

Merger control in Japan: overview

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REGULATORY FRAMEWORK

1. What (if any) merger control rules apply to mergers and acquisitions in your jurisdiction? What is the regulatory authority?

Regulatory framework

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

- Market concentration regulations, which regulate mergers and acquisitions that substantially restrain competition in any particular field of trade (that is, in any market).
- Economic power regulations, which regulate the excessive concentration of economic power.

Under the market concentration regulations, mergers and acquisitions that meet certain thresholds require the filing of a pre-merger notification with the Japan Fair Trade Commission (JFTC) (see *Question 2, Thresholds*).

Regulatory authority

The JFTC is the sole regulatory authority that enforces the merger control rules under the AMA.

The JFTC can review any transaction, regardless of whether a filing is required. Persons cannot engage in any acts that evade any of the two types of merger control rules. On finding a violation of the merger control rules, the JFTC can issue a cease and desist order against the relevant party or parties.

See box, *The regulatory authority*.

TRIGGERING EVENTS/THRESHOLDS

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

Triggering events

The following transactions are subject to the market concentration regulations:

- Share acquisitions.
- Interlocking officer(s) or employee(s).
- Mergers.
- Joint incorporation-type or absorption-type company splits (demergers).
- Joint share transfers (as defined by the Companies Act).
- Acquisitions, leases or undertaking management of a business, acquisitions of fixed assets of a business, and contracts that provides for a joint profit and loss account of a business.

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

Under the economic power regulations, a bank or an insurance company cannot acquire or hold more than 5% or 10%, respectively, of voting rights in another company in Japan, unless either:

- One of the exceptions under the Anti-Monopoly Act applies.
- The bank or insurance company obtains the prior approval of the Japan Fair Trade Commission (JFTC).

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

Thresholds

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

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

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

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

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

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

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

www.jftc.go.jp/en/policy_enforcement/mergers/index.files/ThresholdforNotification.pdf.

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

NOTIFICATION

3. What are the notification requirements for mergers?

Mandatory or voluntary

The notification of transactions that exceed the relevant thresholds (see *Question 2, Thresholds*) is mandatory.

Timing

The notification must be submitted before the closing of a transaction. There are no other statutory requirements on the timing of the notification. The parties can submit the notification before the execution of the definitive agreement.

Pre-notification and formal/informal guidance

It is possible to obtain guidance from the Japan Fair Trade Commission (JFTC) before the filing of a notification through a voluntary consultation with the JFTC. During the consultation, the parties can submit written explanations about the transaction and potential competitive issues it may involve and discuss substantive issues, such as market definition or any potential competition concerns. The parties can also ask the JFTC to review their draft notification, to ensure that the JFTC will accept it on submission. Pre-notification consultations typically take about two weeks to one month, although the time frame of a pre-notification consultation depends on the case and the parties' strategy.

Responsibility for notification

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

Relevant authority

The notification must be filed with the JFTC, specifically with the Mergers and Acquisitions Division of the Economic Affairs Bureau.

Form of notification

The JFTC provides a different form for each type of transaction that is subject to notification. The forms are available at (in Japanese only):

www.jftc.go.jp/dk/kiketsu/kigyoketsugo/dl/kaiseiyoushiki.html.

Filing fee

There is no filing fee.

Obligation to suspend

There is a waiting period of 30 calendar days after the JFTC accepts the notification, during which the parties cannot close the transaction. The JFTC can shorten the waiting period if it deems that a shorter waiting period is necessary.

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

PROCEDURE AND TIMETABLE

4. What are the applicable procedures and timetable?

Phase I

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

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

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

Phase II

The time limit for the Phase II review is the later of the following:

- 120 days from the date of the JFTC's acceptance of the notification.
- 90 days from the date of acceptance of all reports, information or materials requested by the JFTC at the end of Phase I.

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

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

For an overview of the notification process, see *Merger notification flowchart: Japan*.

PUBLICITY AND CONFIDENTIALITY

5. How much information is made publicly available concerning merger inquiries? Is any information made automatically confidential and is confidentiality available on request?

Publicity

The Japan Fair Trade Commission (JFTC) maintains the filing of a notification confidential and does not disclose a summary or the existence of a case, subject to the following exceptions:

- The JFTC publicly announces the initiation of any Phase II review, inviting third parties to submit written opinions about the transaction, and subsequently publishes the outcome of its review.
- The JFTC publishes summaries of a few selected cases that may provide relevant guidance in other cases, such as cases where the JFTC granted clearance subject to the implementation of certain remedies and cases where the JFTC ended its review following the withdrawal of the notification by the party or parties.

