GCR INSIGHT

ASIA-PACIFIC
ANTITRUST REVIEW 2021

ASIA-PACIFIC
ANTITRUST REVIEW 2021

Published in the United Kingdom
by Global Competition Review
Law Business Research Ltd
Meridian House, 34–35 Farringdon Street, London, EC4A 4HL

www.globalcompetitionreview.com

To subscribe please contact subscriptions@globalcompetitionreview.com

ISBN: 978-1-83862-582-5

Printed and distributed by Encompass Print Solutions
Tel: 0844 2480 112

Contents

India

Japan

Malaysia

South Korea

Vietnam

Preface

Global Competition Review is a leading source of news and insight on national and cross-border competition law and practice, with a readership that includes top international lawyers, corporate counsel, academics, economists and government agencies. GCR delivers daily news, surveys and features for its subscribers, enabling them to stay apprised of the most important developments in competition law worldwide.

Complementing our news coverage, the *Asia-Pacific Antitrust Review 2021* provides an in-depth and exclusive look at the region. Pre-eminent practitioners have written about antitrust issues in eight jurisdictions, including a new chapter on China, expanded coverage of Japan in antitrust litigation and settlements, and two new chapters on South Korea. In addition, we have expanded the scope of the regional overviews to encompass cartels and abuse, and pharmaceuticals. The authors are, unquestionably, among the experts in their field within these jurisdictions and the region.

This annual review expands each year, especially as the Asia-Pacific region gains even more importance in the global antitrust landscape. It has some of the world's most developed enforcers – in South Korea and Japan, for example – but it also has some of the world's newest competition regimes, including in Malaysia and Hong Kong.

If you have a suggestion for a topic to cover or would like to find out how to contribute, please contact insight@globalcompetitionreview.com. GCR thanks all of the contributors for their time and effort.

Global Arbitration Review
London
March 2021

Japan: Merger Control

Hideto Ishida and Takeshi Suzuki
Anderson Mōri & Tomotsune

In summary

This chapter provides a comprehensive overview of merger control regulation in Japan, including the amendment to the Merger Guidelines in 2019.

Discussion points

- Prior notification requirement;
- thresholds for notification;
- waiting period;
- substantive test;
- prior consultation procedure; and
- foreign-to-foreign transactions.

Referenced in this article

- The Anti-Monopoly Act (Act No. 54 of 1947, as amended) (AMA);
- the Japan Fair Trade Commission (JFTC);
- Rules on Applications for Approval, Reporting, Notification, etc. Pursuant to articles 9 to 16 of the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (the Merger Rules); and
- the Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (the Merger Guidelines).

Merger control was introduced in Japan by Law No. 54 of 1947, as amended, at the same time as Japan's first competition rules. The JFTC has primary jurisdiction over the enforcement of merger control under the AMA. The AMA provides two types of regulations for business combination:

- a formalistic regulation that requires a prior notification for transactions that satisfy the relevant thresholds; and
- a substantial regulation that prohibits a business combination that will result in substantial restraint of trade in a particular field of trade (relevant market).

Prior notification requirement

Transactions to be notified

Mergers, business transfers, corporate splits (demergers) and stock acquisitions (M&A transactions) are all subject to prior notification under the AMA. M&A transactions whose schemes involve more than one of these transactions (eg, where an acquirer merges with a target after acquiring shares in the target) are separately analysed at each step of the transaction, so separate filings may, in principle, need to be made for the various steps. Joint ventures are also analysed in the same way.

If the M&A transactions satisfy certain thresholds, they are subject to a prior notification obligation. Generally, M&A transactions within the same combined business group are exempted from the prior notification requirement.

In 2013, the JFTC clarified its practice regarding mergers. Under the new practice, in the case of an absorption-type merger where Company A merges into Company B and shares of Company B will be issued to the shareholders of Company A, the JFTC requires a notification of a merger between Company A and Company B, as well as a notification of stock acquisition by the shareholders of Company A.

Thresholds for notification

Stock acquisitions

A stock acquisition will require a prior notification if the stockholding ratio after the transaction rises above 20 per cent or 50 per cent and the following turnover thresholds are satisfied.

	Threshold
Acquiring corporation	The aggregate domestic sales of all corporations within the same combined business group as the acquiring corporation exceed ¥20 billion
Target corporation	The aggregate domestic sales of the target corporation and its subsidiaries exceed ¥5 billion

Business transfer (including corporate splits)

The filing thresholds for business transfers (including asset transfers and corporate splits) are as follows. If a business transfer is implemented by a corporate split under the Corporate Act of Japan, different filing thresholds apply.

