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Merger Control

Japan
Madoka Shimada, Kazumaro Kobayashi and Yumiko Inaoka
Nishimura & Asahi

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Contributed by:
Madoka Shimada, Kazumaro Kobayashi and Yumiko Inaoka
Nishimura & Asahi** **see p.16

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Contributed by: *Madoka Shimada, Kazumaro Kobayashi and Yumiko Inaoka,* ***Nishimura & Asahi***

1. Legislation and Enforcing Authorities

1.1 Merger Control Legislation

Chapter IV of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No 54 of 14 April 1947, as amended) (the Anti-Monopoly Act) provides for two types of merger control rules:

- market concentration regulations, which regulate M&A that substantially restrain competition in any particular field of trade (that is, in any market); and
- economic power regulations, which regulate the excessive concentration of economic power.

Under the market concentration regulations in the Anti-Monopoly Act and its relevant rules, M&A that meet certain thresholds require pre-merger notifications with the Japan Fair Trade Commission (the JFTC).

The Guidelines to Application of the Anti-Monopoly Act Concerning Review of Business Combination (the Merger Guidelines) published by the JFTC set out an analytical framework used by the JFTC in reviewing mergers. In addition, the Policies Concerning Review of Business Combinations published by the JFTC set out the JFTC's merger review procedures.

1.2 Legislation Relating to Particular Sectors

The Foreign Exchange and Foreign Trade Act sets out filing requirements for certain foreign transactions or investments. Notifications and clearances by the relevant Ministers prior to transactions/investments are required depending on foreign investors concerned and/or the subject of transactions/investments. Sector-specific laws and regulations – such as the Civil Aeronautics Act, the Broadcast Act and the Radio Act – also regulate certain foreign transactions or investments by limiting the ratio of shareholding by foreign investors.

1.3 Enforcement Authorities

The JFTC is the sole regulatory authority that enforces the merger control rules under the Anti-Monopoly Act. Other authorities are sometimes asked by the JFTC for their opinions, but usually are not involved in the review process of the merger control. Even if other authorities convey opinions to the JFTC, these opinions will not bind the JFTC's decision.

2. Jurisdiction

2.1 Notification

The notification is compulsory as long as the transaction exceeds relevant thresholds. If the transaction is within the same company group, the parties are in principle exempted from the notification requirement.

The JFTC's Policies Concerning Review of Business Combinations, which was recently revised on 17 December 2019, states that voluntary consultations with the JFTC are desirable (but not compulsory), for mergers which do not meet the notification threshold simply because the domestic sales of the target company and its subsidiaries is not large enough, if the transaction value for the merger exceeds JPY40 billion and the merger is expected to affect domestic customers. If the parties exceeding these thresholds do not make voluntary consultation, the JFTC may request for information to the parties.

2.2 Failure to Notify

Failure to file a notification and consummation of the transaction in breach of the waiting period are subject to a criminal fine of up to JPY2 million.

Although such a penalty has not been imposed so far, in June 2016, the JFTC issued a caution to Canon Inc regarding a "warehousing" two-step transaction structure with respect to its acquisition of Toshiba Medical Systems Corporation's shares by using share warrant, the acquisition of which is not notifiable under the current Anti-Monopoly Act. Although the JFTC did not find any violation in the above-mentioned case, the JFTC announced that if a company plans to acquire shares of a target company through such a "warehousing" two-step transaction structure, a company is required to issue a notification to the JFTC prior to implementing part of such a structure.

2.3 Types of Transactions

The following transactions are subject to the market concentration regulations:

- share acquisitions;
- interlocking officer(s) or employee(s);
- mergers;
- joint incorporation-type or absorption-type company splits (demergers);
- joint share transfers (as defined by the Companies Act); and
- acquisitions, leases or undertaking management of all or a significant part of a business, acquisitions of all or a significant part of fixed assets of a business, and contracts that provide for a joint profit and loss account of a business.

All these transactions, except for interlocking officer(s) or employee(s), require the filing of a prior notification if the relevant thresholds are met.

Under the economic power regulations, a bank or an insurance company cannot acquire or hold more than 5% or 10%, respectively, of the voting rights in another company in Japan, unless one of the exceptions under the Anti-Monopoly Act applies, or the bank or insurance company obtains the prior approval of the JFTC.

The acquisition or holding of shares in a Japanese company that leads to an excessive concentration of economic power is also prohibited.

Internal restructurings or reorganisations within the same company group will not trigger the notification requirement.

Operations not involving the transfer of shares or assets (eg, shareholders' agreements, changes to articles of association) will not trigger the notification requirement, while the operations may be subject to the JFTC's investigation or challenged by relevant parties as a violation of other provisions of the Anti-Monopoly Act.

2.4 Definition of "Control"

The thresholds under the Anti-Monopoly Act are set out without using the concept of "control". An acquisition requires a pre-notification if the voting rights ratio held by an acquiring company group in an issuing company exceeds 20% or 50% as a result of the share acquisition as long as the turnover thresholds are met.

2.5 Jurisdictional Thresholds

The Anti-Monopoly Act provides different thresholds for each type of transaction, which is basically determined based on the Companies Act of Japan. It should be noted that a transaction can be divided into multiple types; thus, multiple notifications can be required. For example, a reverse triangular merger generally requires a share acquisition notification as well as a merger notification due to the fact that the subsidiary of the acquiring company will be "merged" into the target company and the target company will "acquire the shares" of the acquiring company as consideration for the merger.

