IN-DEPTH

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Introduction

Merger control and Japan's first competition rules were introduced in Japan by the 1947 Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (known as the Antimonopoly Act (AMA)). Merger control is enforced by the Japan Fair Trade Commission (JFTC), which was established as an independent administrative office with broad enforcement powers. The JFTC is composed of a chair and four commissioners and has primary jurisdiction over the enforcement of merger control under the AMA.

Pre-merger notification

Types of regulated mergers and thresholds

Share acquisitions, mergers,[2] joint share transfers, business or asset transfers and corporate splits (or demergers) are subject to prior notification under the AMA if they exceed certain thresholds. Mergers and acquisitions (M&A) whose schemes involve more than one of these transactions (e.g., reverse triangular mergers that involve a merger between a target and a subsidiary of an acquirer and an acquisition by the acquirer of shares in the target) are separately analysed at each step of the transaction and may require separate filings for each of the various transactional steps.

Joint ventures are also subject to the notification requirement if they satisfy the thresholds for the type of transactions used to form a joint venture, such as share acquisitions and asset acquisitions. Unlike the regime in the European Union, Japanese law does not distinguish between full-function and non-full-function joint ventures. Notification may be also required when a partnership (including a limited liability partnership) formed under Japanese law or under foreign laws acquires shares in another company through partnership. The controlling company of such a partnership should file a prior notification if the filing thresholds are otherwise satisfied.[3]

In general, no notification is required for transactions that amount to internal reorganisations of companies within a combined business group.[4]

Domestic turnover

Domestic turnover, which is defined as the total amount of the price of goods and services supplied in Japan during the latest fiscal year,[5] is used as a decisive factor in the calculation of thresholds. The same thresholds will apply to both domestic and foreign companies.

According to the Merger Notification Rules,[6] the domestic turnover of a company includes the sales amount accrued through direct importing into Japan regardless of whether the company has a presence in Japan. To be precise, domestic turnover is the total amount of the following three categories of sales:

1. sales amount derived from the sale of goods (including services) sold to domestic consumers (excluding individuals who are transacting business);

2. sales amount derived from the sale of goods (including services) supplied in Japan to business entities or individuals that are transacting business (business entities) (excluding sales of goods where it is known that the goods will be shipped outside Japan at the time of entering into the contract, without any changes made to their nature or characteristics); and
3. sales amount derived from the sale of goods (including services) supplied outside Japan to business entities where it is known that the goods will be shipped into Japan at the time of entering into the contract, without any changes made to their nature or characteristics.[7]

If the calculation of domestic turnover cannot be made in strict compliance with these rules, it is also permitted to use a different method to calculate the amount of the domestic turnover as long as it is in line with the purpose of the above-specified method and in accordance with generally accepted accounting principles.[8]

Notification thresholds for each type of transaction

Under the AMA, different notification thresholds apply depending on the different types of transactions, namely share acquisitions, mergers, joint share transfers, business or asset transfers, and corporate splits.

For share acquisitions (including joint ventures), the thresholds are based on both domestic turnover and the level of shareholding in the target. First, the aggregate domestic turnover of all corporations within the combined business group of the acquiring corporation must exceed ¥20 billion, and the aggregate domestic turnover of the target corporation and its subsidiaries must exceed ¥5 billion to meet the filing requirement.[9] Second, such an acquisition must result in the acquirer holding more than 20 per cent or 50 per cent of the total voting rights of all the shareholders of the target (i.e., an acquisition that increases a shareholding from 19 per cent to 21 per cent is subject to a filing, whereas an acquisition that increases a shareholding from 21 per cent to 49 per cent does not require one).[10] A minority ownership of more than 20 per cent will be caught regardless of whether the acquirer will take control of the target company.

For mergers and joint share transfers,[11] the thresholds are based on domestic turnover. The aggregate domestic turnover of the combined business group of one of the merging companies, or of one of the companies intending to conduct the joint share transfer, must exceed ¥20 billion to meet the filing requirement. Furthermore, the aggregate domestic turnover of the combined business group of one other participating company must exceed ¥5 billion.[12]

For business or asset transfers, the thresholds are based on domestic turnover. The aggregate domestic turnover of all companies within the combined business group of the acquiring company must exceed ¥20 billion to meet the filing requirement. For the transferring company, separate thresholds are applied depending on whether the target business or asset is the whole business or asset of the company or a substantial part of the business or asset thereof. In the former case, a threshold of ¥3 billion of domestic turnover applies to the transferring company; in the latter, the same shall apply to that attributable to the target business or asset.[13]

For corporate splits, there are a number of relevant thresholds depending on the structure of the transactions, but the ¥20 billion and ¥5 billion thresholds (or lower thresholds) similarly apply.[14]

In the case of a merger, corporate split or joint share transfer, both companies intending to effect such transactions have to file jointly.[15] By contrast, in the case of a share acquisition or business transfer, only the acquiring company is responsible for filing.