Transfer of whole business

	Threshold
Acquiring corporation	The aggregate domestic sales of all corporations within the same combined business group as the acquiring corporation exceed ¥20 billion
Transferring corporation	The domestic sales exceed ¥3 billion

Transfer of a substantial part of the business, or the whole or a substantial part of the fixed assets used for the business

	Threshold
Acquiring corporation	The aggregate domestic sales of all corporations within the same combined business group as the acquiring corporation exceed ¥20 billion
Transferring corporation	The domestic sales attributable to the transferring business or assets exceed ¥3 billion

Mergers

The filing thresholds for mergers are as follows:

- the aggregate domestic sales of all corporations within the same combined business group as one of the merging companies must exceed ¥20 billion; and
- the aggregate domestic sales of all corporations within the same combined business group of one of the other merging companies must exceed ¥5 billion.

Domestic sales

As can be seen from the above, domestic sales are a decisive factor in the threshold. Domestic sales are defined as the total amount of prices of goods or services supplied in Japan during the latest fiscal year (article 10, paragraph 2 of the AMA). According to the Merger Rules, published by the JFTC, domestic sales of Company X include the sales amount accrued through direct importing to Japan, and more precisely will be the total amount of the following three categories of sales (article 2, paragraph 1 of the Merger Rules):

- the sales amount of goods with respect to which domestic consumers (individuals excluding those who are transacting for business) are the purchasers;
- the sales amount of goods to be supplied in Japan with respect to which corporations or other business entities or individuals who are transacting for business (business entities) are the purchasers (provided, however, that the sales amount of goods that Company X knows, at the time of entering into the relevant contract, will be further shipped outside Japan without any changes in their nature or physical appearance, should be excluded); and
- the sales amount of goods to be supplied outside Japan with respect to which business entities are the purchasers and which Company X knows, at the time of entering into the relevant contract, will be further shipped to Japan without any changes in their nature or physical appearance.

The same threshold will be used regardless of the jurisdiction in which the acquiring corporation or the target corporation was established. If Company X is a company obliged to submit financial statements (article 5, paragraph 1, item 1 of the Rules regarding the Terms, Forms and Preparation Methods of Financial Statements, etc), it may substitute the value as determined pursuant to the Merger Rules as their domestic sales (article 2, paragraph 2 of the Merger Rules).

The Merger Rules have a provision to allow flexibility where the strict calculation of domestic sales in accordance with the Merger Rules is not possible, in which case it is permitted to use a different method to calculate the amount of domestic sales, so long as it is in line with the purpose of the above method and in accordance with generally accepted accounting principles (article 2, paragraph 3 of the Merger Rules).

Combined business group

The combined business group comprises the ultimate parent company and all of its subsidiaries. A corporation will be considered to be a subsidiary not only when more than 50 per cent of the voting rights of the corporation are held by another corporation, but also if its management is 'controlled' by the other corporation (article 10, paragraph 6 of the AMA). The Merger Rules specify a detailed threshold for 'control' that might be found to be met even if the ratio of beneficially owned voting rights is 50 per cent or below. The concept of control, as used to decide the scope of subsidiaries, is in line with the concept of control, as used to define group companies under the Ordinance for the Enforcement of Companies Act, and therefore it is not a totally new concept. However, it is a concept slightly different from the concept of control under the regulations for financial statements. Moreover, according to a reply by the JFTC to public comments announced on 23 October 2009, the scope of the 'combined business companies' should be decided immediately before the closing of the transaction. Therefore, it may not be possible to use the list of group companies as written in the relevant financial statements, and companies should at least check whether the list of group companies is exactly the same as requested by the Merger Rules, which could take considerable time depending on the complexity of the corporate structure of the company in question. A partnership can be a subsidiary under the AMA but cannot be a parent company. Voting rights held by a partnership are regarded as being held by the parent company of the partnership. Also, a corporation that owns the majority of rights to execute business operations of a partnership (normally, a general partner) is a parent company of the partnership regardless of its participation ratio. Therefore, if more than 50 per cent of voting rights in Company X are held by Partnership Y, General Partner Z of Partnership Y is regarded as holding those voting rights and thus a parent company of Company X (and Company X and Partnership Y are subsidiaries of General Partner Z).

Waiting period

M&A transactions are subject to a standard 30-day waiting period (or, if such period is shortened, within the shortened period). The JFTC may formally request additional information during this period (second request).

If the JFTC considers that the contemplated M&A transaction has an anticompetitive effect and therefore intends to order certain necessary measures be taken, it will notify the party within the 30-day waiting period, or, if the JFTC issues a second request, within the longer period of either 120 days from the date of receipt of the initial notification or 90 days from the date of the receipt of all response to the second request.

