



Market
Intelligence

MERGER CONTROL 2021

Global interview panel led by White & Case LLP

Publisher

Edward Costelloe
edward.costelloe@lbresearch.com

Subscriptions

Claire Bagnall
claire.bagnall@lbresearch.com

Head of business development

Adam Sargent
adam.sargent@gettingthedealthrough.com

Business development manager

Dan Brennan
dan.brennan@gettingthedealthrough.com

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Japan

Yusuke Nakano is a partner at Anderson Mōri & Tomotsune, with broad experience in all aspects of antitrust and competition regulation. He has extensive knowledge and experience in merger control. He has also assisted Japanese companies and individuals involved in antitrust cases in foreign jurisdictions. As a result, he has substantial experience in enforcement of competition law by foreign authorities, such as the US Department of Justice and the European Commission. Yusuke was previously a lecturer at Hitotsubashi University Law School and a co-author of Leniency Regimes (*European Lawyer Reference*, fifth edition, 2015).

Vassili Moussis is a partner at Anderson Mōri & Tomotsune, who is English-qualified and registered to practise law in Japan. His 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 DG Competition and practised in the competition teams of leading UK and US law firms in Brussels and London, Vassili has been based in Tokyo with Anderson Mōri & Tomotsune for almost 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*.

Kiyoko Yagami is a partner at Anderson Mōri & Tomotsune, working mainly in the fields of antitrust and competition law. 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.

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

During financial year 2020 (FY2020: 1 April 2020 to 31 March 2021), the Japan Fair Trade Commission (JFTC) has provided further valuable insights into its key considerations when reviewing potential transactions in Japan. In particular, it has applied the FY2019 amendments to the so-called Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (Merger Guidelines) and clarified some of the important factors to be considered when coming to a decision. For example, it has revealed its interest in any transaction that may have an effect on the Japanese market, regardless of whether it meets the reportable thresholds. From the key cases of FY2020, it is apparent that the JFTC will consider a broader range of potential threats to competition, will continue to have an acute interest in emerging digital markets and will eagerly review any transaction, including non-reportable transactions, that may have an effect on competition in Japan. The JFTC has also made it clear that it may consider any potential threat to future competition when making its decision, even if there is no evidence of a substantial threat to current competition (ZHD/LINE integration).

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

As outlined above, the published JFTC decisions of FY2020 have indicated an appetite for early intervention, increasing interest in digital markets and an eagerness to review non-reportable transactions that may impact competition in Japan. Therefore, our main advice to clients after last year's developments would be to engage in open and transparent communications with the JFTC at the early stages of a proposed transaction, even if such transaction falls under the scope of a non-reportable transaction based on the mandatory thresholds. As we reported last year, the JFTC amended the Policies Concerning Procedures of Review of Business Combination (the Policies for Merger Review) in December 2019, whereby it clearly indicates its willingness to review M&A transactions that will likely affect Japanese consumers but that do not meet the reporting threshold based on the domestic turnover of the target. The amendment encourages voluntary filing for non-reportable transactions with an acquisition value exceeding ¥40 billion, which would be reportable in the case that the domestic turnover of the target exceeds the relevant numerical thresholds if one or more of the following factors are met:

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



Yusuke Nakano



Vassili Moussis



Kiyoko Yagami

“JFTC will consider a broader range of potential threats to competition.”

- 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 that the JFTC opened a review of Google's acquisition of Fitbit in 2020, even though the notification thresholds were not met in that case, we would advise that clients engaging in non-reportable transactions that meet the criteria identified in the Policies for Merger Review should pay close attention to the potential need to make a voluntary filing with the JFTC.

We would also advise clients that 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. This was clearly evidenced in the ZHD and LINE merger, where a key consideration of the JFTC in coming to a decision was that it could not determine the combined market power that the parties would eventually have in the rapidly developing digital market. This decision and measures were based on a potential future concern rather than an existing competition issue. Consequently, we expect that this trend will continue, and that the JFTC will remain vigilant to potential competition concerns in fast-growing markets.

