

# Japan

Kozo Kawai, Madoka Shimada and Mihoko Hori  
Nishimura & Asahi

[www.practicallaw.com/8-504-3670](http://www.practicallaw.com/8-504-3670)

## MERGER CONTROL

### 1. Are mergers and acquisitions subject to merger control in your jurisdiction? If so, please describe briefly the regulatory framework and authorities.

Chapter IV of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 1947) (AML) prohibits mergers and acquisitions that may substantially restrain competition in any particular field of trade.

Chapter IV of the AML also sets out filing requirements for certain transactions. However, even if no filing is required for a transaction, it may be subject to review by the competition authority, the Japan Fair Trade Commission (JFTC). If the JFTC finds that the transaction will substantially restrain competition in any particular field of trade, such transaction may be subject to elimination measures (that is, a cease and desist order).

The JFTC, an external agency of the Cabinet Office, is the sole authority responsible for merger control, from the perspective of competition laws.

In addition to merger control from the perspective of competition law, foreign inward direct investments to Japan are subject to the Foreign Exchange and Foreign Trade Act.

#### Triggering events/thresholds

### 2. What are the relevant jurisdictional triggering events/thresholds?

#### Triggering events

Prior notification is required for the following events, if the applicable thresholds are met:

- Share acquisitions.
- Mergers.
- Company splits (demergers).
- Joint share transfers (a method provided by the Companies Act whereby the participating companies become the subsidiaries of a new company).
- Acquisitions of a business/fixed assets of a business (collectively, acquisition of a business).

However, other types of business combinations (including but not limited to possession of shares, interlocking directorates and lease/entrustment of businesses) may be subject to review by the JFTC (see Question 1).

#### Thresholds

Thresholds are set out for each type of transaction:

- **Share acquisitions.** Prior notification is required if all of the following conditions are met:
  - the sum of the total sales in Japan of the group of corporations consisting of the company and its subsidiaries, and the ultimate parent company of the company and its subsidiaries (Corporate Group) to which the acquiring company belongs exceeds JPY20 billion (as at 1 November 2010, US\$1 was about JPY80) during the most recently completed fiscal year (all references to financial requirements in this answer refer to the most recently completed fiscal year);
  - the sum of the total sales in Japan of the target company and its subsidiaries exceeds JPY5 billion; and
  - the shareholding ratio in the target held by the Corporate Group of the acquiring company will change, as a result of the transaction:
    - from 20% or less to greater than 20%; or
    - from 50% or less to greater than 50%.
- **Mergers.** Prior notification is required if:
  - the sum of the total sales in Japan of the Corporate Group to which any one of the parties belongs exceeds JPY20 billion; and
  - the sum of the total sales in Japan of the Corporate Group to which any one of the other parties belongs exceeds JPY5 billion.
- **Joint incorporation-type company splits (demergers).** Prior notification is required:
  - where both parties transfer all of their businesses to a newly incorporated company (New Co):
    - the sum of the total sales in Japan of the Corporate Group to which any one of the parties belongs exceeds JPY20 billion; and
    - the sum of the total sales in Japan of the Corporate Group to which any one of the other parties belongs exceeds JPY5 billion.



- where all of the business of any one of the parties and part of the business of any one of the other parties is transferred to the New Co and either:
  - both the sum of the total sales in Japan of the Corporate Group to which any one of the parties, which will transfer all of its business to the New Co, belongs, exceeds JPY20 billion and the sum of the total sales in Japan generated from the target business of any one of the other parties, which will transfer part of its business to the New Co, exceeds JPY3 billion; or
  - both the sum of the total sales in Japan of the Corporate Group to which any one of the parties, which will transfer all of its business to the New Co, belongs, exceeds JPY5 billion and the sum of the total sales in Japan generated from the target business of any one of the other parties, which will transfer part of its business to the New Co, exceeds JPY10 billion.
- where both parties transfer part of their businesses to the New Co:
  - the sum of the total sales in Japan generated from the target business of any one of the parties exceeds JPY10 billion; and
  - the sum of the total sales in Japan generated from the target business of any one of the other parties exceeds JPY3 billion.
- **Absorption-type company split (demergers).** Prior notification is required if:
  - where one of the parties transfers all of its business to the company which will succeed the target businesses (Succeeding Co) and either:
    - both the sum of the total sales in Japan of the Corporate Group to which any one of the parties which will transfer all of its business to the Succeeding Co belongs, exceeds JPY20 billion and the sum of the total sales in Japan of the Corporate Group to which the Succeeding Co belongs exceeds JPY5 billion; or
    - both the sum of the total sales in Japan of the Corporate Group to which any one of the parties which will transfer all of its business to the Succeeding Co belongs, exceeds JPY5 billion and the sum of the total sales in Japan of the Corporate Group to which the Succeeding Co belongs exceeds JPY20 billion.
  - where part of the business of any one of the parties is transferred to the Succeeding Co and either:
    - both the sum of the total sales in Japan generated from the target business of any one of the parties, which will transfer part of its business to the Succeeding Co, exceeds JPY10 billion and the sum of the total sales in Japan of the Corporate Group to which the Succeeding Co belongs, exceeds JPY5 billion; or
    - both the sum of the total sales in Japan generated from the target business of any one of the parties, which will transfer part of its business to the Succeeding Co, exceeds JPY3 billion and the sum of

the total sales in Japan of the Corporate Group to which the Succeeding Co belongs exceeds JPY20 billion.

