MERGER REMEDIES GUIDE

THIRD EDITION

Editors
Ronan P Harty and Nathan Kiratzis

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PART VI
MERGER REMEDIES INSIGHTS FROM AROUND THE GLOBE

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Japan

Vassili Moussis, Yoshiharu Usuki and Kiyoko Yagami[1]

Introduction

Merger control was introduced in Japan by the 1947 Japanese Antimonopoly Act (AMA), together with Japan's first competition rules. Merger control is enforced by the Japan Fair Trade Commission (JFTC), which was established as an independent administrative office with broad enforcement powers and is currently composed of a chair and four commissioners. The JFTC has primary jurisdiction over the enforcement of merger control under the AMA. The AMA does not set out any specific procedural steps in relation to remedies. The JFTC's basic stance towards merger remedies is set out in a series of guidelines published by the JFTC, including the 'Policies Concerning Procedures of Review of Business Combination' (Policies) and the 'Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination' (Guidelines), both of which were recently revised to reflect new developments in merger control.[2]

While the number of cases involving merger remedies is smaller than in the EU and the US, the JFTC takes a broadly similar attitude to its EU and US counterparts towards assessing both competition issues and proposed remedies.

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

2 See www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/191217policy.pdf (Policies, originally published in 2011, revised in 2019); www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/191217GL.pdf (Guidelines, originally published in 2004, revised in 2019). Note that English language translations are tentative, and that the Japanese versions of the Policies and the Guidelines remain the authoritative guides.

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Remedies: basic framework

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

As in many other jurisdictions, the JFTC prefers that remedies should, in principle, be structural, such as the transfer of all or part of a particular business, with the aim of restoring competition lost as a result of the transaction to prevent the resultant group from controlling pricing or other market factors. However, the JFTC acknowledges that there may be cases where behavioural remedies are appropriate. For example, in 2011, the JFTC considered a proposed merger between Nippon Steel Corporation and Sumitomo Metal Industries, a transaction that resulted in the formation of the world's second-largest steel maker. Following a Phase II review, the JFTC approved the merger (which reduced the number of competitors in some product markets from three to two), following the submission of proposed behavioural remedies by the parties. These remedies included obligations to supply a third-party market entrant on conditions that were reasonable and equivalent to those offered to the group's affiliates in relation to the high-pressure gas pipeline engineering business, and to provide to third parties trading rights for non-oriented electrical steel sheets at a price equivalent to the production cost.[4] Behavioural remedies were also accepted in the case of a vertical/conglomerate integration between M3, Inc (M3) and Nihon Ultmarc Inc (Ultmarc). A detailed explanation of the behavioural remedies used in this integration is set out below.

Procedural issues

Consultation prior to notification

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

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

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

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Experience suggests the JFTC adopts quite a flexible approach towards topics to be discussed during the prior consultation stage, and the scope of the JFTC's pre-notification review remains relatively wide. This is in part influenced by the fact that the JFTC, like the transacting entities, cannot 'stop the clock' of the Phase I review period once formal notification has been received (as explained below). The JFTC therefore often prefers to commence discussions prior to formal notification, to permit itself sufficient time to analyse complex cases.

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

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

Procedure after notification

Phase I review

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

Instead, where discussion with the JFTC suggests that the transaction will not be cleared under the Phase I review, practice is for the parties to withdraw the notification, and refile it at a later date once further appropriate remedies have been agreed between the parties. As well as the ubiquitous benefits of avoiding a lengthy Phase II review, under the Japanese system this has the additional benefit of protecting the confidentiality of the transaction and of the remedies agreed. When opening any Phase II review, the JFTC will publicly announce the beginning of the Phase II, thereby making the proposed transaction public, even if it is not yet in the public domain. Because of this, where confidentiality of the transaction is important, companies often

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prefer to withdraw their notification and conduct private discussions with the JFTC regarding further remedies, in an attempt to ensure that the transaction is cleared under a Phase I review, to maintain the confidential nature of the transaction.