There are no filing fees under the AMA.

Regulations and guidelines relating to merger control

In December 2019, the JFTC amended the Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination Merger Guidelines (the Merger Guidelines)[16] in response to, among other things, the increased necessity of dealing with M&A transactions in the digital market. The key amendments to the Merger Guidelines are as follows:

1. market definition: the amended Merger Guidelines clarify that, in the case of a two-sided market, the JFTC will define a relevant market for each user segment and then determine how the proposed transaction will affect competition in light of the characteristics of the two-sided market, such as network effects and economies of scale;
2. competition analysis for horizontal business combination: both direct and indirect network effects may be taken into consideration in a merger review of a two-sided market; and
3. competition analysis for vertical and conglomerate business combinations: the Merger Guidelines provide the JFTC's views on theory of harm, including:
    - input, customer foreclosure and exchange of confidential information in a vertical business combination; and
    - foreclosure through bundling or tying, and access to confidential information in a conglomerate business combination.

In addition to the Merger Guidelines, the JFTC simultaneously amended the Policies Concerning Procedures of Review of Business Combination (the Policies for Merger Review).[17] This amendment is significant because the JFTC, in a manner clearer than ever before, indicates its willingness to review M&A transactions 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 voluntary filing for non-reportable transactions with an acquisition value exceeding ¥40 billion, if one or more of the following factors are met:

1. the business base or research and development base of the acquired company is located in Japan;
2. the acquired company conducts sales activities targeting Japanese consumers, such as providing a website or a pamphlet in Japanese; or

3. the aggregate domestic turnover of the acquired company and its subsidiaries exceeds ¥100 million.

Companies engaging in non-reportable transactions for which any of the above three factors are applicable should pay close attention to the potential need to make a voluntary filing with the JFTC.

Year in review

During the 2023 fiscal year (from 1 April 2023 to 31 March 2024 (FY 2023)), the JFTC published the review results of the integration of Riken Corporation (Riken) and Nippon Piston Ring Co, Ltd (NPR), and the acquisition by Korean Air of majority shares in Asiana Airlines.

Integration of Riken and NPR

Riken and NPR are both manufacturers of engine components, including piston rings for engines of automotive and marine applications. The parties filed notification with the JFTC in connection with an integration by means of a joint share transfer.

Focusing on the following three markets for engine components, the JFTC characterised the transaction as a horizontal business combination:

1. piston rings for four-wheeled engines sold to engine manufacturers (Japan-wide);
2. MAN-branded piston rings for marine engines sold to engine manufacturers (Japan-wide); and
3. MAN-branded piston rings for marine engines sold to MAN (worldwide).

With regard to (a) above, the JFTC pointed out that, although the combined market share of the parties after integration would be approximately 60 per cent, there is competitive pressure from a competitor whose market share is approximately 40 per cent and whose products' quality is the same as that of the parties. The JFTC also indicated that there is a certain level of competitive pressure from imported products and purchasers. In addition, the JFTC considered that the possibility of coordinated conduct among the integrated company and the competitor is low because transactions of piston rings for four-wheel engines are not frequent and their prices fluctuate according to the volume of transactions.

With regard to (b) above, the JFTC indicated that, while there is a certain competitive pressure from purchasers, there is no competitive pressure from competitors and new entrants because the integrated company will have a market share of nearly 90 per cent. However, in addition to relatively strong pressure from imported products, the JFTC found that there is indirect competitive pressure from adjacent markets. In its findings, the JFTC focused on the fact that the piston rings sold to the licensor (that sells piston rings under its brand (MAN)) and those sold to engine manufacturers are both eventually sold to the end-users, i.e., shipowners and shipbuilding companies. As such, if the integrated company attempts to increase the price of MAN-branded piston rings sold to engine

manufacturers, the end-users may switch their source from the integrated company to the licensor (MAN). In addition, when MAN purchases piston rings as the licensor, it purchases most of them from overseas manufacturers, not from the parties.

