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MERGER REMEDIES GUIDE

FOURTH EDITION

Editors
Ronan P Harty, Nathan Kiratzis and Anna M Kozlowski

Merger Remedies Guide

Fourth Edition

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Ronan P Harty

Nathan Kiratzis

Anna M Kozlowski

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Merger Remedy Insights from around the Globe

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Japan

Vassili Moussis, Yoshiharu Usuki, Kiyoko Yagami and Ryoichi Kaneko[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 its own guidelines, including 'Policies Concerning Procedures of Review of Business Combination' (the Policies) and 'Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination' (the Guidelines), both of which have been revised to reflect developments in merger control.[2]

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

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1 Vassili Moussis, Yoshiharu Usuki, Kiyoko Yagami and Ryoichi Kaneko are partners at Anderson Mōri & Tomotsune. The authors wish to thank Anna Madafiglio for her assistance with the preparation of this chapter.

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

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, in each case, approving the proposed transaction based, where relevant, on voluntary undertakings proposed by the transaction parties. In broad terms, 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 2020, the JFTC cleared the proposed acquisition of LINE Corporation by Z Holdings Corporation (ZHD), based on the premise that the parties agreed to remove the exclusive dealing conditions from member stores and agreed to cooperate with the JTFC if any competitive concerns were raised in the future. Behavioural remedies were also accepted in the case of a vertical integration between Google and Fitbit. A detailed explanation of the behavioural remedies used in these cases is set out below.

Procedural issues

Consultation prior to notification

As in many other jurisdictions, parties are able 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.

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 influenced in part 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 allow 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 and to evaluate any remedial measures offered by the parties, thereby 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 operation 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 a formal request by 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, the usual 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 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 that it has begun, 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 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 those concerns. 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.

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. Nevertheless, some limited information about cleared cases that have involved merger remedies is disclosed as part of the JFTC's annual review or in a press release regarding the clearance. 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 after the JFTC's receipt of the formal notification of the proposed transaction, or (2) 90 calendar days after the JFTC confirms that it has received all required information.[4] Because option (2) is conditional on the JFTC being satisfied that it has all 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 when 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 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 a Phase II review. This 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.

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

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. 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, if 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.[5] 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 their merger notification.

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

5 See Japan Fair Trade Commission [JFTC] press release, 'The JFTC closed its review on the proposed business integration between Lam Research Corporation and KLA-Tencor Corporation', at https://www.jftc.go.jp/en/pressreleases/yearly-2016/October/161007.html.

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. Although 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.

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).[6] 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 whether:

- the proposed buyer has adequate experience and capability in the relevant product market;
- the buyer is independent of and financially unrelated to the parties;
- the buyer has sufficient funds, expertise and incentives to maintain and develop the business that is the subject of the divestiture; and
- 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.

Should it prove disproportionate to take a structural remedy or difficult to find a suitable transferee to participate in one of the above remedies (for instance, if 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 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

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

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 if appropriate. When 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 when the 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 those of the United States, the European Union, Canada, the Philippines, Vietnam, Brazil, Korea, Australia, China, Kenya, Mongolia, Singapore and the United Kingdom.[7] In respect of large-scale multi-jurisdictional transactions, the JFTC does participate in significant exchanges of information with other authorities; for example, it was reported that the JFTC communicated with the competition authorities of Austria, China, Germany and the United States in the review of Fujifilm's acquisition of Hitachi's diagnostic imaging business in 2021, and with authorities in the European Union and the United States in the review of DIC Corporation's acquisition of BASF Colors & Effects Japan in 2020.[8] It is important, therefore, that information given, and submissions made, to the JFTC are consistent with those made to other competition authorities.

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

8 See JFTC press release, at https://www.jftc.go.jp/en/pressreleases/yearly-2020/December/201224r.pdf.

Timing considerations

As explained above, even in cases where the parties submit a proposed remedy to the JFTC early on, the review periods at either Phase I or Phase II 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, in which 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 effect on the Japanese market and, therefore, must be notified in the same way. In the 2019 amendment of the Policies, the JFTC, in a manner clearer than ever before, indicated its willingness to review merger and acquisition transactions, including foreign-to-foreign mergers, that have a large value and are likely to affect Japanese consumers, but that do not meet the reporting threshold based on the (aggregate) domestic turnover of the target (non-reportable transactions).