For share acquisitions, notification is required when all the following thresholds are met:

- the total amount of domestic sales of the acquiring company, its subsidiaries, its ultimate parent company and subsidiaries of the ultimate parent company (collectively, the acquiring company group) exceeds JPY20 billion;
- the total amount of domestic sales of the target company and its subsidiaries exceeds JPY5 billion; and
- after the share acquisition, the voting rights in the target company held by the acquiring company group will exceed 20% or 50% of the total voting rights in the target.

For mergers and joint share transfers, notification is required when the following thresholds are both met:

- the total amount of domestic sales of any of the merging parties or parties involved in the joint share transfer, their subsidiaries, their ultimate parent company and subsidiaries of the ultimate parent company, exceeds JPY20 billion; and
- the total amount of domestic sales of any of the other parties, their subsidiaries, their ultimate parent company and subsidiaries of the ultimate parent company exceeds JPY5 billion.

For acquisitions of a business and acquisitions of fixed assets of a business, notification is required if the following thresholds are both met:

- the total amount of domestic sales of the acquiring company group exceeds JPY20 billion; and
- the total amount of domestic sales generated by the target business, or fixed assets of the business, exceeds JPY3 billion.

For company splits, the thresholds differ depending on the transaction scheme. However, the total amount of domestic sales of the business to be spun off must be at least JPY3 billion. For more details, see the JFTC's explanatory paper available on its website.

The scope of a group company for threshold calculation purposes explained above is defined based on the concept of control. That is to say, Company A is considered to be a "subsidiary" of Company B ("parent company") when Company B has control over the financial or business decision-making of Company A by holding the majority of voting rights of all shareholders of Company A, or by other means.

Transactions occurring between companies that belong to the same corporate group are exempt from the notification requirements.

Under the economic power regulations, a bank or an insurance company cannot acquire or hold more than 5% or 10%, respectively, of voting rights in another company in Japan, unless one of the exceptions under the Anti-Monopoly Act applies, or the bank or insurance company obtains the prior approval of the JFTC.

2.6 Calculations of Jurisdictional Thresholds

Direct sales in and into Japan will be included in domestic sales. With respect to indirect sales into Japan, such sales will be included in domestic sales if the party is aware that the product will be shipped to Japan by the direct purchaser without changing its character or form. It should be noted that intra-group captive sales will be excluded from the domestic sales.

The sales booked in a foreign currency should be converted to Japanese yen by applying the exchange rate that is applied in preparing the company's financial statements. In the case where such exchange rate is not available, the average telegraphic transfer middle rate (TTM) for the fiscal year should be used.

2.7 Businesses/Corporate Entities Relevant for the Calculation of Jurisdictional Thresholds

Acquisitions

With respect to share acquisitions, the aggregate domestic sales of the acquiring company group and the aggregate domestic sales of the target and its subsidiaries are relevant for the purpose of calculating the jurisdictional thresholds, while the seller's sales will not be included in sales of the target. The acquiring company group consists of the ultimate parent company of the acquiring company and the subsidiaries of the ultimate parent company. The ultimate parent company must be in the form of a "company".

However, a company's subsidiary does not need to be in the form of a company. For example, a partnership can be a subsidiary. If Company A, directly or indirectly, holds a majority of the voting rights in Company B, Company B is deemed to be a subsidiary of Company A.

In addition, if Company A, directly or indirectly, holds between 40% and 50% of the voting rights in Company B, Company B can be determined to be a subsidiary of Company A by taking various factors into consideration, such as board representation and loans from Company A.

Changes During the Reference Period

Changes in the business during the reference period will be reflected in the calculation of the aggregate domestic sales of a company group. For example, if a company that belongs to the acquiring group acquired over 50% of the voting rights in Company X after the close of the last fiscal year but before the consummation of the share acquisition in question, the domestic sales of Company X for the last fiscal year must be included in the aggregate domestic sales of the acquiring company group.

2.8 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control. As long as the thresholds, which are applied to foreign-to-foreign transactions equally as domestic transactions, are met, the transactions must be notified.

There is no local effect test; a local presence is not required to trigger the notification requirement.

The filing will not be required if a target, which includes its subsidiaries, does not have sales in or into Japan exceeding the threshold.

However, the JFTC's Policies Concerning Review of Business Combinations, which was recently revised on 17 December 2019, states that voluntary consultations with the JFTC are desirable for mergers which do not meet the notification threshold simply because the domestic sales of the target company and its subsidiaries is not large enough, if the transaction value for the merger exceeds JPY40 billion and the merger is expected to affect domestic customers. The merger is deemed to affect domestic customers even if a target has no sales in Japan as long as the target has business or development site in Japan, or conducts marketing activities targeting consumers in Japan, which include having a website or leaflets in Japanese.

2.9 Market Share Jurisdictional Threshold

There is no market share jurisdictional threshold.

2.10 Joint Ventures

The Anti-Monopoly Act does not specifically regulate joint ventures, including by reference to full functionality. Joint ventures are subject to merger review and notification where the applicable thresholds are met (see **2.5 Jurisdictional Thresholds**).

2.11 Power of Authorities to Investigate a Transaction

The JFTC has the power to investigate a transaction even if the transaction does not meet the applicable notification thresholds in the case where the transaction may substantially restrain competition in any particular field of trade. Although a transaction that does not meet the thresholds is in general unlikely to restrain competition in Japan substantially, if competitors or customers of the parties to the transaction raise concerns about the transaction with the JFTC, the JFTC would likely contact the parties and ask them to explain why the transaction would not substantially restrain competition in any particular field of trade as well as to provide information to determine whether the transaction would meet the thresholds. In 2008, the JFTC was about to issue a cease and desist order against the proposed joint venture between BHP Billiton and Rio Tinto, which may not be notifiable due to the transaction scheme, but may restrain competition in the relevant market (no order was issued because the parties withdrew the transaction).