Another point that we would like to note is that the JFTC continues to work actively with other major competition authorities on merger 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 their mandate. It is reported that in respect of large-scale multi-jurisdictional transactions, the JFTC does participate in significant exchanges of information with other competition authorities; for example, the JFTC has 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 the authorities in the EU and the United States in the review of DIC Corporation's acquisition of BASF Colors & Effects Japan in 2020. We would therefore remind clients of the importance of ensuring that all the information provided and the submissions that are made to the JFTC are consistent and up to date with those that are made to other competition authorities.



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

FY2020 saw an increased focus on competition issues relating to digital markets. As this area continues to develop and expand, it is now clear that transactions in the digital space are at the forefront of the JFTC's enforcement priorities.

With the increased influence of digital platform operators in our ever-expanding digital world, the JFTC amended the Merger Guidelines in December 2019, where it provided important viewpoints on the definition of two-sided markets for digital platform operators and on the theory of harm in vertical and conglomerate business combinations. In addition, in February 2021, the JFTC released the Report Regarding Digital Advertising, where it articulated its concerns over the potential abuse of a superior bargaining position when digital platform operators acquire or utilise personal information belonging to consumers. In the JFTC's review of Google's acquisition of Fitbit, it was concerned that, among others, Google may block its competitors in the downstream markets by refusing access to the Android API and health-related data provided by Google; and conglomerate effects 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.

The JFTC also highlighted its increased interest in digital markets with its analysis of the business integration of ZHD and LINE. From this decision, it is apparent that if competitive concerns cannot be completely dispelled due to the rapidly evolving nature of the digital market, the JFTC will intervene and ensure that appropriate measures are taken to prevent any future competition issues. This willingness to impose monitoring and other measures on transactions, even when there is no evidence of a substantial threat to competition in the field, reveals a developing trend from FY2020 that will likely not subside as the JFTC continues to focus on transactions involving digital platform operators.

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 filed in FY2020 was 266. In the past 10 years, there have been a few cases brought into a Phase II review each year, while there have been no formal prohibition decisions made by the JFTC. Among the cases closed in FY2020, the most notable were the integration between ZHD and LINE and the acquisition of Fitbit by Google.

ZHD and LINE integration

The ZHD and LINE integration revealed the JFTC's willingness to impose monitoring and other measures on transactions, even when there is no evidence of a substantial threat to competition in the field. This merger involved the business integration of two major digital platforms providers in Japan. With SoftBank group as the ultimate parent of ZHD, and with NAVER group as the ultimate parent of LINE, both parties in the transaction were prominent players in Japan's digital market.

During the review of the transaction, the JFTC's main concerns with the business integration were the parties' horizontal overlaps in the free online news distribution business, the digital advertisement business and the QR code payment business. In particular, they were concerned about 'code-based services', which include the service of settling 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, with a 55 per cent share vis its payment app, PayPay, while LINE Pay had a 5 per cent share. However, LINE Pay had previously held a 25 per cent market share earlier in 2020, evidencing LINE Pay's fluctuating market share. Consequently, the JFTC was concerned that the

“The regulator found that it could not determine the combined market power that the parties would eventually have in the rapidly developing digital market.”

parties' combined market share could grow to anywhere from 60 to 75 per cent, which would limit potential new entrants to the market as well as reducing the competitive pressure from existing competitors in the market.

The JFTC also highlighted its concern with other factors of this merger including:

- the exclusive dealing conditions that the parties were imposing on member stores not to adopt rival payment systems;
- the difficulty for new entrants coming into the markets;
- the fact that competitive pressure from adjacent markets (eg, credit cards and other cashless payment services) and users is limited; and
- 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.



To address the JFTC's concerns, the parties proposed to report (on an annual basis for the next three years) the market size of code-based payment services, the market position of the parties and their competitors, the parties' fees for member stores and the parties' utilisation of data relating to code-based services. They also agreed to remove the exclusive dealing conditions from member stores and to continue to cooperate with the JTFC if any competitive concerns are raised. With the above measures, the JFTC was satisfied that the transaction would not substantially restrain competition in any of the relevant markets.

Google's acquisition of Fitbit

Another matter in FY2020 that caught the JFTC's attention was the acquisition of Fitbit by Google. 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 impact on domestic customers.

