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Japan
MERGER CONTROL

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This country-specific Q&A provides an overview of merger control laws and regulations applicable in Japan.

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JAPAN
MERGER CONTROL

1. Overview

The Japan Fair Trade Commission (JFTC) has authority to review transactions, whether notifiable or non-notifiable, and enforces merger controls under the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (the Antimonopoly Act herein) and its associated regulations.

Under the Antimonopoly Act, premerger notification is mandatory in certain types of transactions if they meet certain filing thresholds. The thresholds are articulated based on domestic sales and/or voting rights ratio, not either domestic assets or market share. The thresholds are not subject to adjustment. The notifiable transactions are prohibited if they would substantially restrain competition in the relevant market. Also, even non-notifiable transactions which would substantially restrain competition in the relevant market are prohibited under the Antimonopoly Act.

The merger review process by the JFTC is divided into the following two stages: Phase I and Phase II. The JFTC reviews transactions within thirty 30 days after the date of the effective notification (Phase I). Parties may not close their transactions until the 30 day waiting period has expired or the JFTC has granted early termination of the waiting period. If the JFTC thinks that further review is necessary to determine whether a transaction would substantially restrain competition and requests the parties to submit necessary reports during Phase I, the JFTC will open the Phase II review. The in-depth review in Phase II is 120 days from the date of the effective notification or 90 days from the date of all requested reports being received by the JFTC, whichever is later.

2. Is notification compulsory or voluntary?

Pre-notification is compulsory in certain types of transactions (for details, see A6) if transactions meet the filing thresholds.

In addition, following the recent significant competitive concerns raised by the so-called “killer acquisitions,” the JFTC revised its procedure guideline on merger control in December 2019 and therein recommends parties to file voluntary consultations if the following conditions are met, even if the transaction does not meet the filing thresholds.

i. the total consideration for the transaction exceeds JPY 40 billion (approximately USD 364 million）and
ii. the transaction would be expected to affect consumers in Japan, including any of the following cases where: (a) the business base, R&D base, or the like of the acquired company is located in Japan, (b) the acquired company conducts sales activities targeting consumers in Japan, such as using a website or filers in Japanese, or (c) the acquired company’s total domestic sales exceed JPY 100 million (approximately USD 0.91 million).

3. Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?

Parties are prohibited from closing the notifiable transactions within the 30 calendar day waiting period after the date of the effective notification unless they obtain a shortening of the waiting period from the JFTC (please see A20 below).

After the lapse of the waiting period, parties may close the notifiable transactions theoretically even if the JFTC has not yet granted clearance. However, the JFTC has the power to issue a cease and desist order after the fact if it finds the transaction would substantially lessen completion in the relevant market. In addition, the JFTC may file a suit seeking a preliminary injunction if it deems it necessary. Therefore, as a practical matter, parties usually close transactions after obtaining clearance by the JFTC.

It is also possible to carve out a portion of the transaction, if such portion might affect the Japanese

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market and can be removed from the whole of the transaction.

4. What types of transaction are notifiable or reviewable and what is the test for control?

Change of "control" itself is not a filing threshold.

The concept of "control" is, however, relevant in deciding the scope of a company's group and thereby calculating its consolidated sales. A company's group consists of the company, its subsidiaries, its ultimate parent company, and subsidiaries of the ultimate parent company. Under the Antimonopoly Act, "subsidiaries" means companies the management of which are substantially controlled by the other company through, among other things, holding a majority of the voting rights, holding a majority of the board seats, or establishing a contractual controlling relationship.

5. In which circumstances is an acquisition of a minority interest notifiable or reviewable

Under the Antimonopoly Act, a share acquisition is required to be pre-notified by the acquiring company if the acquiring company's group will hold, in total, either over 20 percent or 50 percent of all voting rights of the target company after the share acquisition and it meets the other sales thresholds. As such, an acquisition of a minority interest may need to be pre-reported if it meets the above conditions.

6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)? Are there different thresholds that apply to particular sectors?

The Antimonopoly Act requires five types of transactions to be pre-notified (share acquisitions, mergers, joint share transfer, business transfer, and company split) and sets forth different pre-filing thresholds for each of them. Due to this categorical approach, it is sometimes practically difficult to determine whether transactions (particularly M&A using a complicated deal structure) could fall into any of them. It is also possible for certain transactions to be regarded simultaneously as two of such types.

The "domestic sales" referenced below are calculated based on the last fiscal year's financial record.