No statute of limitations on the JFTC's ability to investigate a transaction exists.

2.12 Requirement for Clearance Before Implementation

There is a waiting period of 30 calendar days after the JFTC accepts the notification, during which the parties cannot close the transaction. The JFTC can shorten the waiting period if it deems that a shorter waiting period is appropriate upon request from the parties. It should be noted, however, that the JFTC has discretion to decide whether to shorten the waiting period.

The Anti-Monopoly Act does not technically prohibit the parties from closing the transaction after the 30-day waiting period (which corresponds to the 30-day Phase I review period), even when the JFTC has initiated a Phase II review. However, in practice, the parties usually do not close the transaction before completion of the JFTC Phase II review (if any). If, before completion of the JFTC review, the parties attempt to close a transaction that allegedly substantially restrains competition, and the JFTC finds that this alleged violation may result in irreversible damage to competition, the JFTC can request that the Tokyo District Court issue an urgent injunction order to stop the parties from closing the transaction before the completion of its review.

2.13 Penalties for the Implementation of a Transaction Before Clearance

Failure to comply with the 30-day waiting period is subject to criminal fines of up to JPY2 million, which can be imposed both on the party that must notify and on any representative or employee who is responsible for the failure. Additionally, the JFTC can file a lawsuit to nullify the merger, company split or joint share transfer that has been effected in violation of the waiting period.

These penalties can be made public. However, such penalties have not been imposed so far in any cases including foreign-to-foreign transactions.

2.14 Exceptions to Suspensive Effect

There are no general exceptions to the suspensive effect. However, the parties can file a notification without an executed definitive agreement. Therefore, a company can consummate a public bid by filing a notification 30 days prior to consummation.

In addition, the JFTC, at its sole discretion, may shorten the waiting period if it deems that a shorter waiting period is appropriate upon request from the parties.

2.15 Circumstances Where Implementation Before Clearance is Permitted

There are no circumstances where the JFTC will permit closing before clearance. The Anti-Monopoly Act does not technically prohibit the parties from closing the transaction after the 30-day waiting period. However, in practice, parties usually do not close the transaction before obtaining clearance.

If, before obtaining clearance, the parties attempt to close a transaction that allegedly substantially restrains competition and the JFTC finds that this alleged violation may result in irreversible damage to competition, the JFTC can request that the Tokyo District Court issue an urgent injunction order to stop the parties from closing the transaction before the completion of its review.

The JFTC does not generally accept the implementation of global closing before its clearance even if the parties propose a carve-out (by implementing a ring-fencing or hold-separate arrangement).

3. Procedure: Notification to Clearance

3.1 Deadlines for Notification

There is no deadline for notification, but the transaction must not be consummated before the 30-day waiting period expires. The parties can submit the notification before execution of the definitive agreement.

Failure to file a notification and consummation of the transaction in breach of the waiting period are subject to a criminal fine of up to JPY2 million. However, no such penalty has been imposed so far (see **2.2 Failure to Notify**).

3.2 Type of Agreement Required Prior to Notification

A binding agreement is not required prior to notification. Parties can file a notification on the basis of a less formal agreement such as a letter of intent or memorandum of understanding. Furthermore, the JFTC normally accepts filings without less formal agreements but may request draft agreements or other documents that indicate that the parties have a good faith intention to consummate the transaction, if the parties submit signed agreements after the execution of such agreements.

3.3 Filing Fees

No filing fees are required.

3.4 Parties Responsible for Filing

The acquiring company is usually responsible for filing. For a merger, corporate split or joint share transfer, all the companies participating in the transaction must jointly file a notification form.

3.5 Information Included in a Filing

The notifying party must fill in information specified in a notification form applicable to the type of transaction that is designated by the JFTC. The JFTC provides a different form for each type of transaction that is subject to notification. The forms are available on the JFTC's website.

An overview of the information in the notification form for a share acquisition is as follows:

- a brief explanation of the purpose, reason, background and method of the share acquisition;
- information concerning the notifying company group, which includes the notifying company (ie, direct purchaser of the shares), the ultimate parent company, and its subsidiaries and affiliates that have a certain amount of domestic sales, such as the name, domestic sales, assets and major business of each company;
- information concerning the acquired company and its subsidiaries that have a certain amount of domestic sales, such as the name, domestic sales, assets and major business of each company; and
- market shares of the notifying group, the acquired company and its subsidiaries, and major competitors in markets in which a horizontal or vertical relationship exists between the parties.

As such, the information required for a filing is relatively limited. In practice, however, in cases where substantial review of the transaction is expected, parties often submit materials with supporting documents that explain the details of the relevant markets, such as definitions of the product and geographic markets, the degree of competition between the parties, competitive pressures – including those from competitors, import products or new entries – and efficiency gains.

Documents such as the transaction agreement, financial statements and annual reports of the notifying party, list of major shareholders, minutes of a shareholder meeting or board meeting and powers of attorney are required to be submitted along with the notification form.

The notification form must be written in Japanese. The documents above must be translated into Japanese as well, while summary translations are generally accepted.

The parties' internal documents that discuss synergies or competition concerning the transaction do not need to be submitted to file a notification. However, the JFTC may request that the parties' internal documents, including presentation materials and minutes of meetings such as board of directors' meetings, materials used in analysis and decision-making processes that discuss competitive effects of the transaction, and emails of officers, directors, and employees who participated in the analysis of the transaction be submitted, typically at a later stage of the review.

The documents to be submitted, including powers of attorney, need not be certified, notarised or apostilled.