- **Joint share transfers.** Prior notification is required if:
  - the sum of the total sales in Japan of the Corporate Group to which any one of the parties belongs exceeds JPY20 billion; and
  - the sum of the total sales in Japan of the Corporate Group to which any one of the other parties belongs exceeds JPY5 billion.
- **Acquisition of a business.** Prior notification is required if:
  - the sum of the total sales in Japan of the Corporate Group to which the acquiring company belongs exceeds JPY20 billion; and
  - the sum of the total sales in Japan generated from the target business or fixed assets of the target's business exceeds JPY3 billion.

Notification is not required if all of the parties to the transaction belong to the same Corporate Group.

#### Notification

### 3. Please give a broad overview of notification requirements. In particular:

- **Is notification mandatory or voluntary?**
- **When should a transaction be notified?**
- **Is it possible to obtain formal or informal guidance before notification?**
- **Who should notify?**
- **To which authority should notification be made?**
- **What form of notification is used?**
- **Is there a filing fee? If so, how much?**
- **Is there an obligation to suspend the transaction pending the outcome of an investigation?**

#### Mandatory or voluntary

Notification is mandatory if a transaction meets the applicable thresholds (see *Question 2*).

#### Timing

Notifications must be filed at least 30 days before the proposed implementation date. In practice, a draft notification form is submitted to the JFTC well in advance to ensure sufficient processing time.

#### Formal/informal guidance

It is possible to obtain informal guidance from the JFTC on whether a transaction would be subject to merger controls. Guid-

ance can be obtained on an anonymous basis. There is also a formal prior consultation system, the procedure of which is outlined in the JFTC guidelines (Policies dealing with prior consultation regarding business combination plans) (Prior Consultation Guidelines). This allows the parties to consult the JFTC in relation to what the relevant market is and/or whether the proposed transaction is likely to raise any competition issues.

#### Responsibility for notification

In the case of share acquisitions and acquisitions of businesses, the acquiring party is responsible for notification. In all other types of transactions, both parties are jointly responsible for the notification.

#### Relevant authority

All filings are made to the Merger and Acquisitions Division, Economic Affairs Bureau of the JFTC.

#### Form of notification

The JFTC provides, on its website, standard forms that must be used when submitting a notification.

#### Filing fee

No filing fee is required.

#### Obligation to suspend

A transaction must be suspended for 30 calendar days after the date of acceptance by the JFTC of prior notification.

#### Procedure and timetable

##### 4. Please set out the procedure and timetable.

#### Prior notification

The parties must suspend the transaction for 30 calendar days (waiting period) after the JFTC's acceptance of a prior notification. The JFTC may, at its discretion, reduce the waiting period.

During the waiting period, if the JFTC finds that the transaction may substantially restrain competition in any particular field of trade, the JFTC notifies the parties that the issuance of a cease and desist order is under consideration, giving the parties an opportunity to express their opinion.

If the JFTC requests additional information from the parties during the waiting period, the deadline by which the JFTC must send notice to the parties is extended to the later of:

- 120 days after the JFTC's acceptance of the pre-transaction notification by the parties.
- 90 days after the JFTC's acceptance of all requested information by the parties.

#### Prior consultation

If the parties apply for a prior consultation, the procedures of which are set out in the Prior Consultation Guidelines, the JFTC's review process is as follows:

- **Phase I Review.** Generally, the parties submit explanatory materials and respond to the JFTC's questions. Within 30 calendar days after the parties' submission to the JFTC of all necessary and/or requested information, the JFTC orally notifies the parties either that there are no issues related to the AML or that a second, more detailed review phase (the Phase II Review) is required. In some cases, submission of all information requested by the JFTC takes significantly more time than the parties may expect.
- **Phase II Review.** The JFTC issues questionnaires to the parties to request further information, and within 90 calendar days after the parties' submission of all requested information, the JFTC reports the results of the review in writing.

For an overview of the prior notification process, see flowchart, *Japan: merger notifications*.

#### Confidentiality

##### 5. In relation to merger inquiries:

- **How much publicity is given?**
- **At what stage of the procedure is information released?**
- **Is certain information automatically kept confidential?**
- **Can the parties request that certain information be kept confidential?**

#### Publicity

The JFTC usually does not publish or disclose the fact that a prior notification has been made, or information that the JFTC has obtained during its review.

