

Market
Intelligence

MERGER CONTROL 2020

Global interview panel led by White & Case LLP

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Japan

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1 | What are the key developments in the past year in merger control in your jurisdiction?

During FY 2019 (1 April 2019 to 31 March 2020), the Japan Fair Trade Commission (JFTC) released its clearest guidance yet on merger control in Japan. This past year saw substantial amendments to the Application of the Antimonopoly Act Concerning Review of Business Combination Merger Guidelines (Merger Guidelines) and the Policies Concerning Procedures of Review of Business Combination (Policies for Merger Review), which provide valuable insights into the key considerations of the JFTC when conducting the review process.

Most notably, under the amendments to the Merger Guidelines, the JFTC has clarified some of the important factors to be considered in coming to a decision on any proposed transaction. In the case of two-sided markets for example, the JFTC has indicated that it will first 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, including network effects and economies of scale. Moreover, the amended Merger Guidelines provide the JFTC's views on theory of harm for vertical and conglomerate business combinations, including input or customer foreclosure and exchange of confidential information in the case of a vertical business combination; foreclosure through bundling or tying and access to confidential information in the case of a conglomerate combination.

In the amendments to the Policies for Merger Review, the JFTC has indicated certain categories of non-reportable M&A transactions that it is eager to review, namely, transactions where the acquired company's (aggregated) domestic turnover does not meet the threshold but all other thresholds are met. According to the amendments, voluntary filing of such transactions with the JFTC is recommended where the acquisition value exceeds ¥40 billion and the acquired company has its business in Japan; conducts sales that target Japanese consumers; or if its aggregate domestic turnover exceeds ¥100 million. The JFTC's readiness to review non-reportable M&A transactions was evidenced in its review of the *M3/Ultimec* case last year.

2 | Have there been any developments that impact how you advise clients about merger clearance?

The amendments to the Policies for Merger Review in FY 2019 have highlighted the importance of voluntary filing. As mentioned above, the JFTC has articulated that it will seek to review non-reportable transactions that may impact competition in Japan, even if the acquired company's (aggregated) domestic turnover does not meet the mandatory



Yusuke Nakano



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Kiyoko Yagami

“FY 2019 saw an increased focus on competition issues relating to digital platform operators.”



filing threshold. The JFTC's publication of the *M3/Ultramarc* case is a clear warning shot to transacting parties that the Japanese enforcer will continue to review cases of interest (irrespective of reportability), and will not hesitate in requesting remedies if it genuinely believes a proposed transaction may cause a substantial restraint of competition.

Therefore, our main advice to clients after the developments in FY 2019 is to engage in open and transparent communication with the JFTC at the early stages, if the proposed transaction is reportable or falls under the scope of certain non-reportable transactions identified in the amended Policies for Merger Review. Another reason for this advice is that we are unaware of any case where the JFTC failed to observe secrecy obligations in terms of pre-notification consultations.

We would also advise our clients that, as suggested in the amended Merger Guidelines, in addition to actual and existing competition, the JFTC will further assess potential competition between the merging parties and whether such competition is likely to be reduced by the contemplated transaction. The amended Policies for Merger Review also made clear that the JFTC may request that the parties submit their internal documents concerning the proposed transaction (eg, minutes of the board of directors, documents used for analysis and decision-making, etc.) in order to assess, among other things, the potential effects of the proposed transaction on the research and development activities of the parties. We also expect that in cases involving nascent markets or fast-growing markets, there is a greater chance that the JFTC will ask the parties to submit their internal documents.

It is also important for our clients to be aware that even if the proposed transaction falls within any of the safe harbour thresholds stipulated under the Merger Guidelines, the JFTC may still conduct a substantive review of the proposed transaction. With respect to horizontal transactions, if any of the following conditions are satisfied, the JFTC would likely determine that the notified transaction does not substantially restrain competition in the relevant market. First, the HHI after the notified transaction should not be more than 1,500; second, the HHI after the notified transaction may exceed 1,500 but should not be more than 2,500, and the increased HHI (delta) should not be more than 250; and third, the HHI after the notified transaction may exceed 2,500 but the delta should not be more than 150. The amended Merger Guidelines indicate that even if one of the safe harbour thresholds is satisfied, the JFTC may proceed to a substantive review of the proposed transaction if the parties hold competitive strength (eg, important data or intellectual property) that has not been reflected in the market shares of the parties.