With regard to (c) above, the JFTC found that, in the worldwide market, there is strong competitive pressure because the top competitor has a much higher market share than that of the parties. The JFTC also found that there is no possibility of coordinated conduct between the integrated company and the competitor because the manufacturing capacity and cost structure of the competitor and the parties are very different.

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

Korean Air's share acquisition of Asiana Airlines

Korean Air (KE) and Asiana Airlines (Asiana) are both South Korean airlines and are engaged in passenger and cargo services. Since Hanjin KAL, which owns KE, announced the 1.8 trillion won (approximately US$1.4 billion) takeover of Asiana in November 2020, the JFTC had continued its review of the transaction, and KE and Asiana (the parties) finally obtained conditional clearance in early 2024.

In the passenger sector, the JFTC found that, among 10 overlapping routes between Japan and South Korea, KE's acquisition of Asiana, which tends to offer lower prices, would substantially restrain competition in seven routes, namely, the routes from Seoul to Osaka, Sapporo, Nagoya and Fukuoka, as well as the routes from Busan to Osaka, Sapporo and Fukuoka, respectively, because the parties' combined market share would be very high at approximately 50 per cent to 75 per cent and, in particular, competition between full-service carriers (as opposed to low-cost carriers) will be completely eliminated in some routes post-transaction.

In the cargo sector, the JFTC found that the combined market share of the parties would exceed 60 per cent, and the gap between the parties and the second and lower ranks would be large. The economic analysis conducted by the JFTC also showed that the prices of the parties were correlated to each other, and there would be an incentive for the parties to raise prices after the transaction. The JFTC then concluded that the transaction would substantially restrain competition in air cargo services from Japan to South Korea.

Based on the above, the parties proposed the following remedial measures to the JFTC to alleviate competition concerns in both the passenger and cargo markets:

1. passenger market: the parties will make airport slots (limited to those currently used by one of the parties) available to rival airlines for the seven passenger routes between Japan and South Korea. This measure was finally approved on the condition that if rivals cannot fill all the slots, those slots will remain available for any airlines as open slots for a period of 10 years; and
2. cargo market: the parties will divest Asiana's global cargo business to a third party; and to offer KE's cargo space from Japan to South Korea at competitive prices to a rival airline through a block-space agreement.

It is noteworthy that the JFTC imposed Japan-specific conditions on both the passenger and cargo sectors in a global transaction, including the appointment of different types of trustees to ensure that the conditions were complied with by the parties. Specifically, KE was required to appoint a monitoring trustee for the passenger and cargo markets, respectively, to monitor the continued enforcement of the measures stated in (a) and (b) above. In addition, a cargo divestiture monitoring trustee will be appointed to monitor the bidding and transfer process of Asiana's cargo business. If the parties fails to find a remedy taker by a designated timing, the cargo divestiture trustee will be separately appointed and will select a third party for the business to be transferred to.

This JFTC decision is indicative because it adopts a monitoring mechanism for domestic remedies, which may reduce its burden in monitoring remedy compliance in the coming years.

Statistics of JFTC activity

The total number of merger notifications filed in FY 2023 is still to be confirmed by the JFTC.

In the past 10 years, there have been a few cases brought into Phase II review each year but there have been no formal prohibition decisions made by the JFTC. According to the JFTC's statistics, the number of filings and the cases cleared after Phase II review are as follows.

	FY 2014	FY 2015	FY 2016	FY 2017	FY 2018	FY 2019	FY 2020	FY 2021	FY 2022	FY 2023
No. of filings	289	295	319	306	321	310	266	337	306	345
No. of cases cleared after Phase II review	1	3	3	1	3	0	1	1	0	0

The merger control regime

Waiting periods and time frames

The standard waiting period is 30 days, which may be shortened in certain cases. If the JFTC intends to order necessary measures regarding the notified transaction, it will do so within the 30-day (or shortened) waiting period (which is extremely rare) or, if a Phase II review is opened, within the longer period of either 120 calendar days from the date of

receipt of the initial notification or 90 calendar days from the date of receipt by the JFTC of all requested additional information. The JFTC does not have the power to 'stop the clock' in either the Phase I or Phase II review periods; however, it is possible for the notifying party to 'pull and refile' the notification during the Phase I period, thereby effectively restarting the clock.