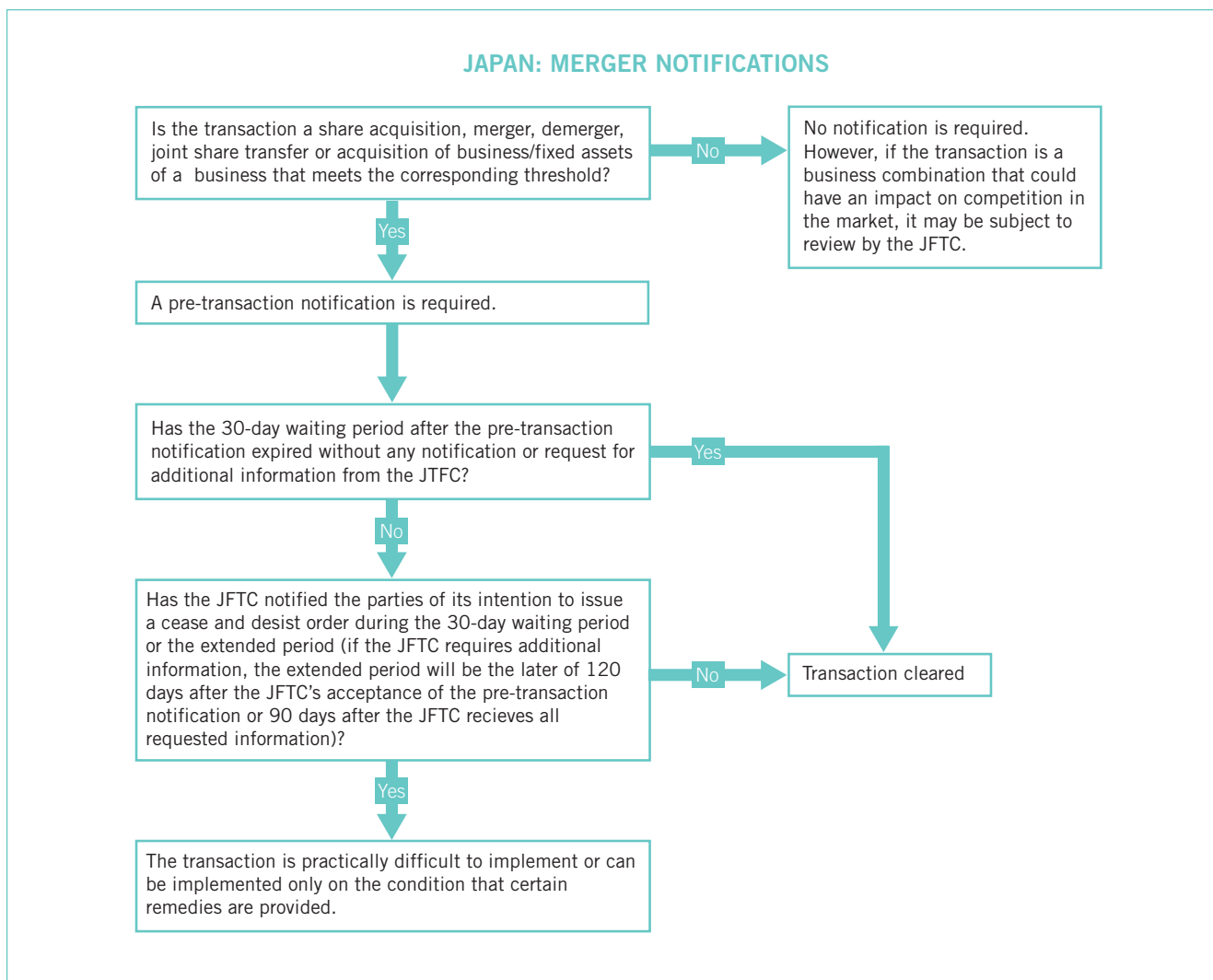
If prior consultation has been requested, the JFTC may publish its analysis regarding the transaction after a Phase I Review is completed. In addition, the JFTC will announce, after the parties disclose the transaction to the public, that the Phase II Review will be conducted in relation to the transaction, to seek third parties' opinion on the transaction (*Prior Consultation Guidelines*). After the Phase II Review is completed, the JFTC will publicly announce the results, excluding any parts containing the parties' business secrets.

In addition, the JFTC annually publishes its analysis of selected cases reviewed as part of prior consultations on its website, even if the Phase II Review was not conducted for those cases.

Under disclosure rules that apply to the securities market, any agreement entered into by a listed company in relation to corporate integration of a certain scale must be disclosed to the public soon after its execution, even if the agreement consists only of a letter of intent. Therefore, in practice, most cases of merger filings are already known to the public by the time the filing is made.

#### Procedural stage

See above, *Publicity*.



**Automatic confidentiality**

The JFTC and its staff members are subject to general confidentiality obligations under the AML (*Article 39*). Although there is no specific category of information that is automatically kept confidential under the AML, confidential information such as business secrets or personal information is generally protected.