3.6 Penalties/Consequences of Incomplete Notification

If the notification is deemed incomplete, the JFTC will not accept the notification. On the other hand, the JFTC must accept the notification if complete information is provided in the notification form and the required documents are submitted.

The JFTC accepts pre-notification consultation where the parties submit a draft notification to the JFTC before officially filing the notification and the JFTC confirms whether the notification satisfies the requirements and is complete. A pre-consultation usually takes approximately between a few days and one week.

3.7 Penalties/Consequences of Inaccurate or Misleading Information

A criminal fine of up to JPY2 million may be imposed if the notifying party is deemed to have supplied false information in the filing. However, there have been no cases in which the JFTC imposed such a fine.

3.8 Review Process

The phases of the JFTC's review process consist of Phase I and Phase II as follows.

Phase I

The Phase I review is initiated when the JFTC accepts the notification form. The JFTC has 30 calendar days from the date of acceptance to review the transaction. A request for information from the JFTC to the parties does not suspend or restart the 30-day period. However, the filing party can withdraw the initial notification and refile, usually following discussions with the JFTC, which basically extends the Phase I review period and allows them to avoid the initiation of a Phase II review.

If the JFTC finds, as a result of the Phase I review, that the transaction will not substantially restrain competition, the JFTC will grant clearance through a written decision stating that it will not issue a cease and desist order (clearance letter).

Please refer to **2.12 Requirement for Clearance Before Implementation** regarding the shortening of the waiting period.

If the JFTC determines that it is necessary to conduct a more detailed review, it will initiate a Phase II review by officially requesting that the filing party or parties submit the necessary reports, information or materials.

Phase II

The time limit for the Phase II review is the later of the following: 120 days from the date of the JFTC's acceptance of the notification or 90 days from the date of acceptance of all reports, information or materials requested by the JFTC at the end of the Phase I review.

If, following a Phase II review, the JFTC finds that the transaction will not substantially restrain competition, the JFTC will grant clearance by issuing a clearance letter.

If the JFTC finds that the transaction will substantially restrain competition, it will notify the filing party or parties of this outcome. The JFTC will give the filing party or parties the opportunity to provide their opinions and submit evidence before the JFTC's final decision on whether to issue a cease and desist order.

In general, it takes at least two to three months to submit complete responses to the report request, while it does not take a full 90-day period from the date of acceptance of all reports, etc, submitted from the parties until clearance. Parties often purposely do not submit complete responses to the report request to have more flexibility in terms of timing.

3.9 Pre-notification Discussions with Authorities

Parties can engage in pre-notification discussions with the JFTC. During the pre-notification discussions, the parties can submit written explanations about the transaction and potential competitive issues it may involve, and discuss substantive issues, such as market definition or any potential competition concerns. Pre-notification discussions typically take about two weeks to one month, although the timeframe of the discussion depends on the case and the parties' strategy.

The communications in the discussions will be treated confidentially. The JFTC, however, may ask the parties to disclose the transaction to the public, if the parties seek a deeper view of the transaction from the JFTC, so that the JFTC can contact competitors and customers, and hear their opinions.

3.10 Requests for Information During Review Process

The JFTC can issue requests for information any time during its review. The volume and content of information requested depend on the degree of complexity of the transaction.

Requests for information will not stop the clock or suspend the review. However, the Phase II review will not start until the JFTC determines that all reports, information or materials requested by the JFTC have been submitted.

3.11 Accelerated Procedure

The Anti-Monopoly Act does not provide a short-form or fast-track procedure. The parties can request that the 30-day waiting period be shortened, but the JFTC has discretion to decide whether to shorten the waiting period.

4. Substance of the Review

4.1 Substantive Test

The JFTC reviews the horizontal, vertical and conglomerate effects of a transaction (as the case may be) and determines whether the transaction will substantially restrain competition in any particular field of trade. A substantial restraint of competition is defined as one that brings about a state in which competition itself has significantly decreased or a situation in which a specific business operator or a group of business operators can control the market by determining prices, quality, volumes and various other terms, with some latitude at their own volition. When assessing the effect of a transaction on competition, the JFTC takes into account various factors, including:

- competitive situation in the relevant market (for example, number of competitors, market shares, excess capacity, degree of differentiation, competition in research and development, and characteristics of the market (especially if so called direct or indirect network effects are at play));
- trade realities (such as conditions of trade, trends in demand and frequency of technological innovation);
- imports;
- entry to the market;
- competitive pressure from related markets;
- competitive pressure from users;
- overall business capabilities of the parties;
- efficiencies;
- financial condition of the parties; and
- size of a particular field of trade

The Merger Guidelines provide certain safe harbour provisions based on the Herfindahl-Hirschman Index (HHI). The JFTC will generally not conduct a substantive review of transactions whose relevant markets fall within the safe harbour provisions.

4.2 Markets Affected by a Transaction

The JFTC determines markets affected by the transaction from the perspective of the scope of the product and geographical conditions by considering the substitutability for consumers and, when necessary, the substitutability for suppliers. While the JFTC has a discretion when selecting and defining the relevant market, and the JFTC can request that the parties submit a full list of overlapping products regardless of the existence of substantial concerns, in practice, the JFTC looks into the market that the parties recognise as the affected market as a starting point.

While the Anti-Monopoly Act does not set out any de minimis threshold, the Merger Guidelines provide the safe harbour standards whereby the effect of a business combination is normally considered not to restrain competition substantially in a particular field of trade. If a business combination falls under any of the safe harbour standards, analyses of each determining factor shown in **4.1 Substantive Test** are generally not considered necessary.