Parties' ability to accelerate the review procedure

There is no provision in the law and there are no regulations regarding the ability to accelerate the review process; however, in practice, it might be possible to put pressure on the JFTC by submitting a written request to the JFTC if a filing is made less than 30 calendar days before the planned closing date. The Merger Guidelines state that the JFTC may shorten the waiting period when it is evident that the notified merger may not substantially restrain competition in any relevant market (which means when the JFTC closes its review prior to the expiry of the 30-calendar-day review period).

Third-party access to the file and rights to challenge mergers

Access to the file

In general, no third party has access to the merger notification files. Further, the JFTC does not even disclose the fact of the filing of a merger notification or clearance thereof, except when a Phase II review is commenced (in which case, the JFTC discloses the identity of the companies involved in the notified transactions).[18] This means that third parties cannot even confirm whether a merger has actually been notified, unless the case has moved on to Phase II. Apart from these limited disclosures, the JFTC usually discloses details of some major merger notification cases as part of its annual review. This disclosure is generally subject to obtaining approval for publication from the notifying parties.

Rights to challenge mergers

Interventions by interested parties in JFTC proceedings have not been common historically.

Although third parties may file a lawsuit to ask the court to order the JFTC to issue a cease-and-desist order, the legal path to successfully do so is extremely narrow and does not merit a detailed explanation here. There are two ways for third parties to submit complaints to the JFTC in the course of a merger review: to notify the JFTC's investigation bureau of a possible breach of the AMA[19] or to submit complaints to the mergers and acquisitions division of the JFTC.

In addition, as stated in the Policies for Merger Review, in the event that a merger review moves on to Phase II, the JFTC will publicly invite opinions and comments from third parties. Public hearings can be held[20] if deemed necessary, but they have been extremely rare to date. The JFTC sometimes conducts informal hearings (and market tests by way of questionnaires) with third parties, including competitors, distributors and customers, in the course of its review, as it did in the review of Korean Air's acquisition of Asiana Air.

Resolution of authorities' competition concerns, appeals and judicial review

The JFTC can issue a cease-and-desist order when it believes that a proposed transaction has the effect of substantially restraining competition in a particular field of trade (i.e., a relevant market). Prior to issuing a cease-and-desist order, the JFTC will provide information, in advance, about, inter alia, the outline of the contemplated order as well as the underlying facts and the list of supporting evidence to the potential recipients of such an order. The JFTC does so to give the potential recipients an opportunity to review and make copies of the evidence (to the extent possible) and to submit opinions as to the possible order.[21]

When the JFTC issues a cease-and-desist order, the parties to the transaction can appeal to the Tokyo District Court for annulment of the JFTC order.

Effect of regulatory review

The JFTC frequently holds consultations with sector-specific regulators concerning general issues as to the relationship between the JFTC's competition policy and sector-specific public and industrial policies. In this regard, it is generally understood that the JFTC considers relevant public and industrial policy issues when ruling on a given transaction, without prejudice to the independence of its competition policy review and merger review. Among the various government ministries, the Ministry of Economy, Trade and Industry has been active in advocating competition policy, but depending on the specifics of each case, other ministries may also be involved.

Substantive review

The Merger Guidelines set out the various factors that may be taken into account by the JFTC when assessing the effects of notified transactions on the competitive situation. Specifically, the Merger Guidelines provide an analysis of the substantive test for each type of transaction (i.e., horizontal, vertical and conglomerate M&A transactions). One of the important parts of the substantive test analysis is the use of safe harbours measured by the Herfindahl–Hirschman Index (HHI) for each of the above three categories. It is also suggested in the Merger Guidelines that, both before and after the transaction, the JFTC will closely analyse market conditions from various viewpoints, including whether the transaction may facilitate concentration between market players, to ultimately determine the notified transaction's actual effect on competition.

Additionally, the amended Merger Guidelines suggest that if the transaction parties are both engaged in research and development in competing markets, the proposed transactions are likely to reduce potential competition between the parties. The amended Policies for Merger Review, which make clear that the JFTC may request the parties to submit their internal documents concerning the proposed transaction (see Section III.vii), may be utilised by the JFTC to assess, among other things, the potential effects in terms of research and development activities of the parties.