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

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

Phase II review

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

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

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

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a Phase II review. Such uncertainty adds to the importance of pre-notification discussions with the JFTC, to ensure that as much information as possible is provided early to allow the JFTC to review as swiftly as it can.

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

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

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

Types of merger remedies

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

The JFTC considers that the most effective remedies are those that either establish a new independent competitor or strengthen existing competitors, so that these competitors can serve as an effective check on competition. These measures include the transfer of all or part of the business of the post-merger group, the dissolution of an existing business combination (such as through the disposition of some or all of the voting rights held in another company) or the elimination of business alliances or agreements with third parties. While where the remedy takes the form of a transfer the JFTC prefers that a buyer is found and identified to the case team prior to the JFTC's approval of the transaction, this is not always necessary.

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

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However, the Japanese system differs from the European model in that a monitoring trustee is rarely used (for example, it was considered in the *Zimmer/Biomet* case of 2015).[7] Instead, it is the JFTC's case team that monitors the implementation of merger remedies, and, where a transfer has been proposed and accepted as a suitable remedy, the JFTC will assess the viability of a proposed third-party purchaser, whether they are identified before or after the conclusion of its review. In its assessment of a 'suitable buyer' for the divestiture offered by the parties, the JFTC will basically consider the following four criteria:

- whether the proposed buyer has adequate experience and capability in the relevant product market;
- whether it is independent of and financially unrelated to the parties;
- whether it possesses sufficient funds, expertise and incentives to maintain and develop the business that is the subject of the divestiture; and
- whether the divestiture will not substantially restrain competition in the relevant market.

The JFTC usually remains involved in the process, and retains the right to issue a cease-and-desist order if the merger remedies are not correctly implemented or it is the JFTC's belief that transfer to the proposed transferee will not sufficiently promote competition, notwithstanding that the formal review process concluded with the JFTC's approval.

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

Multi-jurisdictional remedy coordination

Information exchange and collaboration

The JFTC works actively with other major competition authorities on specific cases, including through the exchange of information with its foreign counterparts, and is entitled to share with foreign competition authorities information that is deemed helpful and necessary for the performance of the foreign competition authority's duties where such duties are equivalent to those of the JFTC under the AMA. In addition, the JFTC has entered into bilateral cooperation agreements with various competition authorities, including the US, the EU and Canada, as well as the Philippines, Vietnam, Brazil, Korea, Australia, China, Kenya, Mongolia and Singapore.[8] It

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

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

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is reported that in respect of large-scale multi-jurisdictional transactions, the JFTC does participate in significant exchanges of information with other authorities, including its counterparts in the US and the EU; for example, in the review of the merger of the container shipping business of Nippon Yusen, Kawasaki Kisen and Mitsui OSK Lines in 2017, the acquisition of Celgene by Bristol-Myers Squibb Company in 2019 and the automotive batteries joint venture between Toyota Motor and Panasonic in 2019. It is therefore important that information given, and submissions made, to the JFTC are consistent with those made to other competition authorities.

Timing considerations

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

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

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

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

Foreign-to-foreign mergers

Foreign-to-foreign mergers are caught by the AMA in the same way as domestic mergers if they will have an impact on the Japanese market, and therefore must be notified in the same way. It is worth noting that, in the recent amendment of the Policies, the JFTC, in a manner clearer than ever before, indicated its willingness to review M&A transactions, including foreign-to-foreign mergers, that have a large value and 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).

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Further, the amendment encourages a voluntary filing for non-reportable transactions with an acquisition value exceeding ¥40 billion, if one or more of the following conditions are met:

- the business base or R&D base of the acquired company is located in Japan;
- the acquired company conducts sales activities targeting Japanese consumers, such as providing a website or a pamphlet in Japanese; or
- the aggregate domestic turnover of the acquired company and its subsidiaries exceeds ¥100 million.

Given how easily the above conditions can be satisfied and considering that the JFTC recently opened a review of the *M3/Ultmarc* case, presumably after the closing (even though that case did not meet the notification thresholds), foreign companies engaging in non-reportable transactions should pay close attention to the potential need to make a voluntary filing with the JFTC.