If the JFTC considers that the contemplated M&A transaction does not have an anticompetitive effect, it will provide a clearance letter to the party within the above-mentioned period. In addition to the statutory waiting period, it takes some time for the parties to prepare a draft notification by collecting, for example, market data, and for the JFTC to check the draft and to formally accept the notification. If the M&A transaction has any anticompetitive effect, the period necessary to consult with the JFTC prior to the notification also needs to be taken into consideration. In practice, it normally takes two to four weeks for such preparation even where the M&A transaction does not have any anticompetitive effect. If the M&A transaction has any anticompetitive effect, the preparation takes longer (ie, approximately two to six months).

Substantive test

The nature of the substantive test for the assessment of mergers

The JFTC can theoretically review any M&A transaction under the substantive test regardless of whether the thresholds described above are met. In fact, the JFTC recommends in the Guidelines Concerning Procedures of Review of Business Combination that certain M&A transactions that do not meet the filing thresholds but of which the acquisition value exceeds ¥40 billion and has a local effect should be voluntarily notified before the M&A transactions complete. The substantive test for clearance is whether the proposed M&A transaction may result in a 'substantial restraint of competition in a particular field of trade'. The Merger Guidelines provide guidance as to the substantive test.

Regarding market definition, the Merger Guidelines in principle adopt the small but significant and non-transitory increase in price test for the purposes of analysing demand and supply substitution. However, if quality competition mainly occurs instead of price competition in, for instance, the market for internet-related service, the small but significant and non-transitory decrease in quality test or small but significant and non-transitory increase in cost test is adopted. Importantly, the Merger Guidelines clarify that the geographic market may be wider than the geographic boundaries of the territory of Japan, depending upon the international nature of the relevant business. The JFTC has actually defined the relevant market as the global market in cases such as the market for magnetic heads (acquisition of fixed assets for magnetic head manufacturing from Alpus Electric Co Ltd by TDK Corporation), the markets relevant for semi-conductors such as SRAM, MCUs, LCD drivers, transistors and thyristors (merger of NEC Electronics Corporation and Renesas Technology Corporation) and HDD (consolidation plan of manufacturing and sales companies of hard disk drives). In addition, the Merger Guidelines explain the factors that will be taken into account when assessing whether a certain M&A transaction substantially restrains competition in a relevant market. The substantive test is analysed in each case for horizontal, vertical and conglomerate M&A transactions. Perhaps the most interesting feature of the Merger Guidelines is the use of safe harbours for each of the three categories of M&A transactions identified above (specific harbours apply to each category) as part of the substantive test analysis. These are cases where the JFTC normally considers that there is no possibility that there may be a substantial restraint of competition or that such possibility is small and accordingly it is not necessary to conduct a detailed examination of the M&A transaction. Each case is, however, reviewed on its own merits, and the application of the harbours needs to be analysed carefully within the specific context of each transaction. In particular, the JFTC tends to define narrower markets for the safe harbour assessment because, as mentioned above, once the transaction meets the safe harbour thresholds, the JFTC loses grounds on further substantive review. The Merger Guidelines also clarify that, if the parties have significant potential competitive power that is not reflected by market shares by owning competitively material data or intellectual property rights, the JFTC will still conduct a substantive review for M&A transactions that meet the safe harbour thresholds.

Safe harbours

Safe harbours for horizontal M&A transactions

In the case of horizontal M&A transactions, if any of the following three conditions is satisfied (and there are no other competitive restrictions) the JFTC is likely to consider that the M&A transaction does not substantially restrain competition in a relevant market:

- the Herfindahl-Hirschman Index (HHI) after the M&A transaction is not more than 1,500;
- the HHI after the M&A transaction exceeds 1,500 but is not more than 2,500, and the HHI does not increase (the delta) by more than 250; or
- the HHI after the M&A transaction exceeds 2,500 and the delta is not more than 150.

If none of the above safe harbours are met, the JFTC will proceed with a (separate) analysis of the non-coordinated (unilateral) and coordinated effects of the horizontal M&A transaction. However, the Merger Guidelines clarify that, based on the JFTC's past experience, if the HHI after the completion of the M&A transaction is not more than 2,500 and the combined market share does not exceed 35 per cent, it is generally considered that there is a low possibility that the M&A transaction will substantially restrain competition.