3 | Do recent cases or settlements suggest any changes in merger enforcement priorities in your jurisdiction?

The past year has revealed the JFTC's new focus on transactions involving digital platform operators. FY 2019 saw the introduction of Guidelines for Digital Platform Operators, which outlined the JFTC's clear direction on the appropriate conduct between digital platform operators and consumers. With the increased influence of digital platform operators in our ever-expanding digital world, the JFTC has articulated its concerns over the potential abuse of superior bargaining position when digital platform operators acquire or utilise personal information belonging to consumers. In the past year, the JFTC has really focused on the trade practices of online retail platforms and app stores, and has tried to ensure that no conduct is disadvantageous to consumers or excludes competitors.

The *M3/Ultharc* case was a good example of those cases investigated by the JFTC that involve digital platform operators. M3 is one of the major operators of online platforms providing doctors with free information and advertising relating to prescription drugs. Meanwhile, Ultharc is the operator of the de facto standard medical information databases known as 'Medical Databases' (MDB), which are composed of information on medical institutions and the doctors working at those medical institutions. The JFTC was originally concerned that, due to the vertical and conglomerate combination, the post-merger entity would have the ability to exclude M3's competitors from the relevant markets. Upon receiving proposals of several behavioural remedies from the parties, the JFTC subsequently concluded that, if

the remedies were implemented, the transaction would not substantially restrain competition in any of the relevant markets.

As previously discussed, the JFTC is also shining a light on any transaction that has the ability to substantially affect the Japanese consumers, regardless of its deal value. With the amended Policies for Merger Review in FY 2019, the JFTC has indicated its willingness to review M&A transactions (including foreign-to-foreign mergers) that will likely impact the everyday consumer. In light of the *M3/Ultharc* case that was reviewed by the JFTC, even though the filing thresholds were not met, foreign companies engaging in any transactions in Japan should pay close attention to the potential need to make a voluntary filing with the JFTC, especially when the proposed transaction falls under the scope of certain non-reportable transactions identified in the amended Policies for Merger Review.

4 | Are there any trends in merger challenges, settlements or remedies that have emerged over the past year? Any notable deals that have been blocked or cleared subject to conditions?

According to the JFTC, the total number of merger notifications formally filed in FY 2019 was 310. The JFTC also reviewed six cases that did not satisfy the notification thresholds (upon the JFTC's initiative or following the voluntary filing by the parties). In the past 10 years, there have been a few cases brought into the Phase II review each year, but there have been no formal prohibition decisions made by the JFTC.

Among the 10 cases closed in FY 2019 whose review results were published by the JFTC, there were two cases worth analysing: M3's share acquisition of Ultharc and the share acquisition by Matsumotokiyoshi Holdings Co, Ltd of Cocokara Fine Inc.

M3's share acquisition of Ultharc

The JFTC review of M3's acquisition of Ultharc is a clear indication that it will continue to review cases of interest, even if they relate to non-reportable transactions or even if the transactions have already completed. While this acquisition did not meet the domestic turnover thresholds for mandatory filing, the JFTC deemed certain remedies necessary in order to protect competition within the field although the acquisition appeared to have already been conducted when the JFTC initiated the investigation.

By way of background, M3 was one of the major operators of an online platform that provided doctors with free information on prescription drugs. Statistics showed that at least 85 per cent of doctors in Japan were registered with M3's platform. Furthermore, pharmaceutical companies paid fees to M3 for the ability to provide drug information for marketing purposes on the platform.

“From the *M3/Ultharc* case, it is now clear the JFTC has its sights set on any transaction that has the ability to affect Japanese consumers, regardless of reportability.”