Confidentiality on request. There is no statutory rule of confidentiality on request by parties. However, in practice, any party can request that certain information it provides to the JFTC be kept confidential.

*Rights of third parties*

**6. Can third parties be involved in the procedure and, if so, how? What rights do they have to make representations, access documents or be heard?**

**Prior notification**

There is no formal procedure which involves third parties. Third parties do not have any formal right to make representations, access documents or be heard. However, in practice, they may submit their opinion to the JFTC at any time on an informal basis.

**Prior consultation**

If the JFTC decides to conduct the Phase II Review, it will make a public announcement to that effect (*Prior Consultation Guidelines*). After the JFTC has made a public announcement, any person who holds an opinion in relation to the proposed transaction can, within 30 days of the date of the public announcement, submit their opinion in writing to the JFTC. The JFTC is not required to respond to third-party opinions received.

*Substantive test*

**7. What is the substantive test?**

The JFTC reviews whether individual transactions will substantially restrict competition in any particular field of trade.

**Safe harbour**

Guidelines to the application of the Antimonopoly Act concerning review of business combination (*Merger Guidelines*) set out safe harbour criteria. For example, the safe harbour criteria for a horizontal concentration are met if the:

- Herfindahl-Herschmann Index (HHI) after the transaction is not more than 1,500.

- HHI after the transaction is more than 1,500 but not more than 2,500, if the increase of the HHI is not more than 250.
- HHI after the transaction is more than 2,500, if the increase of the HHI is not more than 150.

In addition, the transaction is considered unlikely to substantially restrain competition if both the (*Merger Guidelines*):

- HHI after the transaction is not more than 2,500.
- Market share of the company group (not necessarily the same as the Corporate Group) after the transaction is not more than 35%.

HHI is the sum of the squared market share of each business operator in a particular market.

In relation to a vertical or conglomerate concentration, the Merger Guidelines set out specific safe harbour criteria.

#### Factors to be considered

Generally speaking, if the safe harbour criteria are not met, the following factors, among others, will be considered in a JFTC review as a substantive test:

- The position of the parties' company group and the competitive situation (for example, market share, ranking, competition between the parties in the past, and competitors' excess capacity).
- Barriers to entry in the relevant market.
- Pressure from an adjacent market.
- Pressure from users such as countervailing buyer power.
- Overall business capacity of the parties after the transaction.
- Efficiencies resulting from the transaction.
- Financial condition of the company group of the parties.

#### Remedies, penalties and appeal

#### 8. What remedies can be imposed as conditions of clearance to address competition concerns? At what stage of the procedure can they be offered and accepted?

The Merger Guidelines state that structural remedies such as transfers of businesses and dispositions of voting rights are preferable. However, behavioural remedies may instead be applied if the JFTC considers that they are sufficient to eliminate the threat of a substantial restraint on competition. Behavioural remedies include:

- Giving competitors trading (buying) rights at a price equivalent to the production cost of the goods.
- Measures to promote imports and market entry (for example, granting licences to the parties' patents under appropriate conditions to competitors).
- Other measures concerning behaviour of the parties (for example, in the case of creating a production joint venture (JV), blocking the exchange of information on sales of goods between the investing companies).

The parties can offer remedies at any stage of the JFTC's review and the JFTC would take these offers into consideration when making its determination.

#### 9. What are the penalties for:

- Failure to notify correctly?
- Implementation before approval or after prohibition of the merger?
- Failure to observe a decision of the regulator (including any remedial undertakings)?

##### Failure to notify correctly

Fines of up to JPY2 million can be imposed on the parties responsible for the filing and individuals within those parties (criminal sanctions).

With respect to mergers and company splits (demergers), the JFTC is entitled to file a lawsuit to nullify the transaction.

##### Implementation before approval or after prohibition

Implementation before expiration of the waiting period: this is the same as for failure to notify correctly (*see above*).

Implementation after prohibition: this is the same as for failure to observe a cease and desist order (*see below*).

##### Failure to observe

The JFTC can issue a cease and desist order, to order the parties to take necessary measures to eliminate actions violating the AML. If the parties fail to comply with this order, the penalties are as follows:

- Two years' imprisonment with work or fines of up to JPY3 million for an individual (criminal sanctions).
- Fines of up to JPY300 million for a corporate entity (criminal sanctions).
- A civil fine not exceeding JPY500,000 if no criminal sanctions are imposed.

#### 10. Is there a right of appeal against any decision and, if so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties or only the parties to the decision?

If a party objects to a JFTC cease and desist order, it can request a tribunal procedure at the JFTC within 60 days of its receipt of the order. If a party is dissatisfied with the decision made by the JFTC tribunal, it can appeal the decision to the Tokyo High Court within 30 days of the effective date of the tribunal's decision.

The tribunal procedures at the JFTC are currently being reformed (*see Question 39*).