- Every year in June, the JFTC publishes its annual review of "Major Business Combination Cases", which covers significant cases that the JFTC has reviewed in the most recent fiscal year (ending in March).
- Every year in October, the JFTC publishes in its annual report the names of notifying parties, and the date of acceptance of notifications, for all cases for which a completion report was submitted in the previous year after closing of the transaction.

Automatic confidentiality

Generally, the JFTC does not publicly disclose any information provided by the parties. Even where certain information is disclosed (see above, *Publicity*), the JFTC will not disclose confidential information (such as business secrets), unless the parties waive their right or provide consent to the disclosure.

Confidentiality on request

In practice, when the JFTC plans to disclose certain information in the cases listed above (except for disclosure in its annual report), the JFTC will typically contact the notifying party, identifying the information it plans to disclose. The parties will have an opportunity to provide non-binding comments regarding the proposed disclosure.

RIGHTS OF THIRD PARTIES

6. What rights (if any) do third parties have to make representations, access documents or be heard during the course of an investigation?

Representations

Third parties do not have any statutory right to make representations.

Document access

Third parties do not have any statutory right to access documents.

Be heard

In practice, the Japan Fair Trade Commission (JFTC) often interviews third parties, such as competitors and customers, especially for cases in which the JFTC conducts a substantial review. When the JFTC initiates a Phase II review, it publicly announces the initiation of the review and invites third parties to submit written opinions on the transaction.

Third parties can also provide comments to the JFTC regarding specific mergers and acquisitions, regardless of whether a transaction requires prior notification.

SUBSTANTIVE TEST

7. What is the substantive test?

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

- Competitive situation in the relevant market (for example, number of competitors, market shares, excess capacity and degree of differentiation).

- Trade realities (such as conditions of trade, trends in demand and technological innovation).
- Imports.
- Entry to the market.
- Competitive pressure from related markets.
- Competitive pressure from users.
- Overall business capabilities of the parties.
- Efficiencies.
- Financial condition of the parties.

The JFTC's Guidelines on the Application of the Anti-Monopoly Act Concerning Review of Business Combination (Merger Guidelines) provide certain safe harbour provisions based on the Herfindahl-Hirschman Index (HHI). The JFTC will not conduct a substantive review of the markets that fall within the safe harbour provisions.

8. What, if any, arguments can be used to counter competition issues (efficiencies, customer benefits)?

The Japan Fair Trade Commission (JFTC) takes efficiencies into account when reviewing the effect of transactions on competition (see *Question 7*). The JFTC also takes customer benefits into account.

9. Is it possible for the merging parties to raise a failing/exiting firm defence?

The financial condition of the parties is one of the factors that the Japan Fair Trade Commission (JFTC) takes into account in its review (see *Question 7*). Under the Merger Guidelines, the likelihood that mergers and acquisitions may substantially restrain competition in a particular field of trade is usually considered to be small if all the following conditions are met:

- One party to the merger or acquisition has excess debt or is unable to obtain financing for working capital.
- That party is likely to go bankrupt and exit the market in the near future.
- That party has difficulty finding any business operator that can rescue it through merger or acquisition that would have less impact on competition than the proposed merger or acquisition.

REMEDIES, PENALTIES AND APPEAL

10. What remedies (commitments or undertakings) can be imposed as conditions of clearance to address competition concerns? At what stage of the procedure can they be offered and accepted?

The parties can propose remedies to the Japan Fair Trade Commission (JFTC) during both a Phase I and Phase II review. The JFTC will then review the transaction on the basis that the proposed remedies will be implemented.

The Merger Guidelines provide that structural remedies (such as divestiture of business) are the most effective remedies, but behavioural remedies can also be accepted under certain circumstances.

The JFTC typically monitors compliance with remedies by seeking periodical reports from the relevant parties for the duration of the remedies.

11. What are the penalties for failing to comply with the merger control rules?

Failure to notify correctly

Failure to file a notification, and filing a notification with a false description, are subject to criminal fines of up to JPY2 million, which can be imposed both on the party that must notify and on any representative or employee who is responsible for the failure.

Implementation before approval or after prohibition

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

Where a party implements a transaction that the JFTC has prohibited under a cease and desist order, failure to comply with a final and binding order is subject to criminal fines of up to:

- JPY300 million, for the recipient of the order.
- Imprisonment with work for up to two years or criminal fines of up to JPY3 million, for any representative or employee who is responsible for the violation.

Failure to observe

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

12. Is there a right of appeal against the regulator's decision and what is the applicable procedure? Are rights of appeal available to third parties or only the parties to the decision?