- Share acquisitions

Pre-notification is required if the following three conditions are met:

i. the consolidated domestic sales of the acquiring company's group exceed JPY 20 billion (approximately USD 182 million),
ii. the total domestic sales of the acquired company and its subsidiaries exceed JPY 5 billion (approximately USD 46 million), and
iii. the acquiring company's group will hold, in total, either over 20 percent or 50 percent of all voting rights of the acquired company after the share acquisition (in other words, pre-notification will be required once upon exceeding 20 percent and once upon exceeding 50 percent).

- Mergers

Pre-notification is required if the following two conditions are met:

i. the consolidated domestic sales of any of the merging companies' groups exceed JPY 20 billion (approximately USD 182 million) and
ii. the consolidated domestic sales of any of the other merging companies' groups exceed JPY 5 billion (approximately USD 46 million).

- Joint share transfer

A joint share transfer is a type of share transfer where two or more companies transfer all of their outstanding shares to a new jointly-owned company which is established upon the closing, and at the same time the new company issues its new shares to the shareholders of the existing companies. For joint share transfers, pre-notification is required if the following two conditions are met:

i. the consolidated domestic sales of any of the companies' groups exceed JPY 20 billion (approximately USD 182 million) and
ii. the consolidated domestic sales of any of the other companies' groups exceed JPY 5 billion (approximately USD 46 million).

- Business transfer and fixed business asset transfer

For business transfers and fixed business asset transfers, pre-notification is required if the following two conditions are met:

i. the consolidated domestic sales of the transferring company's group exceed JPY 20

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billion (approximately USD 182 million) and
ii. the domestic sales generated from all or a substantial portion of the business or fixed business asset operated or held by the transferring company exceed JPY 3 billion (approximately USD 27 million).

- Company splits

The Antimonopoly Act sets froth different filing thresholds for two types of company splits: joint incorporation-type company splits and absorption-type company splits. The joint incorporation-type company split is a type of company split where two or more companies transfer each of the relevant assets and liabilities to a new jointly-owned company which is established upon the closing. The absorption-type company split is a type of company split where a company transfers the relevant assets and liabilities to an existing company. For your reference, please see charts explaining these two types of company splits below.
https://www.jftc.go.jp/en/policy_enforcement/mergers/index_files/ThresholdforNotification.pdf

For joint incorporation-type company splits, pre-notification is required if any of the following conditions is met.

i. the consolidated domestic sales of the group of any of the companies splitting all of its business exceed JPY 20 billion (approximately USD 182 million) and the consolidated domestic sales of any of the other groups of companies splitting all of its business exceed JPY 5 billion (approximately USD 46 million),
ii. the consolidated domestic sales of the group of any of the companies splitting all of its business exceed JPY 20 billion (approximately USD 182 million) and the domestic sales generated from a substantial portion of the business being split by any of the other companies exceed JPY 3 billion (approximately USD 27 million),
iii. the consolidated domestic sales of the group of any of the companies splitting all of its business exceed JPY 5 billion (approximately USD 46 million) and the domestic sales generated from a substantial portion of the business being split by any of the other companies exceed JPY 10 billion (approximately USD 92 million), or
iv. the domestic sales generated from a substantial portion of the business being split by any of the companies exceed JPY 10 billion (approximately USD 92 million) and the domestic sales generated from all or a portion of the business being split by any of the other companies exceed JPY 3 billion (approximately USD 27 million).

For absorption-type company splits, pre-notification is required if any of the following conditions is met.

i. the consolidated domestic sales of the group of any of the companies splitting all of its business exceed JPY 20 billion (approximately USD 182 million) and the consolidated domestic sales of the absorbing company's group exceed JPY 5 billion (approximately USD 46 million),
ii. the consolidated domestic sales of any of the company groups splitting all of its business exceed JPY 5 billion (approximately USD 46 million) and the consolidated domestic sales of the absorbing company's group exceed JPY 20 billion (approximately USD 182 million),
iii. the domestic sales generated from a substantial portion of the business being split by any of the companies' groups exceed JPY 10 billion (approximately USD 92 million) and the consolidated domestic sales of the absorbing company's group exceed JPY 5 billion (approximately USD 46 million), or
iv. the domestic sales generated from a substantial portion of the business being split by any of the companies' groups exceed JPY 3 billion (approximately USD 27 million) and the consolidated domestic sales of the absorbing company's group exceed JPY 20 billion (approximately USD 182 million).