The detailed method to define the particular field of trade (i.e., relevant market) is also provided in the Merger Guidelines. Importantly, the Guidelines indicate that the geographical market may be wider than the geographical boundaries of Japan, depending

on the international nature of the relevant business. There have been several JFTC cases in which the JFTC defined the relevant geographical market to extend beyond Japan.

Submission of internal documents

In June 2022, the JFTC published new guidance in connection with the submission of internal documents concerning notified transactions. It indicates that the JFTC would review the parties' internal documents to better comprehend their intention and purpose, expected effects of the transaction on third parties and anticipated influence on the future of the market. The scope of the internal documents that may be requested by the JFTC is broad and typically includes the parties' minutes of the board of directors, documents used for analysis and decision-making, and emails between directors and employees regarding the transaction. The JFTC has the power to seize books and documents from relevant parties if those are deemed necessary for the merger review. However, this guidance rather encourages the parties to proactively submit their internal documents so that the JFTC can conduct the review efficiently and accurately.

Safe harbours

In the safe harbour analysis, if any of the following conditions are satisfied, the JFTC is likely to consider that the notified transaction does not substantially restrain competition in a relevant market:

1. horizontal transactions:
    - the HHI after the notified transaction is not more than 1,500;
    - the HHI after the notified transaction exceeds 1,500 but is not more than 2,500, and the increased HHI (delta) is not more than 250; or
    - the HHI after the notified transaction exceeds 2,500 and the delta is not more than 150; and
2. vertical and conglomerate transactions:
    - the merging parties' market share after the notified transaction is not more than 10 per cent; or
    - the merging parties' market share after the notified transaction is not more than 25 per cent and the HHI after the notified transaction is not more than 2,500.[22]

The amended Merger Guidelines indicate that even if one of the safe harbour thresholds is satisfied, the JFTC may conduct a substantive review of the proposed transaction if the market shares of the parties do not reflect their potential competitive significance (e.g., owing to access to important data or intellectual property).

In addition to the safe harbour, the JFTC is highly unlikely to conclude that transactions falling within a certain threshold would substantially restrain competition in any particular market, namely that the HHI after the notified transaction is not more than 2,500 and the merging parties' market share is not more than 35 per cent.

If the notified transaction does not satisfy the requirements for any of the above, the JFTC is likely to conduct a more in-depth analysis of the unilateral and coordinated effects of the notified transactions.

Gun-jumping

In 2016, the JFTC approved Canon's acquisition of shares in Toshiba Medical, the medical equipment unit of Toshiba Corporation (Toshiba). However, the JFTC also issued a statement warning that the structure of the deal could be deemed to circumvent the law, including the prior notification obligation under the AMA, because the parties had provided that Toshiba could receive payment of the transaction price of ¥665.5 billion before the JFTC's clearance. Specifically, Canon acquired an equity warrant for which common shares in Toshiba Medical were the underlying securities. In return for that equity warrant, Canon paid to Toshiba an amount virtually equivalent to the consideration for common shares. Further, shares with voting rights in Toshiba Medical were acquired and held by an independent third-party owner up to the time Canon exercised the equity warrant. The JFTC found that the transaction structure formed part of a scheme that was aimed at Canon ultimately acquiring shares in Toshiba Medical.

The JFTC held that since there is no public precedent of its position as to such a transaction structure, it would not impose any sanctions in this case, but warned that, in future, similar transaction schemes will be considered to be in violation of the AMA.

Other strategic considerations

Cooperation between JFTC and foreign competition authorities

In principle, the JFTC is entitled to exchange information with competition authorities of other jurisdictions based on the conditions set out in the AMA.[23] In addition, the Japanese government has entered into bilateral agreements concerning cooperation on competition law with the United States, the European Union and Canada, and multinational economic partnership agreements with competition-related provisions, including the Comprehensive and Progressive Agreement for Trans-Pacific Partnership. Furthermore, the JFTC has entered into inter-agency bilateral cooperation memoranda with various competition authorities.[24]

The JFTC has a good track record of working closely with other competition authorities. It is reported that the JFTC exchanged information with various authorities, including its counterparts in the United States, the European Union, Australia and South Korea, among others, in the review of the integration between Salesforce and Slack, the acquisition of Siltronic by Global Wafers GmbH (GW), the integration between Microsoft and Activision, and the acquisition of Asiana by Korean Air.