Rights of appeal

The recipient of a cease and desist order issued by the Japan Fair Trade Commission (JFTC) can file a lawsuit requesting cancellation of the order with the Tokyo District Court.

Procedure

The lawsuit requesting cancellation of a JFTC's cease and desist order must be filed with the Tokyo District Court (the court of first instance with exclusive jurisdiction) within six months from the day it was notified to the recipient. As there has been no such lawsuit to date, it is difficult to estimate how long it is likely to take to obtain a decision. A judgment of the Tokyo District Court can be appealed to the Tokyo High Court, and subsequently to the Supreme Court.

Third party rights of appeal

A third party can file a lawsuit to request cancellation of a cease and desist order issued by the JFTC, provided that it has standing based on its legal interest. However, there has been no such lawsuit to date.

AUTOMATIC CLEARANCE OF RESTRICTIVE PROVISIONS

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

Whether ancillary restraints are covered by the Japan Fair Trade Commission's clearance decision is considered on a case-by-case basis.

REGULATION OF SPECIFIC INDUSTRIES

14. What industries (if any) are specifically regulated?

A bank or an insurance company cannot acquire or hold more than 5% or 10%, respectively, of voting rights in another company in Japan (see *Question 2, Triggering events*).

15. Has the regulatory authority in your jurisdiction issued guidelines or policy on its approach in analysing mergers in a specific industry?

The Japan Fair Trade Commission has not issued any guidelines or policy on its approach to analysing mergers in a specific industry.

JOINT VENTURES

16. How are joint ventures analysed under competition law?

The Anti-Monopoly Act does not specifically regulate joint ventures, including by reference to full functionality. Therefore, joint ventures are subject to merger review and notification where the applicable thresholds are met (see *Question 2, Thresholds*).

INTER-AGENCY CO-OPERATION

17. Does the regulatory authority in your jurisdiction co-operate with regulatory authorities in other jurisdictions in relation to merger investigations? If so, what is the legal basis for and extent of co-operation (in particular, in relation to the exchange of information, remedies/settlements)?

The Japan Fair Trade Commission (JFTC) co-operates with regulatory authorities in other jurisdictions for merger investigations. The JFTC can provide information to authorities in other jurisdictions under certain conditions (*Article 43-2, Anti-Monopoly Act*). In practice, the JFTC usually asks the parties to submit a waiver that allows the JFTC to exchange information with foreign authorities.

RECENT MERGERS

18. What notable recent mergers or proposed mergers have been reviewed by the regulatory authority in your jurisdiction and why is it notable?

The Japan Fair Trade Commission (JFTC) has recently reviewed the following two transactions in the Japanese petroleum refining and wholesale industry:

- **Acquisition of shares of Showa Shell Sekiyu K.K by Idemitsu Kosan Co, Ltd (Idemitsu).** The voluntary pre-notification consultation with the JFTC commenced on 30 July 2015 and the notification was filed (that is, the Phase I review started) on 16 December 2015. The JFTC initiated the Phase II review on 15 January 2016. All reports, information and materials that were requested by the JFTC at the end of Phase I were accepted on 1 December 2015.
- **Acquisition of shares of TonenGeneral Sekiyu K.K by JX Holdings, Inc (JX).** The voluntary pre-notification consultation with the JFTC commenced on 3 December 2015 and the notification was filed (that is, the Phase I review began) on 29 February 2016. The JFTC initiated the Phase II review on 30 March 2016 and all reports, information and materials that were

requested by the JFTC at the end of Phase I were accepted on 30 November 2016.

The JFTC conducted the Phase I and II reviews of both transactions in parallel. On 19 December 2016, the JFTC published a press release on its decision to grant clearance to both transactions, subject to the remedies proposed by the relevant parties.

These cases have a practical importance as, while the voluntary pre-notification consultation for the Idemitsu transaction started more than four months before that of the JX transaction, the JFTC took the approach of reviewing the two transactions (which related to the same industry) together, rather than applying the European Commission's "first come, first served" approach. The JFTC had adopted the same approach for the review of the Western Digital–Hitachi transaction and the Seagate–Samsung transaction in 2011.

These cases also have a practical importance with regard to the substance of the JFTC's review in that the JFTC:

- Focused on the substantial restraint of competition through co-ordinated conduct.
- Relied on the results of its own economic analysis, as well as the economic analyses separately submitted by the parties in the JX transaction (among others factors).