Ultharc was the operator of medical information databases (MDBs) that contained information on individual medical institutions and the doctors working at those medical institutions. The MDB was recognised as the de facto standard database among pharmaceutical companies and drug information platform operators in Japan.

From the perspective of a vertical business combination, the JFTC was concerned that the firm post-merger would have the ability to refuse M3's competitors access to the MDB, and would also have the ability to take advantage of competitively sensitive information regarding M3's competitors obtained by Ultharc. From the perspective of a conglomerate business theory, the JFTC was further concerned that the firm post-merger would have the ability to adopt a bundling strategy for M3's online platform and the MDB, thereby excluding M3's competitors from the market.

To address the JFTC's concerns, the parties proposed a series of remedies. They agreed not to refuse M3's competitors with access to the MDB or other databases, and not to treat M3's competitors in a discriminatory way with respect to the price and quality of the MDB or other similar databases. The parties also agreed to



take certain measures to prevent the sharing of any confidential information of M3's competitors, and agreed not to adopt any bundling strategy for the MDB and M3's services. Finally, the parties agreed to report their 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 *M3/Ultramarc* transaction would not substantially restrain competition in any of the relevant markets.

Share acquisition by Matsumotokiyoshi of Cocokara Fine

The other published decision of the past year was Matsumotokiyoshi's 20 per cent share acquisition of Cocokara Fine. This decision was useful as it provided insight into the considerations of the JFTC when determining the relevant market and geographical market impact of a proposed transaction.

These parties both operated large drugstores in Japan which primarily sold 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 in 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 the substitutability of various services, and ultimately defined the relevant service market for this case as (bricks-and-mortar) drugstores. Further, considering that drugstore 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 was concerned that the transaction may limit competition among drugstores in the respective geographical areas. Among the 295 geographic areas where Matsumotokiyoshi and Cocokara Fine compete, the JFTC identified potential competitive concerns in 84 geographic areas where the number of drugstore groups would reduce 'from three to two' or 'from two to one'.

However, given the competitive pressure from competitors in the same or neighbouring areas, the inactive competition between Matsumotokiyoshi and Cocokara Fine prior to the proposed transaction and the competitive pressure from other types of retail stores, such as supermarkets, the JFTC found that the impact on competition in these 84 areas would be limited. The JFTC therefore concluded that the transaction would not substantially restrain competition in any of the relevant markets.

5 | Have the authorities released any key studies or guidelines or announced other significant changes that impact merger control in your jurisdiction 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) in order to effectively deal with the increase of M&A transactions in the digital market. The key amendments to the guidelines were threefold. First, the definition of market was clarified. The JFTC made it clear that in the case of a two-sided market, it would define a relevant market for each user segment and then determine how the proposed transaction would affect competition in light of the characteristics of the two-sided market. Second, the amended Merger Guidelines further clarified the competition analysis for horizontal business combination, so that direct and indirect network effects may be taken into consideration in a merger review of a two-sided market. This has noticeably broadened the scope of factors to be considered by the JFTC in coming to a decision on a proposed transaction. Finally, the amendments clearly articulated the JFTC's views on the theory of harm when determining the competition analysis for vertical and conglomerate business combinations. The JFTC focuses on the input, customer foreclosure and exchange of confidential information in a vertical business combination, and the 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 (Policies for Merger Review). These amendments were significant as they indicated that the JFTC is willing to review certain non-reportable M&A transactions (transactions where the acquired company's (aggregated) domestic turnover does not meet the threshold but all other thresholds are met) that will likely affect Japanese consumers. Further, the amendments encourage voluntary filing for such non-reportable transactions with an acquisition value exceeding ¥40 billion, if the acquired company has its business or R&D base in Japan; if it conducts sales activities that target Japanese consumers; or its aggregate domestic turnover exceeds ¥100 million.

It is also worth noting that the amended Merger Guidelines made clear that, in addition to actual and existing competition, the JFTC will assess potential competition between the merging parties and whether such competition will likely be reduced by the contemplated transaction or not. The amended Policies for Merger Review also mention that the JFTC may request the parties to submit their internal documents concerning the proposed transaction (eg, minutes of the board of directors, documents used for analysis and decision-making, etc.) in order to assess, among other things, the potential effects of the proposed transaction on the research and development activities of the parties. This point is crucial in certain cases where both parties to the potential transaction engage in research and development activities in the same fields of trade.

