendments, which is largely consistent with developments in other major jurisdictions.

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 in recent years. For example, in the acquisition by Usen-Next Holdings Co, Ltd of Cansystem Co, Ltd in 2018, the JFTC disclosed specific details of the economic analysis it conducted, thereby giving greater transparency to its review. Although these disclosures have generally been 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 how network effects will be taken into account in a substantive review). It is hoped that the JFTC will take action, for example, through the publication of more decisions in the near future.

Appendix 1

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Yusuke Nakano is a partner at Anderson Mōri & Tomotsune, with broad experience in all aspects of antitrust and competition regulation. He has 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.

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