### Automatic clearance of restrictive provisions

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**11. If a merger is cleared, are any restrictive provisions in the agreements automatically cleared? If they are not automatically cleared, how are they regulated?**

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The JFTC's clearance does not automatically clear any restrictive provisions in the agreements, as the JFTC does not normally review the provisions of the agreements. Therefore, the JFTC can review these agreements under the provisions regulating restrictive agreements, even after the merger is cleared (see *Question 13*).

### Specific industries

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**12. Are any industries specifically regulated?**

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The AML does not regulate any industries specifically. However, some industries, such as telecommunication, airline business and broadcasting, are subject to sector-specific regulations.

## RESTRICTIVE AGREEMENTS AND PRACTICES

### Scope of rules

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**13. Are restrictive agreements and practices regulated? If so, please give a broad overview of the substantive provisions and regulatory authority.**

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Restrictive agreements and practices are regulated under the AML. The substantive provisions are as follows:

- The prohibition of unreasonable restraint of trade (*Article 3*). In essence, this provision controls horizontal anti-competitive activities, such as cartels and bid-rigging.
- The prohibition of unfair trade practices (*Article 19*). Unfair trade practices are:
  - certain business activities defined in Article 2, Paragraph 9 of the AML; and
  - activities additionally included under this definition by the JFTC, for example, abuse of a superior bargaining position, trading on restrictive terms and unjust low-price sales.

Violation of the unfair trade practices prohibition requires a lower standard of anti-competitive effect than violation of unreasonable restraint of trade.

The relevant regulatory authority is the JFTC. The JFTC normally enforces the AML through administrative procedures, such as cease and desist orders and surcharge payment orders. In some cases, criminal and civil procedures may be instituted.

**14. Do the regulations only apply to formal agreements or can they apply to informal practices?**

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The regulations apply not only to formal agreements but also to informal practices without explicit agreement.

### Exemptions and exclusions

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**15. Are there any exemptions? If so, please provide details.**

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Statutory exemptions under the AML include:

- Use of intellectual property, such as patents, copyrights, trade marks and industrial designs (*Article 21*).
- Conduct by certain types of partnerships, except for conduct using unfair trade practices and price cartels (*Article 22*).
- Resale price maintenance in relation to the goods designated by the JFTC, such as books and newspapers (*Article 23*).

In addition, there are some exemptions under industry-specific laws, including:

- Insurance cartels.
- Rationalisation cartels in relation to the liquor tax.
- Certain cartels in the environmental and health industries.
- Transportation related cartels (under the Aviation Act, Marine Transportation Act, and Road Transportation Act).
- Export cartels.

**16. Are there any exclusions? If so, please provide details.**

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There are no statutory exclusions and no *de minimis* provisions excluding small agreements.

### Notification

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**17. Please give a broad overview of formal notification requirements. In particular:**

- **Is it necessary (or, if not necessary, possible/advisable) to notify to obtain an individual exemption or other clearance?**
- **Is it possible to obtain informal guidance before, or instead of, formal notification? If there is no formal notification procedure, can any type of informal guidance or opinion be obtained?**
- **Who should/can notify?**
- **To which authority should/can notification be made?**
- **What form of notification is used?**
- **Is there a filing fee? If so, how much?**

There is no formal notification process for restrictive agreements and practices.

The JFTC does have a formal prior consultation process, provided by its Consultation and Guidance Office of the Trade Practice Department. Under this, it provides its opinion on the individual case in writing. Consultation is under the JFTC. During the formal

prior consultation process, the name of the applicant and the contents of the consultation will be generally published. However, the JFTC accepts informal consultation on an oral and confidential basis. In practice, the informal consultations are more commonly used than the formal prior consultations.

### Investigations

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#### 18. Can investigations be started by:

- The regulator on its own initiative?
  - A third party by making a complaint?
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#### Regulators

The JFTC generally can start investigation on its own initiative, in response to leniency applications or in response to third-party reports.

#### Third parties

The JFTC accepts third-party reports of anti-competitive conduct through the Information Analysis Office, Investigation Bureau of the JFTC. It is also possible to report suspected anti-competitive acts of others through the JFTC's website.

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#### 19. What rights (if any) does a complainant or other third party have to make representations, access documents or be heard during the course of an investigation?

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Complainants and third parties have no right to access documents or to be heard during the course of an investigation. Statutory confidentiality requirements for the staff members of the JFTC generally prohibit the sharing of information with private parties.

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#### 20. Please set out the stages of the investigation and timetable.

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There are two types of investigation conducted by the JFTC:

- **Administrative investigations.** In many cases, an investigation starts with an inspection conducted on the premises of the suspected violators. Following such inspection, the JFTC investigation team will obtain information by various means, such as the requesting or seizing of documents, examining witnesses, or interrogatories. After the review of the collected materials, the JFTC conducts the pre-order hearing process, during which the suspected violators can examine the draft orders and submit their opinions with the relevant evidence. The JFTC then issues a cease and desist order and/or surcharge payment order.
- **Criminal investigations.** Criminal investigations start on the decision of the Commission to conduct a criminal investigation on a particular case. The Criminal Investigation Bureau is in charge of conducting investigations. The case team of the JFTC will report the result of the investigation to the Commission, and, if appropriate, the JFTC will bring charges through the Prosecutor General, who is the head of

the Prosecutor's Office. Thereafter, a local district prosecutor's office will conduct their own criminal investigation of the subject matter, to determine whether an indictment should be issued.