Safe harbours for vertical and conglomerate M&A transactions

The Merger Guidelines identify two safe harbours for vertical and conglomerate M&A transactions. The JFTC is likely to consider that the M&A transaction does not substantially restrain competition in a relevant market if any of the following conditions are met (and there are no other competitive restrictions):

- the merging parties' market share in each of relevant markets (eg, in both the upstream and downstream markets for vertical M&A transaction) after the M&A transaction is not more than 10 per cent; or
- the merging parties' market share in each of relevant markets after the M&A transaction is not more than 25 per cent and the HHI after the M&A transaction is not more than 2,500.

If neither of the above safe harbours is met, the JFTC will proceed with a (separate) analysis of the non-coordinated (unilateral) and coordinated effects of a vertical or conglomerate M&A transaction. However, the Merger Guidelines clarify that if, in each of relevant markets, the HHI after the M&A transaction is not more than 2,500 and the merging parties' market share after the M&A transaction is not more than 35 per cent, it is generally considered that the possibility of the M&A transaction resulting in substantial restraint of competition is low.

M&A transactions that do not satisfy the safe harbour provision

Analysis of unilateral and coordinated effects of horizontal M&A transactions

The Merger Guidelines specify the following as the determining factors in examining the unilateral effects of a horizontal M&A transaction:

- the position of the company group and the competitive situation – such as market shares and market share ranks, competition among the parties in the past, market share differences between the competitors and the parties, competitors' excess capacity, degree of differentiation of products, status of the parties' research and development regarding competitive products, and market characteristics such as network effect and economies of scale;
- import – degree of institutional barriers to import products, degree of import-related transportation cost and existence of problems in distribution, degree of substitutability between the imported product and the parties' product, and whether it is feasible to supply from overseas;
- entry – degree of institutional barriers to enter the market, degree of practical barriers to enter the market, degree of substitutability between entrants' product and the parties' products, and potential entry pressure;
- competitive pressure from adjacent markets – a consideration of competing goods and the situation of the geographically adjacent market;
- competitive pressure from users – competition among users and ease in changing suppliers;
- overall business capabilities; and
- efficiency – whether the M&A transaction improve efficiency, whether the improvements in efficiency are achievable and whether the improvements in efficiency contribute to the interests of users.

The Merger Guidelines also specify the following as the determining factors in examining whether a horizontal M&A transaction may substantially restrain competition in a relevant market through coordinated conduct:

- the position of the company group and the competitive situation – such as the number of competitors, competition among the parties in the past and excess capacity of competitors;
- actual condition of trade – ease of obtaining information regarding price and quantity of the competitors' trade, trends in demand and technological innovation, and past competitive situation;
- competitive pressure from import, entry and adjacent markets and so on; and
- efficiency – whether the M&A transaction improves efficiency and whether the improvements in efficiency are achievable or contribute to the interests of users.

Failing-firm defence

The failing-firm defence is available under the Merger Guidelines as a defence to a horizontal M&A transaction. The Merger Guidelines stipulate that the possibility that the effect of a horizontal business combination may substantially restrain competition is usually small if:

> *[a] party to the combination has recorded continuous and significant ordinary losses or has excess debt or is unable to obtain finance 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 business combination. Moreover, it is difficult to find any business operator that can rescue the party with a combination that would have less impact on competition than the business operator that is the other party to the combination.*

Based on this failing-firm defence, the JFTC cleared the proposed acquisition of shares of Showa Aluminium KK by Toyo Aluminium KK (see the press release of the JFTC on 28 December 2010).

Prior consultation procedure

When a party plans to implement an M&A transaction that may raise substantive issues, the party may first consider consulting with the JFTC at the pre-notification stage. Although the policies concerning procedures of review of business combination published by the JFTC in 2001 state that the consultation system at the pre-notification stage is mainly to assist parties with filling in the notification form, since the notification form includes some items that are crucial for substantive issues, such as market definition and market share, the parties may discuss substantive issues with the JFTC in connection with such items. In actual practice, during the pre-notification stage, the JFTC comments on the data provided in the notification form by the party and starts to review the substantive issues and asks substantive questions to the parties. The party can also proactively communicate with the JFTC, for example, by requesting the JFTC to explain certain issues in order to understand concerns at an early stage and by submitting its written opinions as to how it plans to address such concerns.

Foreign-to-foreign transactions

After the amendment to the AMA, effective as of 31 January 2010, the thresholds capture domestic sales by a foreign company that does not have a subsidiary in Japan and any foreign-to-foreign transactions should be notified so long as they satisfy the thresholds.

It appears that the JFTC will not hesitate to investigate a foreign-to-foreign transaction if it will result in substantial restraint of competition. As mentioned above, the JFTC may open an investigation when it finds substantive issues regardless of whether the transaction satisfies the notification thresholds. For example, in 2008, the JFTC opened investigations in relation to the acquisition by BHP Billiton of shares issued by Rio Tinto, which was a purely foreign-to-foreign transaction, and actively investigated the transaction.