7. How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?

Basically, thresholds based on "domestic sales" are adopted. The "domestic sales" consists of the following two types of sales: (i) sales of goods or services to customers or business entities located in Japan (excluding sales of goods to such business entities when sellers recognize, at the time of executing the contract, that the sold goods will be exported) and (ii) sales of goods to business entities located outside Japan when sellers recognize, at the time of executing the contract, that the sold goods will be imported to Japan. Also, the "domestic sales" are calculated based on the last fiscal year.

8. Is there a particular exchange rate

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required to be used to convert turnover and asset values?

Domestic sales booked in a foreign currency should be converted to Japanese yen (JPY) according to the exchange rate used in the company's financial statements or (if there is no such exchange rate) the average publically posted exchange rate, such as the telegraphic transfer middle rate of a major bank.

9. In which circumstances are joint ventures notifiable or reviewable (both new joint ventures and acquisitions of joint control over an existing business)?

There is no specific rule for joint ventures under the Antimonopoly Act and therefore the same filing thresholds described above apply to joint ventures. For instance, when two companies jointly establish a new company by holding 50 percent of its shares respectively, it will not require pre-filing because the new company (the acquired company) did not generate sales in the last fiscal year and thereby it does not meet the filing thresholds for share acquisitions. However, when two companies transfer their businesses to the new company at the time of establishing it, the share acquisition may meet the filing thresholds for share acquisitions because the sales generated from the transferred businesses in the last fiscal year can be regarded as the new company's sales in the last fiscal year.

10. Are there any circumstances in which different stages of the same, overall transaction are separately notifiable or reviewable?

N/A

11. How do the thresholds apply to "foreign-to-foreign" mergers and transactions involving a target /joint venture with no nexus to the jurisdiction?

No.

12. For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not notify?

Not applicable.

13. What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies? Are there different tests that apply to particular sectors?

The Antimonopoly Act prohibits transactions, whether notifiable or not, if they would substantially lessen competition in the relevant market. The "Guideline to Application of the Antimonopoly Act Concerning Review of Business Combination" (last revised on December 17, 2019) describes the JFTC's framework to assess such substantial restraint of competition by providing, among other things, how to define the relevant market and what theories of harm it will look at in three types of business combinations (horizontal, vertical and conglomerate business combinations). Also, the JFTC will analyze such substantial restraint of competition from two perspectives (unilateral effects and coordinated effects) as regulatory agencies in many other jurisdictions do.

The above guideline in English can be found at the JFTC's website.

Are there different tests that apply to particular sectors?

There are special rules that apply to the banking, insurance, and regional bus transportation service sectors.

A bank or an insurance company may not acquire or hold over 5 percent or 10 percent of all voting rights of domestic companies respectively unless such company obtains pre-approval of the JFTC, or one of the exceptions outlined in the Antimonopoly Act is applicable.

In addition, temporary legislation with a 10-year duration came into effect for mergers between regional banks and those between regional bus transportation service companies on November 27, 2020. This temporary legislation exempts such mergers from merger review by the JFTC under the Antimonopoly Act, subject to pre-approval by an applicable Minister overseeing the sector. Such applicable Minister is required to consult with the JFTC before approving mergers.

14. Are factors unrelated to competition relevant?

No.

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15. Are ancillary restraints covered by the authority's clearance decision?

There is no particular rule regarding ancillary restraints in Japanese merger control regulations. The JFTC may consider restraints ancillary to a transaction in assessing whether the transaction would substantially lessen competition in the relevant market.

16. For mandatory filing regimes, is there a statutory deadline for notification of the transaction?

No.

17. What is the earliest time or stage in the transaction at which a notification can be made?

There is no earliest time limitation for pre-notification. If parties can show that they are seriously considering the potential transaction by, among other things, showing a draft contract or memorandum of understanding, a pre-notification can be made.

18. Is it usual practice to engage in pre-notification discussions with the authority? If so, how long do these typically take?

N/A

19. What is the basic timetable for the authority's review?

Procedures after the notification consist of Phase I (a primary review) and Phase II (a secondary review).

During Phase I, the company may not consummate transactions subject to the prior notification requirement until the expiration of a 30-calendar day waiting period from the date of the acceptance of the notification by the JFTC unless early termination is otherwise granted by the JFTC.