Pre-filing consultation with JFTC

Following the abolition of the prior consultation procedure in 2011, the JFTC no longer provides its formal opinion at the pre-notification stage, and the review officially starts at the formal notification stage. However, neither of the Phase I or Phase II review periods can be extended even where parties submit a remedy proposal to the JFTC; nor can the JFTC stop the clock.

In practice, the JFTC is flexible about having informal discussions with potential notifying parties upon request or voluntary submission of relevant materials before the formal filings. In fact, in almost all the recent cases that it has cleared after Phase II review, the JFTC made specific notes in its announcements that the parties had voluntarily submitted supporting documents and opinions to the JFTC before officially filing the notifications. It is understood that parties to complicated mergers make use of the informal procedure to try to alleviate any potential concerns early. This is also true in multi-jurisdictional merger notifications where the management of the filing schedule is important to avoid conflicting remedies or prohibition decisions among various jurisdictions. In these pre-filing communications, coordination among Japanese and foreign attorneys is of great importance.

Special situations

Failing company doctrine

The Merger Guidelines recognise the failing company doctrine. They state that the effect of a horizontal merger would not be substantial if a party to the merger has recorded continuous and significant ordinary losses, has excess debt or is unable to obtain financing for working capital, and it is obvious that the party would be highly likely to go bankrupt and exit the market in the near future without the merger, and so it is difficult to find any business operator that could rescue the party with a merger that would have less of an effect on competition than the business operator that is the other party to the merger.

Size of a relevant market

The amended Merger Guidelines indicate that if a relevant market is not large enough for the parties to efficiently compete, even without a proposed transaction, such a proposed transaction would not substantially restrain competition in the relevant market in general even if only the notifying parties will remain active in the relevant market after the transaction. This principle was applied for the first time to the acquisition by Fukuoka Financial Group Ltd of The Eighteenth Bank Ltd, for which the JFTC issued a press release in 2018 stating that it found no substantial restraint of competition even though the notifying party would remain as only one bank in certain rural areas because those areas were too small for the parties to make a profit, regardless of rationalisation of their operations.

Minority ownership interests

Minority ownership of more than 20 per cent of the voting rights in a company is a notifiable event regardless of whether the acquirer will take control of the target company

(see 'Notification thresholds for each type of transaction'). In addition, under certain circumstances, even a minority acquisition may be subject to a Phase II review. Moreover, in the JFTC's substantive review, any companies that are in a close relationship with an acquirer or a target may be deemed to be in a joint relationship. Accordingly, these companies could be treated as an integrated group for the purpose of the substantive analysis; for example, the HHI would also be calculated based on the sales data of the integrated group as a whole. In the acquisition of a partial share of Showa Shell by Idemitsu in 2016, the JFTC, for the purpose of its review, assumed that these parties would be completely integrated as one group after the acquisition, although, at the time, Idemitsu intended to have only a minority shareholding in Showa Shell. The joint relationship is determined by taking into account various factors, even though, according to the Merger Guidelines, a minority holding of voting rights of more than 20 per cent and the absence of holders of voting rights with the same or higher holding ratios of voting rights would suffice to find such a relationship. Most recently, in FY 2022, the JFTC deemed Nippon Steel and Tokyo Rope to have a joint relationship even though Nippon Steel's ownership was less than 20 per cent of Tokyo Rope's voting rights.

Transactions below notification thresholds

Under the AMA, the JFTC can theoretically review any M&A transaction under the substantive test, regardless of whether the filing thresholds are met. The JFTC has actually investigated transactions that had not been notified in the past, including in the case of Google's acquisition of Fitbit and certain foreign-to-foreign transactions. When the JFTC indicated its intention to conduct a merger review on Nippon Steel's non-reportable share acquisition, Nippon Steel decided to sell its acquired shares in Tokyo Rope. To mitigate the risk of an investigation, even parties to a concentration that is below the threshold level may opt to consult with the JFTC and file a notification voluntarily. In practice, the JFTC applies the same rules and guidelines to substantively review these voluntary notifications.

Outlook and conclusions

Although the 2019 amendments to the Merger Guidelines and the Policies for Merger Review were significant, the majority of these simply reflected the developments of practice and case law since the 2011 amendments, which is largely consistent with developments in other major jurisdictions.