PROPOSALS FOR REFORM

19. Are there any proposals for reform concerning merger control?

Following the adoption of the Trans-Pacific Partnership Agreement (TPP), certain provisions of the Anti-Monopoly Act (AMA) will be amended to implement the commitment procedure. The commitment procedure enables an alleged violator to voluntarily resolve violations of the AMA through the conclusion of agreements with the Japan Fair Trade Commission (JFTC). This is an alternative to the standard (current) procedure, under which the JFTC issues a cease and desist order. After the amendment comes into force, and where the JFTC finds that a transaction substantially restrains competition in any particular field of trade, the JFTC will be able to offer the parties to a transaction a choice between:

- The current practice of voluntarily offering remedies to the JFTC, which the JFTC will then take into account when it considers whether to issue a cease and desist order.
- The new commitment procedure, under which appropriate remedies are determined in the form of a cease and desist plan that is authorised by the JFTC.

The commitment procedure was introduced by the Act Prescribing Adjustments to Relevant Acts in Connection with the Conclusion of the TPP Agreement (Act No 108 of 16 December 2016), and will enter into force on the day the TPP becomes effective with respect to Japan.

ONLINE RESOURCES

Japan Fair Trade Commission (JFTC)

W www.jftc.go.jp (Japanese) www.jftc.go.jp/en (English)

Description. The official website of the JFTC provides access to the official and up-to-date original Japanese version of the Anti-Monopoly Act, the JFTC rules and guidelines, a database of case law and forms of documents to be submitted to the JFTC. English translations of most of the relevant legislation and guidelines are also available on this website, although they may not be up to date and are for guidance only (that is, non-binding).

THE REGULATORY AUTHORITY

Japan Fair Trade Commission (JFTC)

T +81 (0)3 35811998 (Consultation and Complaint Section for Foreign Firms) **F** +81 (0)3 3581 1944 **E** intnldiv@jftc.go.jp **W** www.jftc.go.jp/en

Outline structure. The JFTC is an independent administrative commission that was established as an external agency of the Cabinet Office. It is composed of a chair and four commissioners, and performs its duties independently, without being subject to instructions and supervision of other government agencies.

Responsibilities. The JFTC is responsible for enforcing the Anti-Monopoly Act, including merger control, investigations into cartels and unilateral conducts, and investigations under the Act against Delay in Payment of Subcontract Proceeds, Etc. to Subcontractors (Act No 120 of 1 June 1956, as amended).

Procedure for obtaining documents. Documents, such as the results of a JFTC's Phase II merger review, are published on the JFTC's website. Any person can request disclosure of information to the JFTC under the Act on Access to Information Held by Administrative Organs (Act No 42 of 14 May 1999, as amended). However, most (if not all) of the information included in case files is likely to be exempt from disclosure to third parties.

Practical Law Contributor profiles



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Professional qualifications. Japan, 2003

Areas of practice. Competition; merger filings, cartels and unilateral conducts.

Recent transactions

- Establishment of new business venture by Takeda Pharmaceutical Company Ltd. and Teva Pharmaceutical Industries Ltd.
- Business integration between Mitsubishi-Hitachi Metals Machinery and Siemens AG in the steel and metal production machinery business.
- Business integration between Mitsubishi-Hitachi Metals Machinery and IHI Metaltech.
- International cartel investigation in connection with TFT-LCDs.
- JFTC investigation into monopolisation with regard to the provision of "fiber to the home" services.

Languages. Japanese, English

Professional associations/memberships. Daiichi Tokyo Bar Association.

Publications

- Co-author, *The Dominance and Monopolies Review (Japan Chapter)*, *Law Business Research* (2015).
- Co-author, *Japanese Anti-monopoly Act - Annotated*, *Koubundou* (2014).
- Co-author, *Dispute Practices of Anti-Monopoly Law*, *Shojihomu* (2006).



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Professional qualifications. Japan, 2013

Areas of practice. Competition; merger filings, cartels and unilateral conducts.

Recent transactions

- Handling merger filing in Japan in relation to a major foreign-to-foreign acquisition in the flash memory/storage business.
- Advising a Japanese construction company in relation to a cartel investigation initiated by the JFTC.
- Advising multiple international clients on unilateral conducts issues such as abuse of superior bargaining power and standard essential patents.

Languages. Japanese, English, French

Professional associations/memberships. Daini Tokyo Bar Association.

Publications

- Co-author, *Overview of the TPP Agreement-related Legislation*, *NBL No. 1090* (2017).
- Co-author, *The Tokyo District Court grants an injunction under article 24 of the Japanese Antimonopoly Act for the first time against anti-competitive practices (Dry ice)*, *30 March 2011*, *e-Competitions Bulletin March 2011*, Art. N° 72352.