The safe harbour standards for a horizontal business combination are as follows:

- the HHI after the business combination is not more than 1,500;
- the HHI after the business combination is more than 1,500 but not more than 2,500, while the increment of HHI is not more than 250; or
- the HHI after the business combination is more than 2,500, while the increment of HHI is not more than 150.

Even when a horizontal business combination does not meet the safe harbour standards, it does not immediately mean that the effect of the business combination may substantially restrain competition. Rather, this is decided based on the facts of each case by considering the factors set out in **4.1 Substantive Test**. According to the Merger Guidelines, in light of past cases, if the HHI is not more than 2,500 and the market share of the company group after the business combination is not more than 35%, the possibility that a business combination may substantially restrain competition is usually thought to be small.

The safe harbour standards for a vertical or conglomerate business combination are as follows:

- market share of the parties after the combination is not more than 10% in all the particular fields of trade in which the parties are involved; or
- the HHI is not more than 2,500 and the market share of the parties after the business combination is not more than 25% in all the particular fields of trade in which the parties are involved.

As with the horizontal business combination mentioned above, even when a vertical or conglomerate business combination does not meet the above-mentioned safe harbour standards, it does not immediately mean that the effect of the business combination may substantially restrain competition. In light of past cases, if the HHI is not more than 2,500 and the market share of the company group after the business combination is not more than 35%, the possibility that a business combination may substantially restrain competition is usually thought to be small.

A recent revision to the Merger Guidelines, which is an attempt to accommodate digital businesses in the JFTC's review methodologies, states that even if the safe harbour standards are met, if one of the parties potentially has a strong competitive edge due to, for example, its assets such as data and intellectual property rights, the JFTC may conduct further competition analysis.

4.3 Reliance on Case Law

Generally speaking, the JFTC defines the relevant markets in accordance with its own previous merger review cases, regardless of whether those cases were available to the public. If there were any significant changes or developments in the market since the case was reviewed, the JFTC would take the change into consideration. In the absence of such previous cases, and if the present transaction is filed in multiple jurisdictions in parallel with the JFTC notification, the JFTC may refer to possible market definitions in other jurisdictions, including the European Commission and the US Federal Trade Commission/Department of Justice, but that is only for their information.

The JFTC decides its own market definitions independently.

4.4 Competition Concerns

The JFTC will look into any kind of competition concern that may lead to a substantial restraint on competition in the particular field of trade, which includes unilateral effects, co-ordinated effects, conglomerate or portfolio effects, vertical concerns and the elimination of potential competition. Among them, unilateral effects and co-ordinated effects that may arise by horizontal business combinations are traditionally the largest concern of the JFTC because a horizontal business combination reduces the number of competitors and has direct effects on competition. However, the JFTC has recently paid close attention to the vertical effects of transactions as well and granted clearances subject to remedies for some vertical business combinations.

Also, the JFTC currently conducts reviews of certain business combinations regarding other concerns, including conglomerate or portfolio effects, bundling effects and the elimination of potential competition.

4.5 Economic Efficiencies

The JFTC takes efficiencies into account when reviewing the effect of transactions on competition. However, it must be presented to the JFTC that improvements of efficiency are viable and realisable, and that the improvements will contribute to consumers' interests. Accordingly, an efficiency argument alone is not likely to justify a transaction that is otherwise likely to restrain competition substantially.

4.6 Non-competition Issues

The JFTC in principle takes into account competition issues alone as part of the review process. In practice, the JFTC may consider non-competition concerns that other authorities raise in the course of its merger review, such as industrial policies or other public interest issues; however, the JFTC is not bound by these concerns.

On 20 May 2020, an act which exempts regional bus transportation services and regional banks from the JFTC's merger review upon approval from Ministers who have jurisdiction over such businesses was passed by the Japanese legislature. The purpose of the bill is to assist these businesses in maintaining their operations in rural areas in Japan, where the population is rapidly shrinking.

4.7 Special Consideration for Joint Ventures

The Anti-Monopoly Act does not specifically regulate joint ventures, including by reference to full functionality. Instead, if transactions concerning joint ventures fall under one or more types of reportable transactions, and if the applicable thresholds are met, such transactions must be notified. In merger review, possible co-ordination issues between parent companies of joint ventures can be considered.

5. Decision: Prohibitions and Remedies

5.1 Authorities' Ability to Prohibit or Interfere with Transactions

If, before the completion of the JFTC's merger review, the parties attempt to close a transaction that allegedly substantially restrains competition, and the JFTC finds that this alleged violation may result in irreversible damage to competition, the JFTC can request that the Tokyo District Court issue an urgent injunction order to stop the parties from closing the transaction before the completion of its review.

The JFTC must show that the transaction would substantially restrain competition and that the closing of the transaction would result in irreversible damage to competition. However, there has been no such lawsuit to date.

The JFTC has the ability to prohibit or interfere with a transaction by issuing a cease and desist order as well. In cease and desist orders, the parties are obliged to take measures to eliminate any concerns that the transaction would substantially restrain competition, which include divestiture of business, transfer of shares, or transfer of business.

The JFTC must provide the addressee of the order (ie, the party or the parties of the transaction) with an opportunity to state their opinions and submit evidence before the issuance of the order. The JFTC must first make a notification in writing to the addressee of the order of the matters, including the expected contents of the order, the facts, and the application of laws and regulations that leads to a conclusion that the transaction would substantially restrain competition. After the notice, the JFTC must conduct a hearing with the addressee of the order, wherein the addressee may state its opinions and submit evidence. The addressee may submit a written statement and evidence instead of appearing on the date of hearing.

The recipient of a cease and desist order issued by the JFTC can file a lawsuit with the Tokyo District Court requesting cancellation of the order within six months from the order.