Further, the amendment encourages 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 the research and development 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 reviewed the *Google/Fitbit* case the Google/Fitbit case after the announcement of the transaction, 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 digital space: ZHD and LINE

The JFTC is becoming increasingly interested in digital markets. With the business integration of Z Holdings Corporation (ZHD) and LINE Corporation (LINE),[9] the JFTC revealed its willingness to impose monitoring and other measures on transactions, even when there is no evidence of a substantial threat to competition in the field.

The *ZHD/LINE* merger involved an integration of two major digital platforms providers in Japan. The SoftBank group is the ultimate parent of ZHD, and the NAVER group is the ultimate parent of LINE, both of which are prominent players in Japan's digital market. The parties notified the JFTC of the contemplated business integration and, given the status of the parties and the rapidly developing digital space, the regulator was eager to review the proposed transaction.

9 See JFTC press release, 'The JFTC reviewed the proposed M&A operations between Z Holdings Corporation and LINE Corporation', at https://www.jftc.go.jp/en/pressreleases/yearly-2020/August/20080403.pdf.

The JFTC's concerns

The JFTC's main concerns with the merger were the parties' horizontal overlaps in free online news distribution business, digital advertisement business and QR code payment business. In particular, it was concerned about 'code-based services', which include the settling of funds by electronically reading payment information in the form of a bar code or a QR code through a payment app. In the field of code-based services, the SoftBank group had the top market position (a 55 per cent share with its payment app, PayPay), while LINE Pay had a 5 per cent share. However, LINE Pay had held a 25 per cent market share earlier in 2020, evidencing the ability of LINE Pay to easily fluctuate its market share. Therefore, the JFTC was concerned at the possibility that the parties combined market share could grow to anywhere between 60 and 75 per cent, which would limit potential new entrants to the market as well as competitive pressures from existing competitors in the market.

The JFTC also highlighted its concern about other factors of the merger, including (1) the exclusive dealing conditions that the parties were imposing on member stores not to adopt rival payment systems, (2) the difficulty for new entrants into the market, (3) the fact that competitive pressure from adjacent markets (e.g., credit cards and other cashless payment services) and users is limited and (4) the fact that the parties' internal data implied an intention to consider raising fees for member stores following the transaction. After considering all these factors, the regulator found that it could not determine the combined market power that the parties would eventually have in the rapidly developing digital market and, therefore, it sought measures to ensure that there was no substantive restriction of competition.

Measures

To address the JFTC's concerns, the parties proposed to report (annually for the next three years) the market size of code-based payment services, the market position of the parties and their competitors, the parties' fee for member stores and the parties' use of data relating to code-based services. They also agreed to remove the exclusive dealing conditions from member stores and continue to cooperate with the JTFC if any competitive concerns are raised.

With these proposed measures, the JFTC was satisfied that the transaction would not substantially restrain competition in any of the relevant fields. However, this case reveals the JFTC's appetite for early intervention and its ability to require remedial measures based on a competition concern, without an apparent theory of harm. The JFTC has used this high-profile case to demonstrate its front foot approach when dealing with emerging digital markets.

Investigation of non-reportable transactions: Google and Fitbit

Another matter that caught the regulator's attention was the acquisition of Fitbit by Google.[10] The Google group is active in a wide range of areas, including digital advertising, internet search engines, cloud computing, software and hardware. The Fitbit group mainly manufactures and distributes wrist-worn wearable devices. Google's proposed acquisition of Fitbit did not trigger the mandatory filing requirements in Japan because Fitbit's turnover in Japan was less than the ¥5 billion threshold. However, the JFTC initiated an investigation based on the transaction's value and its likely effects on domestic customers.

The JFTC's concerns

The JFTC was concerned about the parties' vertical relationships concerning the operating system for smartphones and wristwatch-type wearable devices, and the vertical business combination regarding healthcare databases and health applications. In particular, it was concerned that Google may block its competitors in the downstream markets by refusing access to the Android API[11] and health-related data provided by Google. The regulator was also concerned about the conglomerate effect that may arise from the use of Fitbit's healthcare database for the benefit of Google's digital advertising, which could further strengthen Google's position in the digital advertising market.