To facilitate the investigation of international transactions, the JFTC has entered into an anti-monopoly cooperation agreement with each of Canada, the European Community and the United States. In addition, the JFTC entered into economic partnership agreements with various countries such as Mongolia, Australia, Peru, India, Switzerland, Vietnam, Indonesia, Thailand, Chile, the Philippines, Malaysia, Mexico and Singapore.

Hideto Ishida
Anderson Mōri & Tomotsune

Hideto Ishida is a partner at Anderson Mōri & Tomotsune and counsels a variety of domestic and foreign multinational companies in Japanese competition and distribution matters, including those relating to mergers and acquisitions, joint ventures, distribution agreements and other antitrust-related agreements. He also represents many domestic and foreign companies in investigations before the Japan Fair Trade Commission and other antitrust foreign authorities involving price cartels, bid-rigging and similar serious alleged violations such as bond, foreign exchange, LIBOR/TIBOR, car parts, maritime transportation, LCD, marine hose and GIS international cartel cases. He served for seven years as the first attorney appointed as a special investigator with the Japanese Fair Trade Commission, and thus has a keen sense of the actual and practical application of antitrust and distribution regulations to companies doing business in Japan.

He also writes many English or Japanese articles and was appointed as professor and lecturer at the Faculty of Law, Tokyo University (1995–1999), and the Faculty of Law, Hitotsubashi University (2003–2011). He is a graduate from Tokyo University (LLB, 1976) and Harvard Law School (LLM, 1989).

Takeshi Suzuki
Anderson Mōri & Tomotsune

Takeshi Suzuki is a partner at Anderson Mōri & Tomotsune. He specialises in the full range of competition law, including domestic and international cartel defence, multijurisdictional merger filing, and dominance and distribution matters. Prior to joining Anderson Mōri & Tomotsune, he was engaged in a number of M&A transactions and competition matters, including advice on cartel defence, merger control, joint venture and unfair trade practices at a leading UK law firm, and has also gained experience working in Brussels. He also worked for about two years at the Japan Fair Trade Commission as a chief case handler of merger control investigations. He is listed by *Who's Who Legal* as one of the partners aged 45 or under who are considered to be the future leaders of the international competition community. He graduated from the University of Kyoto in 2006.

ANDERSON MŌRI & TOMOTSUNE

Anderson Mōri & Tomotsune (AMT) is among the largest and most diversified law firms in Japan, offering full corporate services. Our flexible operational structure enables us to provide our corporate clients with effective and time-sensitive solutions to legal issues of any kind. We are pleased to serve Japanese companies, as well as foreign companies doing business in Japan. In response to the increasingly complex and varied legal needs of our clients, we have grown significantly, augmenting both the breadth and depth of expertise of our practice.

AMT has one of the leading international antitrust and competition practices in Japan and has advised on many of the highest-profile, most complex international cartel investigations and merger control transactions. We continuously work together with top competition practitioners around the world and are well accustomed to coordinating with lawyers from international firms in formulating and implementing global competition strategies. To that end, our Japanese attorneys work closely together with our native English-speaking lawyers to provide advice and assistance at a level that matches the quality our clients are accustomed to receiving in their home jurisdictions.

Our competition practice is highly ranked, having earned a Band 1 ranking from *Chambers Asia-Pacific* for 12 consecutive years (from 2010 to 2021). Nine AMT lawyers in this practice area were nominated to the list of recognised competition lawyers in *Who's Who Legal: Competition 2020*.

Otemachi Park Building
1-1-1, Otemachi
Chiyoda-ku
Tokyo 100-8136
Japan
Tel: +81 3 6775 1000
Fax: +81 3 6775 2288

www.amt-law.com/en

Hideto Ishida
hideto.ishida@amt-law.com

Takeshi Suzuki
takeshi.suzuki@amt-law.com

The Asia-Pacific Antitrust Review 2021 edition of Global Competition Review Insight is one of a series of publications that also covers the Americas and Europe, Africa and the Middle East. Each book delivers specialist intelligence and research designed to help readers – general counsel, government agencies and private practitioners – successfully navigate the world's increasingly complex competition regimes. Global Competition Review has worked exclusively with the region's leading competition practitioners, and it is their wealth of experience and knowledge – enabling them not only to explain law and policy, but also put it into context – that makes the report particularly valuable to anyone doing business in the Asia-Pacific region today.

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

an LBR business

ISBN 978-1-83862-582-5