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#### 21. In relation to an investigation into a potentially restrictive agreement or practice:

- What details (if any) of the investigation are made public?
  - Is certain information automatically kept confidential?
  - Can the parties (or third parties) request that certain information be kept confidential?
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#### Publicity

The JFTC does not publish the details of an investigation concerning a potential violation, but acknowledges that it is investigating the alleged practice. Often, inspections (typically in the form of dawn raids) are the first events to be reported by the press.

#### Automatic confidentiality

See *Question 5, Automatic confidentiality*.

#### Confidentiality on request

There is no statutory rule of confidentiality on request by parties or third parties. However, in practice, any party can request that certain information it provides to the JFTC be kept confidential.

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#### 22. Please summarise any powers that the relevant regulator has to investigate potentially restrictive agreements or practices.

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The JFTC's powers during administrative and criminal investigations include (*Article 47, AML*):

- Inspection of premises.
  - Orders to respond to its interrogatories.
  - Orders to submit/present documents or other materials.
  - Conducting interviews of the relevant parties.
  - Orders to obtain appraisal by experts.
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#### 23. Can the regulator reach settlements with the parties without reaching an infringement decision (for example, by accepting binding or informal commitments)? If so, please summarise the procedure and the circumstances in which settlements can be reached.

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There is no formal settlement procedure that allows the JFTC to close any case without reaching an infringement decision. In practice, however, it is common that, after the JFTC starts an investigation, the suspected party voluntarily offers remedial measures in relation to the target agreements or practices. The JFTC may cease the investigation when it is satisfied with the offered measures.

### Penalties and enforcement

#### 24. What are the regulator's enforcement powers in relation to a prohibited restrictive agreement or practice? In particular:

- What orders can be made?
- What fines can be imposed on the participating companies? What are the consequences if they are not paid?
- Can personal liability, including fines, attach to individual directors or managers?
- Is it possible to obtain immunity/leniency from any fines?
- Can an entire agreement be declared void (that is, not only any restrictive provisions)?

#### Orders

The JFTC can issue:

- Cease and desist orders (that is, order the parties to stop the anti-competitive practices, or take any other action required).
- Surcharge payment orders.
- Informal warnings.

#### Fines

The JFTC can order the parties to pay administrative surcharges. In addition, in criminal procedures, the court can impose fines of up to JPY5 billion on a corporation per violation.

#### Personal liability

Personal liability is available, including fines of up to JPY5 million and/or imprisonment of up to five years.

#### Immunity/leniency

It is possible to obtain immunity from fines under the leniency programme. The first applicant is fully exempted from a surcharge payment order (not necessarily from a cease and desist order). The second applicant receives a 50% reduction of surcharges. The third, fourth and fifth applicants are given a 30% reduction of surcharges. The Ministry of Justice has confirmed that only the first applicant's officers/employees should be exempted from personal liability.

#### Impact on agreements

Agreements violating the AML are not automatically void. However, these agreements are often considered void under Article 90 of the Civil Code (Law No. 89 of 1896), which nullifies any agreement violating public order. Whether an entire agreement is void should be determined on a case-by-case basis.

### Third party damages claims and appeals

#### 25. Can third parties claim damages for losses suffered as a result of a prohibited restrictive agreement or practice? If so, please summarise any special procedures or rules that apply. Are class actions possible?

Third parties can claim damages for losses suffered as a result of a prohibited restrictive agreement or practice under Article 25

of the AML, or through a general tort claim under Article 709 of the Civil Code:

- **Article 25 Action.** Parties who are found to be engaged in, or a party to, unreasonable restraint of trade or other unfair trade practices are liable to indemnify those they have injured. The compensation is payable on a no-fault basis. The JFTC must issue either a cease and desist order, a surcharge payment order or a finalised tribunal judgment before taking an action at the Tokyo High Court.
- **General tort claims.** Persons who violate the rights of another must pay the damages resulting from their actions (*Article 709, Civil Code*). This is recognised to include anti-competitive acts.
- **Injunctive relief.** An individual claimant can, in addition to seeking damages, seek an injunction (provisional as well as permanent) against certain unfair trade practices that are prohibited under the AML (*Article 24, AML*) (see *Question 13*). An injunction aims to restore the injured party's position before the commencement of the violation.

Class actions are not available.

#### 26. Is there a right of appeal against any decision of the regulator and, if so, which decisions, to which body and within which time limits? Are rights of appeal available to third parties, or only to the parties to the agreement or practice?