Before the end of the Phase I, the JFTC will request the corporation to submit reports, etc. and then will start Phase II. The period of Phase II will last until the later of (i) 120 calendar days from the date of the acceptance of the notification, or (ii) 90 calendar days from the date of acceptance of all requested reports, etc.

20. Under what circumstances may the basic timetable be extended, reset or frozen?

If the JFTC determines, during Phase I, that the transaction would not lessen competition in the relevant market, the review will be completed within the 30-day waiting period. On contrary, if the JFTC thinks that further review is necessary for such determination, Phase II will be opened by a request for information by the JFTC.

Under Phase II, as explained in A18, the clock for the deadline practically will not start to run until all requested reports, etc. have been accepted. In recent years, it takes about five months to about eight months for Phase II review.

Parties may use the tactic of pulling-and-refiling to avoid Phase II review.

21. Are there any circumstances in which the review timetable can be shortened?

The 30-day waiting period will be shortened when the JFTC deems it necessary and the requirements of both (i) and (ii) below are satisfied.

i. It is evident that the transaction would not substantially restrain competition in any of the relevant markets.
ii. The notifying company requests in writing to shorten the 30-day waiting period.

The shortening of the 30-day waiting period is often used. For FY2020, it was used in 199 cases of the total 266 cases.

22. Which party is responsible for submitting the filing?

For share acquisition, the party that acquires the shares of the target is responsible for submitting the filing.

For merger, company split and joint share transfer, both parties are responsible for jointly submitting the filing.

For business transfer, the party to which the business is transferred is responsible for submitting the filing.

Under the Antimonopoly Act, there are no special rules regarding joint ventures and filing responsibility depends on whether the transaction meets any of the above five types of transactions.

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23. What information is required in the filing form?

The format of the filing form of a transaction plan and the documents for the filing are prescribed in the JFTC's rules. The form is available from the JFTC's website (https://www.jftc.go.jp/dk/kiketsu/kigyoketsugo/dl/kaiseiyoushiki.html). However, the JFTC has not released an English version of the form. What information needs to be described depends on the type of the transaction. In the case of share acquisition, the purpose of acquisition, the outline of the acquiring company and its group, the outline of the target company and its subsidiaries, information about common and inter-related raw materials and services that the acquired company and the target use, and the basic description on the relevant markets which would be affected by the acquisition (including market share) are required.

24. Which supporting documents, if any, must be filed with the authority?

The supporting documents required to be submitted slightly vary depending on the type of the transaction, but, in principle, the notifying company is required to submit the business report, balance sheet, profit and loss statements of the notifying company, and a securities report prepared by the ultimate parent company of the corporate group to which the notifying company belongs, etc. for the last fiscal year.

In addition, as one of the supporting documents, a copy of the contract or documents to provide evidence of the decision for the transaction should be submitted. If the contract has not been concluded at the time of the notification, the notifying company may submit a draft of the contract or MOU at that time and then submit the final contract promptly after the contract is signed.

25. Is there a filing fee?

No filing fee.

26. Is there a public announcement that a notification has been filed?

Yes. While the JFTC does not disclose it once a notification has been filed, the JFTC publishes a list of the notified transactions cleared by the JFTC on its website every quarter.

The notifying company can request that it does not wish to publish the notification. However, if the company discloses its transaction plan, the notification will be published in the end.

27. Does the authority seek or invite the views of third parties?

If the JFTC believes that it is necessary to seek or invite the views of third parties (such as competitors and customers) in determining whether the transaction plan may substantially restrain competition in the relevant market, it may will hear the opinions of such third parties. Particularly, in the opening of Phase II, the JFTC announces it along with seeking the opinions of third parties that have concerns about the transaction.

28. What information may be published by the authority or made available to third parties?

Basic information such as the name of the company conducting the transaction, its main business, the type of the transaction and the date of clearance are published every quarter.

The JFTC publishes the mere fact of opening Phase II once the transaction moves to Phase II and reveals the result of the review (with its detailed analysis) upon its completion. Also, the JFTC publishes the result of the review of Phase I cases that are worthy of attention.

Furthermore, major cases (about 10 cases) which the JFTC believes are useful for future reference are published every June.

29. Does the authority cooperate with antitrust authorities in other jurisdictions?

Yes. Among the major cases (see A27) in recent years, the JFTC cooperated with antitrust authorities in other jurisdictions in three cases in FY2020, two cases in FY2019, zero cases in FY2018, and three cases in FY2017.