Recent trends

The combined approach: the Idemitsu and Showa Shell and the JXHD and TonenGeneral cases

Idemitsu, Showa Shell, JXHD and TonenGeneral (TG) are Japan-based major oil refiners. In December 2015, Idemitsu notified the JFTC of its proposed acquisition of more than a 20 per cent share in Showa Shell. Shortly after, JXHD also notified its intention to acquire more than a 50 per cent share in TG. As the proposed acquisitions would be implemented around the same time, the JFTC took a 'combined approach', meaning that each assessment was based on the assumption that the other transaction had already been implemented. This is in contrast to a 'priority rule', whereby cases are assessed separately and the increased market share resulting from the earlier of the two transactions is taken into account in the review of the second one only.[9]

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

Refinery and wholesale of fuel oils

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

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

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Production and wholesale of LP gases

The JFTC established that there were four major producers of LP gases in Japan, whose combined market share would amount to 80 per cent, and each of the transaction parties held shares in one or two of these wholesalers. In particular, following the proposed transactions, each of the combined JXHD/TG group and the combined Idemitsu/Showa Shell group would hold 25 per cent of the shares in the LP gas producer Gyxis Corporation (Gyxis), with the remaining shares held by two other competitors. Having examined various factors, including the status of joint shareholding and interlocking directorates, the JFTC found that, after the acquisitions, these producers of LP gases could easily anticipate the activities of other competitors. The JFTC thus concluded that the proposed acquisitions would create a 'joint relationship' among these four producers of LP gases, thereby resulting in a situation where the combined JXHD/TG group and the combined Idemitsu/Showa Shell group could restrain competition through coordination among the four producers.

Remedies

The parties proposed the following main remedies.

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

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

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

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

In 2017, Broadcom Limited (a world leader in the manufacture and sales of semiconductors) notified the JFTC of its intention to acquire the entire share capital of Brocade Communications Systems Inc (whose business involved the manufacturing and sale of hardware and software for networks). The acquisition fell under the category of 'vertical business combination', with the upstream market being the manufacturing and selling of application-specific integration circuits for fibre channel storage area network (FCSAN) switches, and the downstream market being the manufacturing and selling of FCSAN switches. It was also considered to be a 'conglomerate business combination' because the FCSAN switch that is manufactured and sold by Brocade Group, for which it has a market share of approximately 75 per cent, and the fibre channel host bus adapter (FCHBA) manufactured and sold by Broadcom Group, for which it has a

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market share of approximately 45 per cent, are related products and sold to common customers who manufacture and sell servers. While the JFTC did not have concerns in respect of the vertical aspects of the integration, it had conglomerate-type issues with the business combination.

The JFTC's main concern

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

Remedies

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

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

Remedies for integration of regional banks: Fukuoka Financial Group of The Eighteenth Bank

In June 2016, Fukuoka Financial Group Ltd (FFG) filed a notification with the JFTC of its intention to acquire the majority shares of The Eighteenth Bank Ltd (Eighteenth Bank). Both parties are regional banks located in the Kyushu region whose areas of business overlap in part. While no special rule applies to the review of mergers that involve financial institutions, this case is notable because the JFTC demonstrated how the 'restraints of trade' were assessed in a merger between regional banks.

In defining geographic markets, the JFTC conducted a survey using consumer questionnaires to assess the scope and distance enterprises located in the Nagasaki area would cover in search of lenders. Concerning commercial loan trades for small and mid-size enterprises, FFG and Eighteenth Bank would have held, post-merger, a combined market share as high as 75 per cent in certain geographic areas.

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The JFTC's main concern

The JFTC was concerned that the contemplated acquisition would limit consumers' choice in connection with commercial loans, especially as competitive pressure in the same as well as adjacent markets was limited and there was no pressure from new entrants.

Remedies

To address the JFTC's concern, the parties proposed the following remedies: (1) to assign part of their account receivables of commercial loans (for which the borrowers agree to the assignment to competitors) with an aggregated amount of approximately ¥100 billion to competitors before the acquisition; (2) to establish a monitoring mechanism to properly monitor and control the lending rates of the parties; and (3) to submit periodic reports to the JFTC to ensure that the parties adhere to the above remedies.

