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Merger Control Regulations in Japan

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A. Introduction

Over 130 countries across the world have merger control regulations. A majority of them have introduced the European Union's model system where a filing is required if a change in the "control" of a target company will occur. However, the Japanese merger control regulations do not use the concept of "control" as the threshold for the filing requirement. Filing is mandatory in certain types of transactions if they meet certain thresholds. This article will provide an overview of the merger control regulations in Japan.

B. Thresholds for Notification

The Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (the "**Act**") regulates certain types of transactions, such as share acquisitions, joint share transfers, statutory mergers, statutory demergers, business transfers, and interlocking directorships. Such transactions are prohibited if they will substantially restrain competition. Except for interlocking directorships, all these transactions are subject to a prior notification requirement if they meet the relevant thresholds. The Japan Fair Trade Commission (the "**JFTC**") has the authority to review transactions and enforce the Act.

The filing thresholds vary depending on the structure of the transaction as explained below.

1. Share acquisition

a. The percentage of voting rights of the shares held by the acquiring party as a group in the issuing company (i.e., the target) will exceed 20% or 50% of the outstanding voting rights of the target as a consequence of the share acquisition;
b. The Japanese turnover of the acquiring party as a group exceeds JPY 20 billion; and
c. The Japanese turnover of the target and its subsidiaries exceeds JPY 5 billion.[1]

2. Joint share transfer

a. The Japanese turnover of one company as a group exceeds JPY 20 billion; and
b. The Japanese turnover of the other company as a group exceeds JPY 5 billion.[2]

3. Statutory merger/demerger

a. The Japanese turnover of one of the parties as a group exceeds JPY 20 billion; and
b. The Japanese turnover of the other party as a group exceeds JPY 5 billion.[3]

1. The Act, art.10, para. 2.
2. *Id.*, art. 15-3, para. 2.
3. *Id.*, art. 15, para. 2, and art. 15-2, para. 2.

Depending on the type of demerger, there are more detailed rules to be observed.[4]

4. Business transfer

a. The Japanese turnover of the acquiring party as a group exceeds JPY 20 billion; and

b. The Japanese turnover relating to the acquired business or the fixed assets thereof exceeds JPY 3 billion.[5]

5. Voluntary consultation with the JFTC

Even if a transaction does not meet any of the above-mentioned thresholds, parties are encouraged to consult with the JFTC to avoid an order for a post-transaction remedy if their transaction will substantially restrain competition in the relevant market. The JFTC's Policy Concerning Procedures of Review of Business Combination was revised in December 2019. The revised policy makes it clear that the JFTC may request parties to submit relevant documents for it to review the impact of a transaction on competition when the total consideration for the acquisition is large and the transaction is expected to affect domestic consumers, even if the turnover of the acquired party does not meet the applicable threshold. This revision intends to address the issue of so-called "killer acquisitions," where big companies would acquire start-up companies whose turnover is small to pre-empt future competition. The revised policy provides the following thresholds for a voluntary consultation:

a. The total consideration for the transaction exceeds JPY 40 billion; and

b. The transaction would likely affect consumers in Japan, including any of the following cases where: (i) the business base, R&D base or the like of the acquired party is located in Japan, (ii) the acquired party conducts sales activities that target consumers in Japan, such as using a website or brochure in Japanese, or (iii) the Japanese turnover of the acquired party exceeds JPY 100 million.

C. Procedure and Timetable

1. Phase I

A Phase I review will be initiated when the JFTC receives a notification form. The duration of this review is 30 calendar days (i.e., waiting period). Parties may not consummate the transaction until the expiration of the 30-day period, however, the JFTC may shorten the said period upon a party's request if it deems it appropriate.[6] At the end of Phase I, the JFTC may (a) grant the clearance,[7] or (b) request the submission of additional information and move on to the Phase II review.[8]

2. Phase II

If the JFTC requests in writing the submission of additional information, then the review process will move on to Phase II. The period for this review is 120 days after the date of receipt by the JFTC of the notification or 90 days after the date of its receipt of all the additional information requested, whichever is later.[9] As a result of the Phase II review, the JFTC may (a) grant the clearance,[10] or (b) provide prior notice of a cease and desist order if the transaction will substantially restrain competition in the relevant market.[11]

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4. *Id.*, art. 15-2, para. 2.
5. *Id.*, art.16, para. 2.
6. *Id.*, art. 10, para. 8, art. 15, para. 3, art. 15-2, para. 4, art. 15-3, para. 3, and art. 16, para. 3.
7. Ordinance Regarding Articles 9 to 16 of the Antimonopoly Act, as amended (the "**Ordinance**"), art. 9.
8. *Id.* art. 8, para. 1.
9. The Act, art. 10, para. 9, art. 15, para. 3, art. 15-2, para. 4, art. 15-3, para. 3, and art. 16, para. 3.
10. The Ordinance, art. 9.
11. The Act, art. 10, para. 9, art. 15, para. 3, art. 15-2, para. 4, art. 15-3, para. 3, and art. 16, para. 3.

