Market Intelligence

MERGER CONTROL 2022

Global interview panel led by White & Case LLP

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Getting the Deal Through

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MERGER CONTROL 2022

Japan

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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 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*.

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

During financial year 2021 (FY2021: 1 April 2021 to 31 March 2022), the Japan Fair Trade Commission (JFTC) provided further valuable insights into its key considerations when reviewing potential transactions in Japan. In particular, it has applied the FY2019 amendments to the 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 might have an effect on the Japanese market, regardless of whether it meets the reportable thresholds. From the key cases of FY2021, 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 might have an effect on competition in Japan.

Another key point is the JFTC's further emphasis on economic analysis in the context of merger review. In early 2022, an office was set up specifically for economic analysis purposes in the JFTC's general secretariat in order to strengthen the regulator's capability of handling digital markets matters, economic analysis and analytics of information relevant to investigations. The office is expected to support a more frequent use of economic analysis in merger cases.

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

As outlined above, the JFTC's published decisions of FY2021 have continued to indicate an appetite for early intervention, increasing interest in digital markets and an eagerness to review non-reportable transactions that may impact on 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 previously reported, 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 otherwise be reportable in cases where the domestic turnover of the target

Yusuke Nakano

Vassili Moussis

Kiyoko Yagami

"A key point is the JFTC's further emphasis on economic analysis in merger review."

exceeds the relevant numerical thresholds, especially if one or more of the following factors is met:

- the business base or 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 that the JFTC opened a review of Google's acquisition of Fitbit in 2021, even though the notification thresholds were not met in that case, we 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 also note that there is more frequent use of economic analysis in the context of merger review. In the review of the integration of Kobelco Engineered Construction Materials and Nippon Steel Metal Products in FY2021, the JFTC applied various models of economic analyses (including the Cournot model and the Bertrand model, etc.) and partly relied on the results of such analyses to conclude that there would be a substantial restraint of competition. In contrast, in the review of the acquisition of Siltronic's share by Global Wafers GmbH (GW) in FY2021, the JFTC did not find a substantial threat, partly because the results of an economic analysis (using the Cournot model) did not clearly indicate an anticompetitive effect. Since an economic analysis could be a key to a complex merger case, we advise clients that, where an economic analysis will be relevant, it is necessary to explore the possible approaches by involving an economist at an early stage.

The last point 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 communicated with the competition authorities of Singapore and the United States in the review of GW's share acquisition of Siltronic in FY2021, and with the authorities in Australia and the United States in the review of the integration between Salesforce and Slack in FY2021. We 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.

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

FY2021 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 its '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 other things, Google may block its competitors in the downstream markets by refusing access to the Android application programming interface (API) and health-related data provided by Google, and that 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 Salesforce and Slack. The JFTC characterised the transaction as a conglomerate business combination and demonstrated its proactive approach when assessing two-sided markets for digital platform operators and when setting out its concerns as to potential foreclosure and exclusion effects.

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 FY2021 was 337, which is a 27 per cent increase compared with FY2020, one case of which was brought into a Phase II review. Among those cases reviewed in FY2021, three cases were cleared based on the remedies proposed by the parties and, notably, 14 cases were non-reportable transactions that were voluntarily submitted by the parties or investigated by the JFTC *ex officio*. Among the cases closed in FY2021, the most notable were the integration between Salesforce and Slack and GW's share acquisition of Siltronic.

Integration between Salesforce and Slack

The JFTC characterised the transaction between Salesforce and Slack as a conglomerate business combination in relation to the customer relationship management (CRM) software market and the business chat services market and identified the following foreclosure and exclusion concerns as potential theories of harm:

1. the parties might foreclose access to the API or reduce API interconnectivity for other business chat services suppliers or CRM software suppliers or supply Slack's business chat services to users in combination with Salesforce's CRM software, or vice versa; and
2. the parties might share confidential information on a competitor within the group and use it to their own benefit, whereby such a competitor might suffer a competitive disadvantage.

With regard to point (1) above, given the competitive pressures from competitors and the small number of users that have integrated CRM software and business chat services in practice, the JFTC found that the parties did not have the ability to cause market foreclosure or exclusion by engaging in foreclosure or bundling.

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Furthermore, after having conducted interviews with competitors and customers, the JFTC found that the parties would not have any incentive to cause market foreclosure or exclusion because one of the central values of the parties' businesses is 'high convenience', which can be realised by enabling their services to integrate with as many third-party applications as possible (best of breed), and that if the parties engaged in foreclosure or bundling, the foundation of the parties' businesses would be significantly damaged.

With regard to point (2) above, the JFTC found that because the parties do not usually obtain confidential information on competitors for CRM software or for business chat services when integrating competitors' applications, and nor do they have any incentive to do so, it is unlikely that confidential information on the competitors would be shared within the parties. The JFTC also considered that the data collected from CRM software and business chat services users would not give the parties a competitive advantage in comparison with their competitors with regard to enhancement or development of new services.

Based on the above analysis, the JFTC concluded that the notified transaction would not substantially restrain competition in any of the relevant markets.

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GW's share acquisition of Siltronic

Both GW and Siltronic are engaged in the manufacturing and sale of silicon wafer products. In respect of the relevant product markets, the JFTC defined the respective product market for each type of silicon wafer based on different manufacturing methods, different sizes (diameter) and different processing methods of single crystal silicon (which is the raw material for silicon wafers). Out of the 10 product markets in which the parties are competing, the JFTC focused its review on five product markets in which a relatively small number of competitors have a certain degree of market share.

The JFTC conducted an economic analysis (through the Cournot model) and found that, although there is a possibility that competition problems might arise in three out of the five product markets, it is difficult to reach such a conclusion solely based on the results of the economic analysis, and that it is appropriate to also consider other factors when reaching a conclusion.

After having considered the presence of major competitors in each market, non-significant barriers to entry and competitive pressure from customers with bargaining power, the JFTC ultimately concluded that the notified acquisition 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?

Although the JFTC has not released any new guidelines in FY2021, 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 in 2019 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 FY2021, the JFTC took a proactive approach in the high-profile *Salesforce/Slack* case when assessing two-sided markets for digital platform operators, as well as when setting out the theory of harm in vertical and conglomerate business combinations. 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 JFTC published its decisions on these cases immediately after reaching its conclusion. This is a welcome trend because the JFTC used to publish its decisions on limited cases in the annual disclosure only, except for Phase II decisions, on which the JFTC was supposed to publish its findings in a timely manner under the Policies for Merger Review.

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 FY2021, 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's publication of the *Google/Fitbit* case and the fact that the JFTC reviewed 14 non-reportable mergers in FY2021 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 the high-profile cases *Salesforce/Slack* and *GW/Siltronic* has given practitioners further insight into the process of the JFTC when reviewing transactions. For example, in the *Salesforce/Slack* case, the JFTC demonstrated its proactive approach when assessing two-sided markets for digital platform operators and when setting out its foreclosure and exclusion concerns in vertical and conglomerate business combinations. In the *GW/Siltronic* 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 clarification is necessary. We hope that the JFTC will provide further guidance through the publication of more decisions in the near future.

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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 might 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, on 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 publication of high-profile cases such as the *Salesforce/Slack* and *GW/Siltronic* cases has given practitioners further insight into the process of the JFTC when reviewing transactions. In the *Salesforce/Slack* case, the JFTC took a proactive approach when assessing two-sided markets for digital platform operators and when setting out its concerns as to potential foreclosure and exclusion concerns in vertical and conglomerate business combinations. In the *GW/Siltronic* case, the JFTC disclosed specific details of the economic analysis it conducted, thereby giving greater transparency to its review.

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