The JFTC cease and desist orders and/or surcharge payment orders can be appealed to a JFTC tribunal within 60 days of the receipt of the order. The tribunal decision can be appealed to the Tokyo High Court within 30 days of the decision. However, the Tokyo High Court must follow the JFTC's findings of fact. The right of appeal to the JFTC tribunal is available only to the parties to whom the cease and desist order and/or the surcharge payment order are addressed, not to third parties.

Under the expected amendment of the AML in 2010, the JFTC tribunal may be abolished (see *Question 39*).

Court decisions relating to third party claims (see *Question 25*) can be appealed to the High Court or the Supreme Court.

## MONOPOLIES AND ABUSES OF MARKET POWER

### Scope of rules

#### 27. Are monopolies and abuses of market power regulated under civil and/or criminal law? If so, please give a broad overview of the substantive provisions and regulatory authority.

Monopolies and abuses of market power are regulated under the AML, which is enforced by the JFTC. Article 3 of the AML prohibits private monopolisation, which is defined as excluding and controlling behaviour that has the effect of substantially restraining competition.

Sanctions include:

- Cease and desist orders.





- Surcharge payment orders.
- No-fault compensation.

Criminal sanctions, although theoretically possible, are very unlikely.

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## 28. How is dominance/market power determined?

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The AML does not clearly define dominance or market power. In practice, precedent shows that dominance or market power is likely to be established if a violator has, or violators jointly have, 50% or more of market share in the relevant market. In October 2009, the JFTC issued the Guidelines for Exclusionary-type Private Monopolization, in which the JFTC recommended to investigate cases in which the suspected violators have over 50% of market share in the relevant market, causing a serious impact on public welfare. However, even if the suspected violator's market share is below 50%, the violator may be deemed to enjoy dominance or market power.

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## 29. Are there any broad categories of behaviour that may constitute abusive conduct?

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There are two categories of private monopolisation:

- **Exclusionary-type private monopolisation.** This relates to business activities, by which any entrepreneur excludes the business activities of other entrepreneurs, thereby substantially restraining competition in the relevant market, contrary to the public interest.
- **Controlling-type private monopolisation.** This relates to business activities, by which any entrepreneur controls the business activities of other entrepreneurs, thereby substantially restraining competition in the relevant market, contrary to the public interest.

There is often an overlap between business activities covered by unfair trade practices and abusive conduct under private monopolisation.

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### Exemptions and exclusions

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## 30. Are there any exclusions or exemptions?

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There are no statutory exclusions and no *de minimis* provisions excluding small agreements.

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### Notification

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**31. Is it necessary (or, if not necessary, possible/advisable) to notify the conduct to obtain clearance or (formal or informal) guidance from the regulator? If so, please set out briefly the procedure.**

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### Notification

There is no formal notification process for restrictive agreements and practices.

### Informal guidance

The JFTC does have a formal prior consultation process, under which it provides, in writing, its opinion on the individual case. During the formal prior consultation process, the name of the applicant and the contents of the consultation will be generally published. However, the JFTC accepts informal consultation on an oral and confidential basis. In practice, the informal consultations are more commonly used than the formal prior consultations.

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### Investigations

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**32. Where different than for restrictive agreements and practices, please explain how investigations are started, the procedures that apply, the rights of third parties, what details are made public and whether the regulator can accept commitments.**

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This is the same as for restrictive agreements (*see Questions 18 to 21 and 23*).

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**33. Please summarise the regulator's powers of investigation.**

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This is the same as for restrictive agreements (*see Question 22*).

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### Penalties and enforcement

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**34. What are the penalties for abuse of market power and what orders can the regulator make?**

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This is the same as for restrictive agreements (*see Question 24*).

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### Third party damages claims

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**35. Can third parties claim damages for losses suffered as a result of abuse of market power? If so, please summarise any special procedures or rules that apply. Are class actions possible?**

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This is the same as for restrictive agreements (*see Question 25*).

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## EU LAW

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**36. Are there any differences between the powers of the national regulatory authority(ies) and courts in relation to cases dealt with under Article 101 and/or Article 102 of the TFEU, and those dealt with only under national law?**

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Not applicable.

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## JOINT VENTURES

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**37. Please explain how joint ventures are analysed under competition law.**

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The AML may treat joint ventures as business combinations that are subject to merger control under the Merger Guidelines. The



JFTC will examine:

- Whether a relationship between the joint venture partners will be created, maintained and strengthened through the joint venture.
- The possibility of integration of the business activities of the joint venture partners.

There is no specific standard such as full function joint venture in Europe.

If a joint venture requires share acquisitions, transfer of businesses, or other business combinations that meet the thresholds for the filing requirements, relevant filings with the JFTC are required (see *Question 2*).

In addition, some joint ventures formed between competitors may be considered unlawful restrictive agreements or practices, even if such joint ventures are not treated as business combinations.