However, the JFTC has not issued such a cease and desist order for over 40 years. In practice, parties usually voluntarily withdraw notifications pursuant to informal suggestions from the JFTC to the effect that a clearance would not be granted.

5.2 Parties' Ability to Negotiate Remedies

The parties can propose to the JFTC certain appropriate remedies to eliminate the effect of a restraint of competition in a particular field as a result of a business combination, during both a Phase I and Phase II review. The JFTC will then review the transaction on the basis that the proposed remedies will be implemented and a clearance with conditions (the implementation of the remedy) for such a business combination will be granted by the JFTC.

The Merger Guidelines provide that structural remedies (such as divestiture of business) are the most effective remedies, but behavioural remedies can also be accepted, under certain circumstances. Thus, the parties are able to negotiate with the JFTC as to what type of remedy is appropriate to eliminate the JFTC's concerns.

In addition, the parties can negotiate with the JFTC concerning remedies in the course of the commitment procedure.

5.3 Legal Standard

The Anti-Monopoly Act does not provide any legal standard with respect to acceptable remedies. However, the Merger Guidelines suggest that remedies must be sufficient to eliminate the concerns that the transaction may substantially restrain competition.

In addition, if the remedy is voluntarily proposed in the course of the commitment procedure, the proposed remedy must be sufficient to eliminate the suspected violation of the Anti-Monopoly Act and be certain to be implemented.

5.4 Typical Remedies

The Merger Guidelines provide that structural remedies (eg, divestiture of business) are the most effective remedies, but behavioural remedies can also be accepted under certain circumstances. Thus, the parties are able to negotiate with the JFTC as to what type of remedy is appropriate to eliminate the JFTC's concerns on competition issues.

As far as this firm knows, there have been no cases where remedies have been required to address non-competition issues to date.

5.5 Negotiating Remedies with Authorities

The parties can propose to the JFTC certain appropriate measures to eliminate the effect of the restraint on competition in a particular field as a result of a business combination, during both a Phase I and Phase II review. The JFTC will then review the transaction on the basis that the proposed remedies will be implemented and a clearance with conditions (the implementation of the remedy) for such a business combination will be granted by the JFTC. This being said, the JFTC does not have the authority to impose remedies not agreed by the parties and it is unusual that the JFTC would propose remedies of their own volition; however, the JFTC sometimes provides a "hint" to the parties as to what remedies will be required, during the discussion of proposed remedies.

In addition, if the parties intend to propose a remedy voluntarily in the course of the commitment procedure, the JFTC must notify the parties of an outline of the suspected violation of the Anti-Monopoly Act and the related provisions, and then the parties can work out a plan themselves to eliminate the suspected violation and apply to the JFTC.

5.6 Conditions and Timing for Divestitures

According to the Merger Guidelines, remedies should be, in principle, completely implemented before the consummation of the transaction. However, the guidelines also suggest that the remedies can be implemented after the closing of the transaction, although that is exceptional, provided that the detailed structures of the measures and deadlines have been approved by the JFTC.

Parties that fail to implement any remedy on which the JFTC's clearance was based can be subject to a cease and desist order.

5.7 Issuance of Decisions

When the JFTC decides that the notified transaction would not substantially restrain competition, the JFTC issues a notice to the parties in which the JFTC declares that it would not render a cease and desist order against the notified transaction. With respect to the notification in cases where the JFTC considers that the transaction should be prohibited, see **5.1 Authorities' Ability to Prohibit or Interfere with Transactions**.

An overview of the confidentiality of the decisions is as follows.

The JFTC publishes summaries of a few selected cases that may provide relevant guidance in other cases, such as cases where the JFTC granted clearance subject to the implementation of certain remedies and cases where the JFTC ended its review following the withdrawal of the notification by the party or parties.

Every year in June, the JFTC publishes its annual review of "Major Business Combination Cases", which covers certain significant cases that the JFTC has reviewed in the most recent fiscal year (ending in March). The JFTC publishes the same information in its annual report in October.

Every quarter of the fiscal year, the JFTC updates and publishes a list of the cases in which the JFTC granted clearance during the same fiscal year, including the date of acceptance of notification, the names of the parties, the main business of the notifying party, whether the transaction exceeded the 50% or 20% threshold (for share acquisitions only) and the date of clearance. However, unlike the European Commission and German Bundeskartelamt, the JFTC does not make public the fact that a notification was submitted soon after the submission and thus the interested parties may not be aware of the submission or the status of the merger review.

5.8 Prohibitions and Remedies for Foreign-to-Foreign Transactions

Almost every year, the JFTC issues clearances subject to remedies in several cases, which include foreign-to-foreign transactions. Such foreign-to-foreign cases in recent years are as follows:

- JX Metals Deutschland GmbH/H.C. Starck Tantalum and Niobium GmbH (FY2018);
- Qualcomm/NXP Semiconductors (FY2017);
- Broadcom/Brocade (FY2017);
- Dow Chemical/Du Pont (FY2016);
- Abbott Laboratories/St Jude Medical (FY2016); and
- Zimmer/Biomet (FY2015).

6. Ancillary Restraints and Related Transactions

6.1 Clearance Decisions and Separate Notifications

Questions as to whether ancillary restraints are covered by the JFTC's clearance decision are considered on a case-by-case basis. If, in the JFTC's merger review, the JFTC becomes clearly aware of ancillary restraints by receiving information from the parties and nevertheless the JFTC does not raise concerns about the restraints, the likelihood of challenge by the JFTC after the parties obtain clearance can be considered to be not high in general. However, in theory, the JFTC can challenge any anti-competitive ancillary restraints even after the issuance of the clearance decision.