The scope of disclosure, which the JFTC has made in relation to its review of Phase II cases and as part of its annual review about recent major cases, seems to have expanded in recent years. For example, in GW's share acquisition of Siltronic in FY 2021, the JFTC disclosed specific details of the economic analysis it conducted, thereby giving greater transparency to its review. Although these disclosures have generally been welcomed by practitioners, when compared with the practice of other leading competition authorities, there is still a relative lack of available information as to the JFTC's decisional practice (e.g., few decisions are published), and there are some areas where further clarification or improvements seem necessary (e.g., as to how network effects will be taken into account in a substantive review). It is hoped that the JFTC will take action in the near future, for example, through the publication of more decisions.

The JFTC has been intervening more proactively in cases that are below the notification thresholds when it deems that there is a joint relationship formed between the parties. Therefore, the parties to a below-threshold transaction may wish to take a more cautious approach and voluntarily consult with the JFTC where appropriate.

Endnotes

1 Yusuke Nakano, Takeshi Suzuki and Kiyoko Yagami are partners and Tono Sugita is an associate at Anderson Mori & Tomotsune. Back to section

2 The Japan Fair Trade Commission (JFTC) uses the term 'merger' in its English translation of the Japanese Antimonopoly Act (AMA) to describe what is called an 'amalgamation' in many other jurisdictions. Back to section

3 AMA, Article 10, Paragraph 5. Back to section

4 A combined business group consists of all the subsidiaries of the ultimate parent company. A company will generally be considered to be part of a combined business group not only when more than 50 per cent of the voting rights of a company are held by another company but also if its financial and business policies are controlled by another company. The Merger Notification Rules (see footnote 6) specify detailed thresholds for 'control' to exist, which might be found even in cases where the ratio of beneficially owned voting rights is even slightly higher than 40 per cent. The concept of control to decide which companies are to be included in the combined business group is in line with the concept of control used to define group companies under the Ordinance for the Enforcement of Companies Act. This concept of control generally (there are still some differences) aligns Japanese merger control with the merger rules of other jurisdictions, especially the European Union rules regarding the identification of the undertaking concerned. Back to section

5 AMA, Article 10, Paragraph 2. Back to section

6 Rules on Applications for Approval, Reporting, Notification, etc. Pursuant to the Provisions of Articles 9 to 16 of the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (as amended) (Merger Notification Rules). Back to section

7 Merger Notification Rules, Article 2, Paragraph 1. Back to section

8 id., Article 2, Paragraph 2. Back to section

9 AMA Article 10, Paragraph 2. Back to section

10 Implementation Rules of the AMA, Article 16, Paragraph 3. Back to section

11 Under Japanese law, 'joint share transfer' refers to a specific structure stipulated by the Companies Act of Japan that involves two or more companies transferring their shares into a new holding company in exchange for shares of that holding company. Back to section

12 AMA, Article 15, Paragraph 2 and Article 15-3, Paragraph 2. Back to section

13 id., Article 16, Paragraph 2. Back to section

14 id., Article 15-2, Paragraphs 2 and 3. Back to section

15 Merger Notification Rules, Article 5, Paragraph 2; Article 5-2, Paragraph 3; and Article 5-3, Paragraph 2. Back to section

16 'Guidelines to Application of The Antimonopoly Act Concerning Review of Business Combination' (amended as of 17 December 2019) (Merger Guidelines) (English translation), available at www.jftc.go.jp/en/pressreleases/yearly-2019/December/1912173GL.pdf (accessed 12 June 2024). Back to section

17 'Policies Concerning Procedures of Review of Business Combination (Policies for Merger Review) (English translation)', available at www.jftc.go.jp/en/pressreleases/yearly-2019/December/1912174Policy.pdf (accessed 12 June 2024). Back to section

18 See Policies for Merger Review. Back to section

19 AMA, Article 45, Paragraph 1. Back to section

20 id., Article 42. Back to section

21 Rules on the Procedures of Hearing of Opinions, Article 9. Back to section

22 Merger Guidelines, Part IV, 1(3) Part V, 1(2) and Part VI, 1(2). In practice, if a transaction satisfies the safe harbour conditions in points (a) and (b), above, the JFTC does not conduct any further substantive review of the transaction. Back to section

23 AMA, Article 43-2. Back to section

24 A list of international agreements and memoranda concerning competition law is available at www.jftc.go.jp/en/int_relations/agreements.html (accessed 20 April 2024). Back to section

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