## INTER-AGENCY CO-OPERATION

**38. Does the regulatory authority(ies) in your jurisdiction cooperate with regulatory authorities in other jurisdictions in relation to infringements of competition law? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information)?**

The JFTC co-operates with competition authorities in other jurisdictions through:

- Formal co-operation agreements (for example, with the US, EU and Canada).
- Economic Partnership Agreements (for example, with Singapore, Malaysia, Thailand, Philippines, the Association of Southeast Asian Nations (ASEAN), Vietnam, Mexico, Chile and Switzerland).
- Information exchanges via informal communication channels (for example, with the US, the European Commission and Korea).

In addition, the JFTC often conducts joint investigations with the competition authorities in the US, EU and Korea.

Article 43-2 of the AML (which was enacted through the amendments of the AML in 2009) authorises the JFTC to exchange information with competition authorities in other jurisdictions, unless such exchanges undermine the national interest.

## PROPOSALS FOR REFORM

**39. Please summarise any proposals for reform.**

The expected 2010 amendment to the AML may abolish the JFTC tribunal system. If the amendment is passed, JFTC orders will be challenged directly (without the JFTC tribunal) at local

## THE REGULATORY AUTHORITY

### Japan Fair Trade Commission (JFTC)

**Head.** Kazuhiko Takeshima

**Contact details.** 6-B Building, Chuo Godo Chosha  
1-1-1, Kasumigaseki  
Chiyoda-ku  
Tokyo 100-8987  
Japan  
**T** 81 3 3581 1988 (International Affairs Division)  
**F** 81 3 3581 1944  
**E** [intnldiv@jftc.go.jp](mailto:intnldiv@jftc.go.jp)  
**W** [www.jftc.go.jp/e-page/index.html](http://www.jftc.go.jp/e-page/index.html)

**Outline structure.** The JFTC comprises:

- Commission. This is the decision making body, which consists of four commissioners, including the Chairman. By law there must be five commissioners but one commissioner is being appointed.
- General Secretariat.
- Tribunal body, which consists of hearing examiners.
- Economic Affairs Bureau.
- Investigation Bureau.
- Local offices.

**Responsibilities.** The JFTC is responsible for:

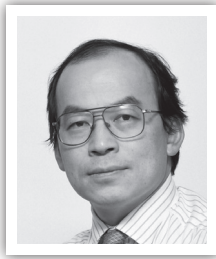
- Enforcement of laws, including the AML, as the law enforcement agency.
- Positive deployment of competition policies as a policy enforcement agency.

**Procedure for obtaining documents.** Most of the JFTC's statutes, guidelines, policies, official decisions and other documents are available on its website. It is also possible to obtain the JFTC internal documents under the Public Information Disclosure Act of Japan.

district courts, and not only at the Tokyo High Court, as is currently the case. In addition, courts would not have to follow the JFTC's findings of fact (see *Question 26*).

The amendment was submitted to the National Diet of Japan (Diet) in March 2010. It was then withdrawn because it was not adopted by the end of the Diet session. The Diet is currently considering the amendment again. The amendment may be implemented in autumn 2011 or spring 2012.

## CONTRIBUTOR DETAILS



### KOZO KAWAI

*Nishimura & Asahi*

T +81 3 5562 8539

F +81 3 5561 9711/12/13/14

E [k\\_kawai@jurists.co.jp](mailto:k_kawai@jurists.co.jp)

W [www.jurists.co.jp/en/](http://www.jurists.co.jp/en/)



### MADOKA SHIMADA

*Nishimura & Asahi*

T +81 3 5562 8941

F +81 3 5561 9711/12/13/14

E [m\\_shimada@jurists.co.jp](mailto:m_shimada@jurists.co.jp)

W [www.jurists.co.jp/en/](http://www.jurists.co.jp/en/)

**Qualified.** Japan, 1988 (voluntarily deregistered in 1995 and re-admitted in 1997)

**Areas of practice.** Competition law (international and domestic); international trade.

#### Recent transactions

- Representing Japanese companies who filed the first and second leniency applications with the JFTC.
- Representing foreign companies in connection with the first international cartel cases ever handled by the JFTC.
- In relation to merger regulation, representing a group of Japanese steel mills and strongly opposing the currently proposed production joint venture of BHP Billiton and Rio Tinto.

**Qualified.** Japan, 1999; New York, 2005

**Areas of practice.** Competition law; cross-border transactions.

#### Recent transactions

- Representing foreign and domestic clients in international cartels, such as alleged cartels on airline surcharges, air cargo forwarders, marine hoses and TFT-LCDs.
- Representing clients in international merger control cases.



### MIHOKO HORI

*Nishimura & Asahi*

T +81 3 5562 9972

F +81 3 5561 9711/12/13/14

E [mi\\_hori@jurists.co.jp](mailto:mi_hori@jurists.co.jp)

W [www.jurists.co.jp/en/](http://www.jurists.co.jp/en/)

**Qualified.** Japan, 2007

**Areas of practice.** Competition law; litigation.

#### Recent transactions

Representing foreign and domestic clients in international merger control cases.