



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

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.