FY 2019 also saw an increased focus on competition issues relating to digital platform operators. After receiving public feedback, the JFTC formally established the Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, in December 2019 (Guidelines for Digital Platform Operators). The purpose of these guidelines was to enhance the transparency and predictability of digital platform operators by clarifying the kinds of conduct that would constitute an abuse of superior bargaining position when acquiring or utilising personal information belonging to consumers. The guidelines have been very informative in aiding an understanding of the JFTC's focus on digital services and data collection and are potentially useful in assessing M&A transactions in the digital space.

6 | Do you expect any significant changes to merger control rules? How could that change your client advocacy before the authorities? What changes would you like to see implemented in your jurisdiction?

In FY 2019, the JFTC provided guidance on proposed transactions providing the most decisive and clear direction since the 2011 amendments. The amendments to the Merger Guidelines and the Policies for Merger Review have been significant

“The amended Merger Guidelines made clear that the JFTC will assess potential competition between the merging parties and whether such competition will likely be reduced by the contemplated transaction or not.”

milestones, even though they largely articulate the developments that have occurred in practice and case law since the 2011 amendments. The key developments of FY 2019 have created essential guidelines and greater transparency of the JFTC's considerations in reviewing transactions in Japan. Consequently, practitioners are now required to prepare more informative and thorough materials before engaging in pre-notification consultations with the JFTC.

Although these FY 2019 amendments have clearer guidance and direction on proposed transactions, there is still a relative lack of available information regarding the JFTC's decisional practice, and there are some areas where further clarification or improvements seem necessary. For example, potential competition between the parties has been included in the amended Merger Guidelines, but how the JFTC will analyse the impact of such potential competition between the parties is not necessarily clear. We hope that the JFTC will provide further guidance through the publication of more decisions in the near future.

From the *M3/Ultharc* case, it is now clear the JFTC has its sights set on any transaction that has the ability to affect Japanese consumers, regardless of reportability. This will likely change the playing field in Japan, as no transaction will be safe from JFTC's scrutiny if it has any impact on the wellbeing of the Japanese consumer. The changes implemented in FY 2019 will likely see the increase of voluntary filing and early communications from transacting parties at the beginning of any proposed transaction affecting Japan.

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The Inside Track

What should a prospective client consider when contemplating a complex, multi-jurisdictional transaction?

A potential client should consider pre-consultation discussions with the JFTC regarding the proposed multi-jurisdictional transaction on a confidential basis. During the pre-consultation discussions, the prospective client should consider the in-depth feedback offered by the JFTC including the appropriateness of any changes suggested by the JFTC, in order to ensure a smooth review of the transaction. The JFTC does participate in significant exchanges of information with other major competition authorities in respect of large-scale multi-jurisdictional transactions, so it is important to ensure that the information given to the JFTC is consistent with that provided to other competition authorities.

In your experience, what makes a difference in obtaining clearance quickly?

Early and thorough pre-consultation discussions with the JFTC make a difference in obtaining clearance quickly. In our experience, the earlier transacting parties engage in discussions with the JFTC, the smoother the official review process. The pre-notification consultation system in Japan differs from that of many other jurisdictions in terms of the in-depth feedback that the JFTC provides at this early stage of the transaction. In practice, provided that the companies in question have fully cooperated, 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.

What merger control issues did you observe in the past year that surprised you?

The past year revealed that the JFTC will take a broad approach to reviewing any transaction that may impact the Japanese consumer. Through the publication of the *M3/Ultramarc* case, the JFTC has sent a strong message that it will continue to review any case that may restrict competition in Japan, even if the acquired company does not meet the mandatory filing threshold. This case has also shown us that the JFTC will not hesitate to request remedies if they are deemed necessary. The clear lesson here is the value of voluntary filing at the early stage of any proposed transaction, in order to ensure no hurdles in the final stages.

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