30. What kind of remedies are acceptable to the authority?

Acceptable remedies are considered based on the facts of individual cases. The remedies should, in principle, be structural measures such as the transfer of business. However, in reality, the JFTC seems to take a more flexible case-by-case approach and uses behavioral measures independently or along with such structural remedies.

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The main kinds of remedies that are acceptable include (i) dissolution of business combination, such as the transfer of business, (ii) establishment of cost-based trading rights, (iii) provision of equipment necessary for importation or/and entry, (iv) licensing of patents and know-how under appropriate conditions, (v) technical guidance, (vi) firewall, and (vii) prohibition of discriminatory treatment.

According to the press releases on merger enforcement by the JFTC, the remedies were used in four cases in FY2020, three cases in FY2019, three cases in FY2018 and three cases in FY2017.

31. What procedure applies in the event that remedies are required in order to secure clearance?

There is no rule setting forth the timeline of remedy proposal. In most cases, the proposal of the remedies by parties is made after the notification, but it may also be made at the time of the notification. For example, in the acquisition of shares by Boston Scientific Corporation in 2006, Boston Scientific Corporation proposed remedies at the time of the notification in order to obtain clearance early.

The remedies need to be completed before the implementation of the transaction in principle. Even when parities are allowed to complete the remedies after the closing of the transaction, the parties usually need to complete the remedies by a certain definite deadline imposed by the JFTC.

In addition, parties are not obliged to secure an "up-front-buyer" in Japan, however, it is desirable that parties decide upon a buyer and obtain approval from the JFTC before the implementation of the transaction.

32. What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?

If a company fails to file a notification, or if the company conducts a transaction before the 30-day waiting period has expired, the company may be imposed a fine of up to JPY 2 million. However, to the best of our knowledge, such imposition has never occurred.

The JFTC may, in cases where the company fails to file a notification, bring a lawsuit for invalidation of a merger, company split and joint share transfer.

33. What are the penalties for incomplete or misleading information in the notification or in response to the authority's questions?

If a company submits a notification with false information, the company may be imposed a fine of up to JPY 2 million. However, to the best of our knowledge, such imposition has never occurred.

34. Can the authority's decision be appealed to a court?

If the JFTC determines that the transaction would not lessen competition in the relevant market, a third party cannot file a lawsuit to appeal the decision.

If the JFTC determines that the transaction would substantially lessen competition, the JFTC will issue a cease and desist order to prohibit the transaction unless the parties abandon the transaction. In such a case, the notifying company may file a lawsuit to rescind the order.

35. What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment

The JFTC are paying more attention to the role of big data under merger review. For example, in 2019, M3, Inc., which operates platforms that provide doctors with drug information and advertising ("Drug Information Providing Platforms") and has approximately a 75 % share in the relevant market, acquired the shares of Nihon Ultmarc Inc. ("Ultmarc"), which provides the medical information database. The JFTC found that the medical information database is indispensable to operate the Drug Information Providing Platforms and there is no other way to get the medical information database from Ultmarc. Considering the value of the data and other matters (including an indirect network effect), the JFTC concluded that the share acquisition would substantially lessen competition, and, as a remedy, the parties were required not to refuse to provide competitors with the medical information database for an indefinite period and not to discriminatorily handle the database to be provided to competitors for an indefinite period. Surprisingly, the JFTC proactively reviewed the above case even though it did not meet the filing threshold and required the parties to conduct the above remedies even after the closing of the transaction. The above case shows the JFTC's interest in the value of data.

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36. Are there any future developments or planned reforms of the merger control regime in your jurisdiction?

Addressing the increasing challenges brought in the digital markets in recent years, the JFTC amended the Business Combination Guidelines and the Business Combination Procedures Policies in December 2019.

- The amended guidelines stipulate views regarding market definition in multi-sided markets. Specifically, the guidelines state, while the relevant market is basically defined on each side separately, the relevant market may be also defined as a single market comprising each side's user if a platform mediates business transactions between different users on each side and causes a strong indirect network effect.
- The amended guidelines stipulate views on competition analysis based on the characteristics of digital platforms. For example, a direct network effect needs to be considered in analyzing how the transaction affects competition. In particular, it clearly points out that a direct network effect affects competition in a single-homing case to a greater extent than in a multi-homing case. In addition, an indirect network effect also needs to be considered in analyzing how a transaction regarding a multi-side platform affects competition.
- The amended guidelines also stipulate views on elimination of the possibility for new entry into the market by acquiring startup companies.

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