3. Pre-notification consultation

Consultation with the JFTC prior to notification is a voluntary procedure. In practice, it is common for a party to contact the JFTC prior to notification (i.e., prior to Phase I) to discuss potential issues with it, especially in difficult cases. A party may submit the draft notification form and other materials to the JFTC for its review. Consultation prior to notification is often used as a way to avoid a Phase II review. In many difficult cases, prior to notification, parties would submit sufficient information that would be requested in Phase II. A party would then file a formal notification form to initiate Phase I once it has reason to believe from the pre-notification consultation that the JFTC will grant the clearance (or a conditional clearance with remedies).

D. Substantive Test

The Act prohibits transactions that will substantially restrain competition in the relevant market. The JFTC has issued "Guidelines to the Application of the Act Concerning Review of Business Combinations." According to the guidelines, the JFTC will take into account the following factors in determining whether a transaction will substantially restrain competition in the market:

1. The market position of the parties and their competitors, including market shares, rankings, excess capacity for supply, and degree of product differentiation;
2. Import barriers and potential for entry by imports;
3. Entry barriers and potential for entry;
4. Competitive pressure from neighbouring markets;
5. Competitive pressure from customers;
6. Overall business capabilities of the parties;
7. Efficiencies; and
8. The financial condition of the parties.

The JFTC has not issued any cease and desist order to formally ban any transaction. In practice, whenever the JFTC identifies competition concerns, the parties would negotiate with it the remedies that would address the subject issues. If the proposed remedies appear to be adequate, then the JFTC would grant the clearance subject to the condition that such remedies will be implemented. If the parties are unable to offer sufficient remedies, then they would just voluntarily withdraw their notification.

E. Conclusion

The annual turnover for the filing thresholds in Japan is relatively low compared to other jurisdictions. In addition, even the acquisition of a minority stake (i.e., over 20%) in a company may require a filing. These points are important to note because any transaction that meets the filing thresholds requires the filing of a notification and closing of such transaction is prohibited during the 30-day waiting period. Therefore, it would be advisable for parties to pay attention to the merger control regulations in Japan when planning a transaction with a target that generates any Japanese turnover or would likely affect domestic consumers.

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Legal Protection of Big Data in Japan

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A. Introduction

Today, the importance of information as an asset is increasing due to the evolution of digital network technology and its widespread use in business. The increase in the number of work-from-home situations triggered by the pandemic has also made the value of information for individuals even greater. In particular, among the different types of information, the group of data known as "big data" is becoming a source of value for companies given the remarkable development of IoT, the means of collecting data, and AI, which analyzes and utilizes such data.

The purpose of this article is to give an overview of the legal protection of big data in Japan in light of the increasing value thereof for international use. This article will first discuss the definition and key characteristics of big data, followed by a description of the two types of legal protection thereof in Japan under the Copyright Act[1] and the Unfair Competition Prevention Act.[2] As for the protection under the Unfair Competition Prevention Act, a draft revision of its related guidelines was published on March 23, 2022,[3] and the latest discussions thereon will be presented in this article.

B. Definition and Key Characteristics of Big Data

While the term "big data" has come to be used in everyday conversation, there is no clear, universal definition thereof. Big data, stated abstractly, refers to a huge group of data composed of various types and formats of data, including unstructured data. Notably, Gartner, Inc., a major U.S. IT research firm, defines big data as having the following "Three Vs" as its key characteristics:[4]

> Big data is high-volume, high-velocity and/or high-variety information assets that demand cost-effective, innovative forms of information processing that enable enhanced insight, decision making, and process automation.