Separate notifications are not required or possible for ancillary restraints in the merger review process, unless the ancillary restraints trigger another notifiable transaction.

7. Third-Party Rights, Confidentiality and Cross-border Co-operation

7.1 Third-Party Rights

Third parties can provide comments to the JFTC regarding specific M&A, regardless of whether a transaction requires prior notification. However, no third parties have any statutory right to make representations, nor any statutory right to access documents in the merger review process.

7.2 Contacting Third Parties

In practice, the JFTC often contacts third parties, such as customers and competitors, through written questionnaires or oral interviews, especially for cases in which the JFTC conducts a substantial review, unless the matter is so straightforward that the JFTC can be convinced without contacting any third parties that the proposed merger does not raise any competition issues. In particular, where the JFTC initiates a Phase II review, it publicly announces the initiation of review and invites third parties to submit written opinions on the transaction on its website.

The JFTC has recently been conducting a kind of "market test", where the JFTC hears the opinions of third parties relevant to the proposed remedies on whether the remedy is feasible and sufficient to eliminate concerns.

7.3 Confidentiality

The JFTC keeps the filing of a notification confidential and does not disclose the existence of a case, subject to the following exceptions:

- the JFTC publicly announces the initiation of any Phase II review, inviting third parties to submit written opinions about the transaction, and subsequently publishes the outcome of its review;
- the JFTC publishes summaries of a few selected cases that may provide relevant guidance in other cases, such as cases where the JFTC granted clearance subject to the implementation of certain remedies and cases where the JFTC ended its review following the withdrawal of the notification by the party or parties;
- every year in June, the JFTC publishes its annual review of "Major Business Combination Cases", which covers significant cases that the JFTC has reviewed in the most recent fiscal year (ending in March);
- every quarter of the fiscal year, the JFTC updates and publishes a list of the cases in which the JFTC granted clearance during the same fiscal year, including the date of acceptance of notification, the names of the parties, the main business of the notifying party, whether the transaction exceeded the 50% or 20% threshold (for share acquisitions only) and the date of clearance; and
- every year in October, the JFTC publishes, in its annual report, the same information in the "Major Business Combination Cases".

Regarding bullet point four, unlike the European Commission and Bundeskartelamt, the JFTC does not make public the fact that a notification was submitted soon after the submission and thus the interested parties may not be aware of the submission or the status of the merger review.

Generally, the JFTC does not publicly disclose any information provided by the parties. Even where certain information is disclosed, the JFTC will not disclose confidential information (such as business secrets), unless the parties waive their right or provide consent to the disclosure. In practice, when the JFTC plans to disclose certain information for the cases listed as "Major Business Combination Cases", the JFTC will typically contact the notifying party, identifying the information it plans to disclose.

Parties have an opportunity to provide non-binding comments, on including redacting its business secrets and/or inaccurate facts, regarding the proposed disclosure.

7.4 Co-operation with Other Jurisdictions

The JFTC co-operates with regulatory authorities in other jurisdictions for merger reviews, such as the US DOJ/FTC, the European Commission, and the Korean Fair Trade Commission. The JFTC can provide information to authorities in other jurisdictions under certain conditions, such as confidentiality (Article 43-2 of the Anti-Monopoly Act). In practice, the JFTC asks the parties to submit a waiver that allows the JFTC to exchange information with foreign authorities if necessary.

8. Appeals and Judicial Review

8.1 Access to Appeal and Judicial Review
The recipient of a cease and desist order issued by the JFTC can file a lawsuit with the Tokyo District Court (the Court of First Instance with exclusive jurisdiction) requesting cancellation of the order.

8.2 Typical Timeline for Appeals
A lawsuit requesting cancellation of a JFTC's cease and desist order must be filed with the Tokyo District Court within six months from the day when it was issued to the recipient. As there has been no such lawsuit to date, it is difficult to estimate how long it is likely to take to obtain a decision. A judgment of the Tokyo District Court can be appealed to the Tokyo High Court and, subsequently, to the Supreme Court. There is no automatic suspensory effect, therefore the recipient of the cease and desist order or third parties need to file a petition to stay the execution of the cease and desist order.

Under the current Anti-Monopoly Act, there has been no case where the court admitted such a petition to stay the execution of an order.

8.3 Ability of Third Parties to Appeal Clearance Decisions
A third party can file a lawsuit to request cancellation of a cease and desist order issued by the JFTC (not a clearance decision), provided that it has standing based on its legal interest. However, there has been no such lawsuit to date in the context of the merger reviews.

In a recent case involving unilateral conduct, the tribunal in the JFTC issued a judgment that the JFTC should not issue a cease and desist order against the JASRAC, which is a copyright collective agency. However, a competitor of JASRAC filed an objection with the Tokyo High Court against such judgment and the case was found in favour of the competitor (the JASRAC case). In the JASRAC case, the court admitted the standing of the competitor in light of the excessive damage suffered by the competitor due to the unlawful conduct; therefore, the possibility cannot be excluded that a third party seeking to deny a clearance decision in merger cases may be deemed to have rights, but there is no direct precedent in merger control regulatory history in Japan.

9. Recent Developments

9.1 Recent Changes or Impending Legislation
Both the JFTC's Merger Guidelines and Policies Concerning Review of Business Combinations were recently revised on 17 December 2019. The revision is part of the JFTC's effort to reinforce its merger control with respect to digital service providers, especially digital platform operators. The Merger Guidelines now include explicit explanations on how the JFTC evaluates mergers involving digital service businesses, with special attention being paid to network effects of digital platforms and the value of accumulated data in the digital service market.