The JFTC was concerned about vertical relationships concerning the parties' operating system for smartphones and wristwatch-type wearable devices, and the

vertical business combination regarding healthcare database and health applications. In particular, it was concerned that Google might block its competitors in the downstream markets by refusing access to the Android API and health-related data provided by Google. In addition, 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.

To address the JFTC's concerns, the parties proposed to provide access to the Android API and health-related data free of charge for a period of 10 years. Further, Google proposed that it would not use health-related data for its digital advertising business and would maintain the health-related data separately from other datasets within the Google group. Subject to these remedies, the JFTC concluded that the transaction would not substantially restrain competition in 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?

While the JFTC has not released any new guidelines in FY2020, we have been able to see the practical implications of the FY2019 amendments to the Merger Guidelines and the Policies for Merger Review. The amended Merger Guidelines of the previous year made it apparent that the JFTC had broadened the scope of factors that it would consider in coming to a decision on a proposed transaction. In FY2020, the JFTC has used the high-profile ZHD and LINE case to demonstrate its position of assessing potential competition between merging parties, rather than just actual competition. Similarly, when assessing Google's acquisition of Fitbit, the JFTC confirmed that, as articulated in the Policies for Merger Review, it would review any transaction that was likely to affect Japanese consumers, regardless of whether such transaction meets the reportable thresholds.

The above two cases are also notable in that the JFTC published its decisions of these cases immediately after reaching its conclusion. This is unusual because the JFTC normally publishes its decisions in the annual disclosure only (and limited to those cases it deems significant), except for Phase II decisions for which the JFTC is required to publish its findings in a timely manner. Ultimately, the key cases of FY2020 revealed how the JFTC has implemented the FY2019 amendments to the Merger Guidelines and the Policies for Merger Review and provided an insight into how the JFTC is likely to continue assessing potential transactions in Japan.

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?

From the developments in FY2020, we can see the importance of voluntary filing and early communication with the JFTC at the beginning of any proposed transaction affecting the market in Japan. The JFTC has used the high-profile cases of *ZHD/LINE* and *Google/Fitbit* to demonstrate its pro-active approach when dealing with emerging digital markets. It has also confirmed that it will seek to review any transaction that may impact competition in Japan. The JFTC's publication of the *Google/Fitbit* case is a clear warning shot that it will continue to review cases of interest, even if they are non-reportable transactions, and will also not hesitate to request remedies if deemed necessary.

The publication of both the *ZHD/LINE* and *Google/Fitbit* cases has given practitioners further insight into the process of the JFTC when reviewing transactions. For example, in the *ZHD/LINE* case, the JFTC disclosed specific details of the economic analysis it conducted, thereby giving greater transparency to its review. However, there is still a relative lack of available information regarding the JFTC's decisional practice, and there are some areas where further clarifications are necessary. We hope that the JFTC will provide further guidance through the publication of more decisions in the near future.

Yusuke Nakano

yusuke.nakano@amt-law.com

Vassili Moussis

vassili.moussis@amt-law.com

Kiyoko Yagami

kiyoko.yagami@amt-law.com

Anderson Mōri & Tomotsune

Tokyo

www.amt-law.com

The Inside Track

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

All prospective clients should be aware of the JFTC's heightened interest in any transaction that may have an effect on Japanese consumers, regardless of the deal value or whether it meets the reportable thresholds. As noted above, given that the JFTC continues to work actively with other major competition authorities on multi-jurisdictional transactions, it is also important to ensure that the provided information and the submissions that are made to the JFTC are consistent and up to date with those made to other competition authorities.

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

It is important to engage in open and transparent communications with the JFTC at the early stages of a proposed transaction, even if such a transaction falls under the scope of a non-reportable transaction based on the mandatory thresholds. In any case, when communicating with the JFTC, the parties should be mindful to effectively address the points that the JFTC is likely to be interested in, particularly in cases of vertical and conglomerate business combinations for which the JFTC provided important viewpoints in the FY2019 amendments of the Merger Guidelines.

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

The JFTC has made it clear that it will consider any potential threat to future competition when assessing a proposed transaction, even if there is no evidence of a threat to current competition. When the transaction parties communicate with the JFTC, it is necessary to address not only the existing and current competition issues, but also any potential impact that the transaction may have in the future, especially in case of transactions in the digital sector.

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