Remedies

To address the JFTC's concerns, the parties proposed to provide access to the Android API and health-related data free of charge for 10 years. Further, Google proposed that it (1) would not use health-related data for its digital advertising business, and (2) would maintain the health-related data separately from other data sets within the Google group.

Subject to these remedies, the JFTC concluded that the transaction would not substantially restrain competition in the relevant fields. However, this case is particularly notable as it is the first published case in which the JTFC has applied the valued-based threshold for an investigation.

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10 See JFTC press release, 'The JFTC's Review Results Concerning Acquisition of Fitbit, Inc. by Google LLC', at https://www.jftc.go.jp/en/pressreleases/yearly-2021/January/210114r.pdf.

11 API is the acronym for Application Programming Interface, which is a software intermediary that allows two applications to 'talk' to each other.

Remedies for integration of regional banks: Fukuoka Financial Group and 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. Although 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 geographical markets, the JFTC conducted a survey using consumer questionnaires to assess the scope and distance that 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 geographical areas.

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 both the same and adjacent markets was limited and there was no pressure from new entrants.

Remedies

To address the JFTC's concern, the parties proposed to (1) assign part of their account receivables of commercial loans (for which the borrowers agree to assignment to competitors) with an aggregated amount of approximately ¥100 billion to competitors before the acquisition, (2) establish a monitoring mechanism to properly monitor and control the lending rates of the parties, and (3) submit periodic reports to the JFTC to ensure that the parties adhere to the proposed 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 a review of M3's acquisition of all shares in Ultmarc, even though the acquisition did not meet the domestic turnover thresholds for mandatory filing.[12] 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 databases (MDBs), which are composed of information about medical institutions and the doctors working at those medical institutions. An 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)).

The JFTC's main concern

From the perspective of a vertical business combination, the JFTC was concerned that, post-merger, the firm would have the ability and incentive to refuse to provide M3's competitors with the MDB, and might take advantage of competitively confidential information about M3's competitors obtained by Ultmarc. Under a conglomerate business combination, the JFTC further expressed its concerns that, post-merger, the firm 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.

12 JFTC press release, 'The JFTC Reviewed the Acquisition of Shares of Nihon Ultmarc Inc. by M3, Inc.', at https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191024.html.

Remedies

To address the JFTC's concerns, the parties proposed the following remedies (all except the last being 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 about 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 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 in respect of 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 European Union 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 2019 amendment of the Policies that it will seek to review transactions that, although they do not meet the mandatory filing thresholds, may affect competition in Japan. The JFTC's publication of the *M3/Ultmarc* and *Google/Fitbit* cases is a clear warning 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.

APPENDIX 1

About the Authors

Vassili Moussis
Anderson Mōri & Tomotsune

Vassili Moussis is a partner at Anderson Mōri & Tomotsune who is English-qualified and registered to practise law in Japan. Vassili's practice focuses on EU and international competition law, with a particular emphasis on inbound and outbound merger control and international cartel matters. Having worked at the European Commission's Directorate-General for 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.

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 and 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 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.

Ryoichi Kaneko
Anderson Mōri & Tomotsune

Ryoichi Kaneko is a partner at Anderson Mōri & Tomotsune, specialising in competition law and mergers and acquisitions. He has extensive experience in advising on merger filings before the major competition authorities, including the Japan Fair Trade Commission, and on competition issues relating to mergers and acquisitions such as gun jumping. He also provides practical advice on domestic and cross-border mergers and acquisitions from the deal perspective. He has worked at a top-tier UK law firm in London and Brussels, and a leading Spanish law firm in Madrid for the dual practice of mergers and acquisitions and competition law, which has resulted in him developing the ability to advise foreign clients on such matters.

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
ryoichi.kaneko@amt-law.com
www.amt-law.com

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 to the future and successfully predict outcomes.

As such, practical guidance for both practitioners and regulators in navigating this challenging environment is critical. This fourth edition of the *Merger Remedies Guide* provides that 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 four jurisdictions around the world supplement the global analysis to inform the reality of multi-jurisdictional deals.

The Guide draws not only on the wisdom and expertise of 41 distinguished practitioners from 15 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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