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MERGER CONTROL 2023

Global interview panel led by Bradley Justus, Lisl Dunlop and James Hunsberger of Axinn Veltrop & Harkrider LLP.

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Led by Axinn Veltrop & Harkrider LLP, this *Merger Control* volume features discussion and analysis of emerging trends and hot topics within key jurisdictions worldwide.

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Japan

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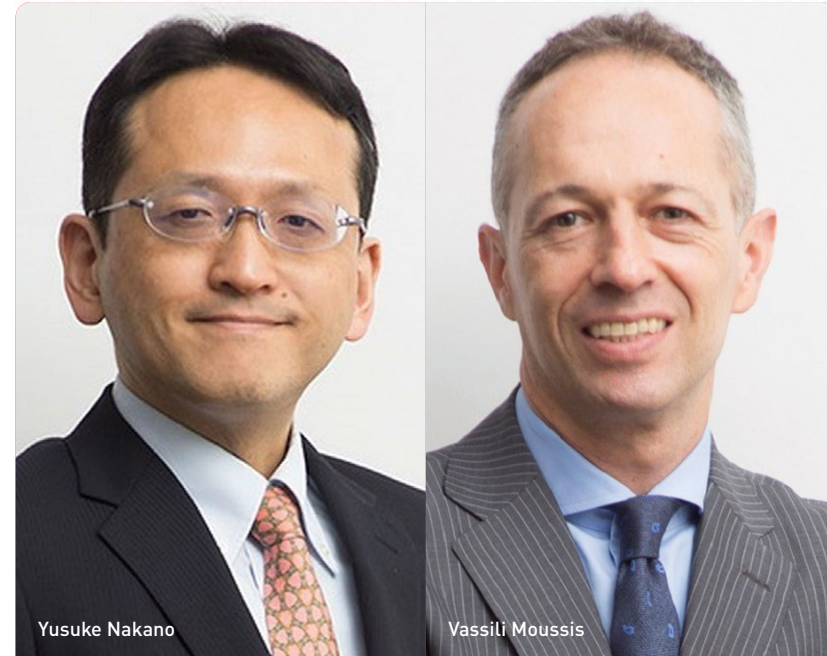
INSIDE TRACK



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

During financial year 2022 (FY2022: 1 April 2022 to 31 March 2023), 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 2019 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 FY2022, 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 continuous 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 frequently conducting economic analysis in merger cases.



Yusuke Nakano



Vassili Moussis



Kiyoko Yagami

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

“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.”

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

As outlined above, the JFTC’s published decisions of FY2022 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 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 Microsoft's acquisition of Activision Blizzard in FY2022, the JFTC conducted a vertical analysis to evaluate the level of incentives of the parties for input foreclosure, and concluded that the acquisition would unlikely result in the input foreclosure of the downstream market. In contrast, 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. 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 Australia, the United Kingdom, European Union, the United States and South Korea in the review of Microsoft's acquisition of Activision Blizzard in FY2022, and with authorities of Singapore and the United States in the review of Global Wafers GmbH's share acquisition of Siltronic in FY2021. We therefore remind clients of the importance of ensuring that all the

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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?

FY2022 saw a continued 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 June 2022, the JFTC released its

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policy on ‘Active Promotion of Competition Policy in response to Socioeconomic Changes caused by Digitalization’, where it announced that it would promote prompt and appropriate enforcement in merger cases involving digital markets by seeking comments from third parties, reviewing internal documents of the parties, and conducting economic analysis, where applicable. In the review of Microsoft’s acquisition of Activision Blizzard in FY2022, the JFTC in fact reviewed the internal documents submitted by the parties, including the minutes of the board meetings, to assess the intention of the parties.

The JFTC also highlighted its increased interest in digital markets with its analysis of the business integration of Salesforce and Slack in FY2021. 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 FY2022 was 306, no case of which was brought into a Phase II review. Among those cases reviewed in FY2022, one case was cleared based on the remedies proposed by the parties and, notably, 15 cases were non-reportable transactions that were voluntarily submitted by the parties or investigated by the JFTC *ex officio*. Among the cases closed in FY2022, the most notable was Microsoft’s acquisition of Activision Blizzard.

Microsoft’s acquisition of Activision Blizzard

Microsoft is active in the manufacture and sale of OS software for PCs (Windows) and game consoles (Xbox), and also in game development and publishing services, and distribution of game software on its



online stores (Microsoft Store and Xbox Store). Activision is also active in the game development and publishing services for PCs and game consoles such as Xbox, Sony Interactive Entertainment's PlayStation and Nintendo's Switch, as well as distribution of game software on its online store (Battle.net). Although there are various markets in which Microsoft and Activision are both active, as the parties' combined market share in the game development and publishing services in Japan is less than 5 per cent, the JFTC concluded that no competition concern would arise in the context of horizontal integration. On the other hand, the JFTC identified, among others, the following foreclosure and exclusion concerns as potential theories of harm:

1. the parties might refuse to provide their game software to competing game service providers, or refuse to offer competitors' game software on their game platforms, thereby causing market foreclosure or exclusion in the downstream and/or upstream market; 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 fact that there are many other game software titles that are more popular than Activision's *Call of Duty* and that there is no restriction on supply of game software, the JFTC found that the parties did not have the ability to cause market foreclosure or exclusion by engaging in foreclosure. Furthermore, the JFTC found that the parties would not have any incentive to cause market foreclosure or exclusion because it is essential for game service providers to offer many game software titles to consumers, and that if the parties engaged in foreclosure, the parties would lose customers to competitors.

With regard to point (2) above, the JFTC found that because the parties do not usually obtain confidential information on competitors' products or services or marketing plans when providing competitors' game

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software or using competitors' game providing services, it is unlikely that confidential information on the competitors would be shared within the parties. The JFTC also considered that even if the parties receive competitors' confidential information, it would not give the parties a competitive advantage in comparison with their competitors.

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

5 Have the authorities released any key studies or guidelines or announced other significant changes that impact merger control in your jurisdiction in the past year?

Although the JFTC has not released any new guidelines in FY2022, 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 addition and as mentioned above, in June 2022, the JFTC released its policy on 'Active Promotion of Competition Policy in response to Socioeconomic Changes caused by Digitalization', where it announced that it would promote prompt and appropriate enforcement in merger cases involving digital markets.

In the past couple of years, the JFTC took a proactive approach in the high-profile *Microsoft/Activision* case when assessing two-sided markets for 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 in FY2021, 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.

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 recent developments, 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 in FY2021 and the fact that the JFTC reviewed 15 non-reportable mergers in FY2022 is a clear warning shot that it continues to review cases of interest, even if they are non-reportable transactions, and does not hesitate to request remedies if deemed necessary.

The publication of the high-profile case *Microsoft/Activision* has given practitioners further insight into the process of the JFTC when reviewing transactions. In the *Microsoft/Activision* case, the JFTC demonstrated its proactive and detailed 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 *Kobelco Engineered Construction Materials/Nippon Steel Metal Products* case in FY2021, 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 *Microsoft/Activision* case has given practitioners further insight into the process of the JFTC when reviewing transactions. In this case, the JFTC took a proactive and detailed 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.