In August 2018, following an in-depth Phase II review and on the premise that the parties would adhere to the proposed remedies, the JFTC concluded that the notified concentration would not substantially restrain competition in any of the relevant markets.

Remedies for vertical/conglomerate integration: 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.[10] 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 a fee 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 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:

- vertical business combination (upstream market: (x); downstream markets: (y) for (a) and (y) for (b)); and
- conglomerate business combination ((x) on one hand, and (y) for (a) and (y) for (b) on the other hand).

It is noteworthy that the JFTC defined two sets of two-sided markets ((x) and (y) for (a); and (x) and (y) for (b)).

10 www.jftc.go.jp/en/pressreleases/yearly-2019/October/191024.html.

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The JFTC's main concern

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.

Remedies

To address the JFTC's concerns, the parties proposed the following remedies (other than the last remedy, all of the remedies offered are of indefinite duration):

- not to refuse to provide M3's competitors with the MDB or other databases;
- not to treat M3's competitors in a discriminatory way with respect to, among other things, the prices for, and quality of, the MDB and other similar databases;
- to take certain measures to prevent the parties from sharing confidential information of M3's competitors;
- not to adopt a tying or bundling strategy for the MDB and M3's services; and
- 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.

Conclusion

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

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

Importantly, the JFTC has articulated in its recent amendment of the Policies that it will seek to review transactions that, although they do not meet the mandatory filing thresholds, may impact competition in Japan. The JFTC's publication of the recent *M3/Ultmarc* case is a clear warning shot that the Japanese enforcer will continue reviewing cases of interest even if they are non-reportable transactions but will also not hesitate to request remedies, if deemed necessary.

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Appendix 1

About the Authors

Vassili Moussis
Anderson Mōri & Tomotsune

Vassili Moussis is an English-qualified lawyer registered to practise law in Japan and whose practice focuses on EU and international competition law, with a particular emphasis on inbound and outbound merger control and international cartel matters. Having trained at the European Commission's DG Competition and practised in the competition teams of leading UK and US law firms in Brussels and London, Vassili has been based in Tokyo with Anderson Mōri & Tomotsune for close to 15 years now.

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

Yoshiharu Usuki
Anderson Mōri & Tomotsune

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

Kiyoko Yagami
Anderson Mōri & Tomotsune

Kiyoko Yagami is a partner at Anderson Mōri & Tomotsune, working mainly in the fields of antitrust and competition law. Before joining Anderson Mōri & Tomotsune, she worked as a trainee in the Beijing office of a leading global firm and in the Economic Affairs Bureau of the Ministry of

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Foreign Affairs of Japan. She has extensive experience in handling merger filings with the Japan Fair Trade Commission and major foreign competition authorities. She is also experienced in international dispute resolution involving antitrust issues, and other competition law-related matters such as joint ventures, dominance issues and distribution arrangements.

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

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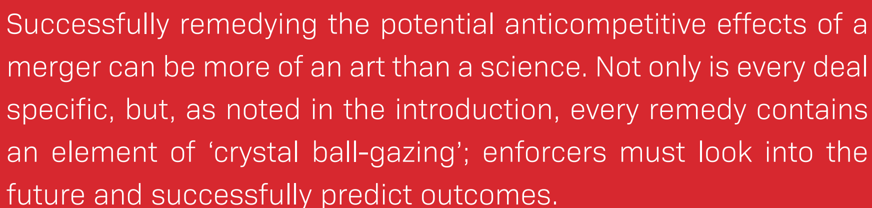

Successfully remedying the potential anticompetitive effects of a merger can be more of an art than a science. Not only is every deal specific, but, as noted in the introduction, every remedy contains an element of 'crystal ball-gazing'; enforcers must look into the future and successfully predict outcomes.

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

The Guide draws not only on the wisdom and expertise of 46 distinguished practitioners from 18 firms, but also the perspective of former enforcers Daniel Ducore and Diana Moss. It brings together unparalleled proficiency in the field and provides essential guidance for all competition professionals.

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