In its "White Paper on Information and Communications (2017 edition)," the Ministry of Internal Affairs and Communications classifies big data into the following

1. Chosakukenho [Copyright Act], Act No. 48 of May 6, 1970.
2. Fuseikyosoboshiho [Unfair Competition Prevention Act], Act No. 47 of May 19, 1993.
3. Ministry of Economy, Trade and Industry ("**METI**"), "gentei teikyo data ni kansuru shishin (kaitei-an) [Guidelines on Shared Data with Limited Access (revised draft)] (2022) (available at https://www.meti.go.jp/shingikai/sankoshin/chiteki_zaisan/fusei_kyoso/pdf/016_04_00.pdf (in Japanese)). Although this draft has not yet been finalized, it is useful in understanding the direction of the latest discussions.
4. "Big Data," *Gartner Glossary*, Gartner, Inc. (2022) (available at https://www.gartner.com/en/information-technology/glossary/big-data).

four categories, focusing on the entities that generate the data:[5]

1. "Open data" provided by national and local governments;
2. Digitalizing and structuralizing knowhow;
3. M2M (Machine to Machine) streaming data; and
4. "Personal data" involving attributes.

With reference to the above categories, in this article, big data will be defined as the data generated by governments, companies or individuals that are difficult to manage with ordinary software because of their high-volume, high-velocity or high-variety.

C. Legal Protection of Big Data in Japan

1. Two types of protection

There are two ways to legally protect big data in Japan. First is the method of protecting data as if it were a physical object by giving it the effects of ownership. This is called the rights-granting type of protection. In contrast, the second way to protect data is by regulating the conduct related to such data rather than protecting the data itself by creating rights to it. This is called the rule-of-conduct type of protection.

In Japan, the Copyright Act protects data by granting copyrights to databases as a form of the rights-granting type of protection. In addition, the Unfair Competition Prevention Act regulates unfair acts related to certain data called "shared data with limited access" as a rule-of-conduct type of protection.

2. Data protection under the Copyright Act

The Copyright Act defines databases as follows and recognizes the copyrightability of certain databases:

> "Database" means an aggregate of data such as articles, numerical values, or diagrams, which is systematically constructed so that such data can be searched with a computer.[6]
>
> A database that, by reason of the selection or systematic construction of information contained therein, constitutes a creation, is protected as a work.[7]

Therefore, for data to be protected as a copyrightable work in Japan, (a) the data must be organized in such a way that it can be retrieved by a computer, and (b) the selection or systematic organization of the information must be creative.

In one case, the court recognized the copyrightability of a database that classified the telephone number information of businesses nationwide based on occupation.[8] In this case, the court affirmed the copyrightability of the database on the grounds that its occupational classification system was structured to cover all occupations from the viewpoint of search convenience, and that it was devised uniquely by the plaintiff.[9]

In another case, the court recognized the copyrightability of a database containing information such as tourist facility data, accommodation data, and similar data, which was used by a travel agency to

5. At 12-13 (available at https://www.soumu.go.jp/johotsusintokei/whitepaper/eng/WP2017/chapter-2.pdf).
6. Copyright Act, art. 2, para. 1, item 10-3.
7. *Id.*, art. 12-2, para. 1.
8. *See* Tokyo District Court, March 17, 2000, Hei 8 (wa) No. 9325, Saibansho Web, https://www.courts.go.jp/app/files/hanrei_jp/286/013286_hanrei.pdf (in Japanese).
9. *See* Id., at 6.
10. *See* IP High Court, January 19, 2016, Hei 26 (ne) No. 10038, Saibansho Web, https://www.courts.go.jp/app/files/hanrei_jp/639/085639_hanrei.pdf (in Japanese).

prepare a process chart.[10] In the decision, the court interpreted the creativity requirement in item (b) above as follows:

> If there is a range of choices in the selection or systematic composition of information, and if the selection or systematic composition of information in a particular database shows some individuality of the creator, then it can be understood that the database may be recognized as having creativity through the selection or systematic composition of information, as if the creator's thoughts or feelings were transferred during the production process and his/her thoughts or feelings were expressed in a creative manner.[11]

On the other hand, the court denied the copyrightability of a database that collected information on actual automobiles in Japan on the grounds that the automobile data items were only arranged in order from the oldest to newest automobiles, without any further classification, and that such classification had been adopted by other companies.[12]

In light of these court cases, it can be said that a simple accumulation of raw data will not be protected by the Copyright Act, and that for big data to be protected as a copyrighted work, it must be systematized in some creative or innovative way.