Substantive Review
More specifically, with respect to the definition of product and geographical market, the JFTC has specified that, for digital services including those that provide digital platforms, the review may take into account the quality of the services and the geographic scope where service of the same quality can be enjoyed, and a market may subsequently be defined, that includes different sets of customers/users involved in a platform (eg, advertisers and the general public using the service), since the multiple layers of customers mutually affect each other due to indirect network effects. The same principle applies to the assessment of horizontal overlap; the revised Merger Guidelines now state that for digital platform services, the JFTC's review shall pay special attention to the significance of network effects, especially if customers choose only one single platform, and to the switching costs users may experience, both of which make the services difficult to substitute.

With regard to the vertical and conglomerate effects, the revision puts emphasis on the importance of acquired entities which possess invaluable data including start-ups, since such a merger could lead to customer foreclosures or elimination of future competition between the parties by preventing acquired entities from entering new markets on their own.

Other Revisions
See also **2.1 Notification** about the revision of the Policies Concerning Review of Business Combinations. The revision, which encourages voluntary consultations with the JFTC for certain transactions, also reflects the JFTC's attempt to capture competition concerns about mergers involving digital service businesses; the domestic turnover notification threshold may not be useful in evaluating the actual competitive effects of transactions due to the nature and size of acquired businesses.

9.2 Recent Enforcement Record
According to the JFTC's latest annual report published in June 2019, during the 2018 fiscal year (1 April 2018 to 31 March 2019), 321 notifications were accepted and out of those 321

cases, 315 were granted clearance during the Phase I review, four were withdrawn during the Phase I review and two were subject to a Phase II review. During FY2018, the JFTC did not issue any cease and desist orders with respect to M&A. However, in practice, parties usually voluntarily withdraw notifications pursuant to informal suggestions from the JFTC that a clearance would not be granted.

The number of cases in which remedies were required, including those related to foreign-to-foreign transactions, is not published.

9.3 Current Competition Concerns

As is apparent from the recent revision of the JFTC's Merger Guidelines and Policies Concerning Review of Business Combinations, the JFTC has recently paid close attention to the effects on competition of the conduct of digital platform businesses. In particular, the JFTC is concerned that such digital platform operators may lessen competition in R&D by accumulating big data, or acquiring key technologies or personnel resources through mergers that have not been reportable due to the small size of the target companies. In the same vein, on 17 December 2019, the JFTC published Guidelines on the Interpretation of Abuse of a Superior Bargaining Position in Transactions Between Digital Platform Operators and Consumers Who Provide Personal Information, and established a new department within the JFTC, which is dedicated to researching and regulating transactions involving digital service providers.

9.4 COVID-19

There has not been any substantial delay in the JFTC's merger reviews; however, shortening of the waiting period, which can be done at the JFTC's discretion, may not be granted easily due to the restraints the COVID-19 crisis has placed on the JFTC's capacity such as remote working.

Instead of accepting notifications in paper at the JFTC office, the JFTC is now accepting notifications in digital format via email; the waiting period starts on the date when the email is received, although paper originals with necessary seals must be mailed to the JFTC later.

The JFTC is also avoiding in-person interviews and, instead, is using emails and phone calls to communicate with relevant parties during its reviews.

Nishimura & Asahi is one of Japan's largest law firms, covering all aspects of domestic and international business and corporate activity. The firm has more than 600 Japanese and foreign lawyers, and employs over 900 support staff in Japan, Asia, the Middle East and the New York area. Around 40 lawyers belong to its competition law practice team, and the team covers every area of competition law and represents foreign and domestic companies in various industries such as steel, auto parts, semiconductors, shipping, chemical, energy, financial services and the entertainment industry for merger filings. Through the enhancement of professional and organisational synergies resulting from the firm's expansion, an unprecedented level of client service is made possible in highly specialised and complex areas of commercial law, including corporate/M&A practice.

Authors

Madoka Shimada is a partner at Nishimura & Asahi. She advises clients on various matters of competition law, including domestic and international cartels, bid-rigging, M&A transactions, investigations by the Japan Fair Trade Commission, leniency applications and general antitrust law compliance. Madoka is especially active in cross-border transactions, such as international cartels. She earned an LLM degree from Harvard Law School in 2003 and a Master in Public Administration degree from the Kennedy School of Government, Harvard University. Madoka has been admitted as an attorney in Japan since 1999 and in New York since 2005.

Kazumaro Kobayashi is a partner at the firm whose practice has focused on antitrust/competition matters and international trade affairs. He handles merger notifications with the Japan Fair Trade Commission and competition authorities in the world for domestic and international clients in the automotive industry and energy industry. Kazumaro earned an LLM degree from Columbia Law School in 2014 and worked at Cleary, Gottlieb, Steen & Hamilton in Washington, DC from 2014 to 2015. He has been admitted as an attorney in Japan since 2007 and in New York since 2015.

Yumiko Inaoka has been an associate at Nishimura and Asahi since 2018. She has wide-ranging experience in numerous fields, including antitrust/competition, M&A, international trade, international dispute resolution, and general corporate law. She represents domestic and international clients with merger filings, both inside Japan and across multiple international jurisdictions, and also advises companies on compliance with various antitrust laws and regulations. Yumiko received her LLB degree from the University of Tokyo in 2017 and was admitted to practice law in Japan in 2018.

Nishimura & Asahi

Otemon Tower, 1-1-2 Otemachi
Chiyoda-ku
Tokyo
100-8124
Japan

Tel: +81 3 6250 6200
Fax: +81 3 6250 7200
Email: info@jurists.co.jp
Web: www.jurists.co.jp

NISHIMURA & ASAHI