3. Data protection under the Unfair Competition Prevention Act

The Unfair Competition Prevention Act defines certain data as "shared data with limited access," as further described below, and regulates certain acts pertaining to such data as acts of unfair competition. The said Act does not apply to acts pertaining to information that is identical to that made available to the public free of charge.[13]

> "Shared data with limited access" as used in this Act means technical or business information that is accumulated to a significant extent and is managed by electronic or magnetic means (meaning an electronic form, magnetic form, or any other form that is impossible to perceive through the human senses alone; ...) as information to be provided to specific persons on a regular basis (excluding information that is kept secret).[14]

According to the above provision, the following six requirements must be met for certain data to qualify as shared data with limited access:

a. The data is provided to a specific person on a regular basis;
b. The data is accumulated to a significant extent by electronic or magnetic means;
c. The data is managed by electronic or magnetic means;
d. It is technical or business data;
e. The data is not kept secret; and
f. The data is not the same as any information that has been made available to the public without compensation.

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11. *Id.*, at 37.
12. *See* Tokyo District Court, May 25, 2001, Hei 8 (wa) No. 10047, Saibansho Web, https://www.courts.go.jp/app/files/hanrei_jp/333/034333_hanrei.pdf (in Japanese).
13. Unfair Competition Prevention Act, art. 19, para. 1, item 8-Ro.
14. *Id.*, art. 2, para. 7.
15. METI, "gentei teikyo data ni kansuru shishin" [Guidelines on Shared Data with Limited Access] (2019) (available at https://www.meti.go.jp/english/policy/economy/chizai/chiteki/pdf/guidelines_on_shared_data_with_limited_access.pdf).

METI established the Guidelines on Shared Data with Limited Access on January 23, 2019[15] to interpret the above requirements. It also published its draft revisions on March 23, 2022.[16] In the proposed revisions, the rationale for the requirements was further clarified. To introduce some important points in the draft guidelines, first, the term "provided" in the first requirement includes not only the case of an actual provision of data but also covers cases where an intention to provide the data is acknowledged. This requirement is satisfied, for example, when the data holder allows customers to access data in its cloud. As to the second requirement, satisfaction of the "significant extent" requirement depends on the nature of the subject data. As an example, in the case of a business operator that accumulates cell phone location information based on a nationwide area and then extracts and sells such information in units of specific areas, it has been pointed out that the data for such specific areas is highly likely to satisfy this requirement. In the third requirement, the fact that the data is "managed" is required to ensure that third parties can foresee that such data may constitute shared data with limited access. Thus, measures such as access restrictions must be in place so that third parties can become aware of the data provider's intention to control the data. The fourth requirement ensures that information that is illegal or offensive to public order and morals, such as child pornography and information about prohibited drugs, will be excluded from protection. The fifth requirement is designed to avoid duplication of protection with "trade secrets" that are already protected by the Unfair Competition Prevention Act.

When data constitutes shared data with limited access, the following acts with respect to such data are regulated as acts of unfair competition:[17]

a. Obtaining, using or disclosing the data through theft, fraud, threats or other wrongful means;
b. Use or disclosure of the data by a person who has received the data from the data holder for the purpose of obtaining unjust profits or causing damage to the holder (however, with respect to the act of use, it is limited to one in violation of a duty relating to the management of the data);
c. Obtaining, using or disclosing the data with knowledge that the data has been unlawfully obtained or unlawfully disclosed; and
d. Disclosure of the data by a person who had bona fide intentions at the time of acquisition of the data, but who learned thereafter that an act of unlawful acquisition or disclosure had intervened (excluding, however, acts of disclosure within the scope of the title acquired to the data).

A person whose business interests are infringed by any of the above-mentioned acts may file a claim for injunction or damages against the offender. The draft revisions to the guidelines also refer to the relationship between a claimant and a platform provider. For example, if a platform provider played a role in providing the environment that mediated and facilitated the provision of data by a data holder to an acquirer, then the platform provider can also be a claimant because it is the entity that stored and managed the data electromagnetically.

D. Conclusion

As mentioned above, big data in Japan is mainly protected by two laws with each of them seeking to provide a more appropriate form of protection as they are supplemented by the accumulation of court precedents and the formulation of guidelines. However, striking a balance between the protection of

16. *See* https://www.meti.go.jp/shingikai/sankoshin/chiteki_zaisan/fusei_kyoso/pdf/016_04_00.pdf (in Japanese).
17. Unfair Competition Prevention Act, art. 2, para. 1, items 11-16.

investments in data collection and the sharing of information can still be difficult depending on the circumstances of each case. At any rate, since Japan was the first country to introduce the rule-of-conduct type of protection of big data under the Unfair Competition Prevention Act, the accumulation of cases in Japan is expected to provide a valuable source of examples of rule-of-conduct type of protection that will benefit the international community.

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