

# Merger control in Japan: overview

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A Q&A guide to merger control in Japan.

This Q&A is part of the global guide to merger control. Areas covered include the regulatory framework, regulatory authorities, relevant triggering events and thresholds. Also covered are notification requirements, procedures and timetables, publicity and confidentiality, third party rights, substantive tests, remedies, penalties, appeals, joint ventures, inter-agency co-operation, powers of intervention and proposals for reform.

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Restraints of Trade and Dominance: [global.practicallaw.com/restraintsoftrade-guide](https://global.practicallaw.com/restraintsoftrade-guide).

Cartel Leniency: [global.practicallaw.com/leniency-guide](https://global.practicallaw.com/leniency-guide).

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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) 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 Anti-Monopoly Act.

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.

## 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 JFTC.

The JFTC launched a public comment procedure on 7 August 2019 to receive comments about the proposal to extend the term for which a bank or insurance company can hold certain voting rights in small and mid-sized companies.

The public comment procedure was closed on 10 September 2019. The results of the public comment procedure have not been published. The proposal is to do this by amending the Guidelines Concerning Authorisation of Acquisition and Holding of Voting Rights by Banking and Insurance Companies and Authorisation of Debt-Equity-Swaps, under section 11 of the Antimonopoly Act.

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](http://www.jftc.go.jp/en/policy_enforcement/mergers/index.files/ThresholdforNotification.pdf).

The scope of a group company for threshold calculation purposes explained above is defined based on the concept of control. That is, Company A is considered to be a "subsidiary" of Company B ("parent company") when Company B has control over the financial or business decision making of Company A by holding the majority of voting rights of all shareholders of Company A, or by other means.

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 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](http://www.jftc.go.jp/dk/kiketsu/kigyoketsugo/dl/kaiseiyoushiki.html).

The JFTC usually accepts filings without formal agreements, but may request draft agreements or other documents that indicate that the parties have a good faith intention to complete the transaction, including a letter of intent.

The JFTC accepts pre-notification consultation where the parties submit a draft notification to the JFTC before officially filing the notification, and the JFTC confirms whether the notification satisfies the requirements and is complete. A pre-consultation takes a few days to one week.

## **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 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 flowchart, [Japan: merger notifications](#).

## 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 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 quarter of the fiscal year, the JFTC updates and publishes a list of the cases in which the JFTC granted clearance during the same fiscal year, including the date of acceptance of notification, the names of the parties, the main business of the notifying party, whether the transaction exceeded the 50% or 20% threshold (for share acquisitions only) and the date of clearance. However, unlike the European Commission

and German Bundeskartellamt, the JFTC does not make the fact of submission of the notification public soon after the submission, and thus the interested parties may not be aware of the submission or the status of the merger review.

- 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 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 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 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 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 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 in 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 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 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 in principle 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 JFTC has not issued any guidelines or policy on its approach to analysing mergers in a specific industry.

## Powers of intervention and foreign investment review

16. What powers does the national government have to intervene in mergers on the grounds of public interest, national security or media plurality?

The Anti-Monopoly Act does not provide a system for national authorities other than the JFTC to prevent and/or investigate mergers that may harm specified public interests or raise national security concerns.

However, there are certain shareholding limits for broadcasting companies (*Broadcasting Act*), to avoid concentrations in the media sector. In the case of satellite broadcasting companies, if more than one-third of the voting rights of a satellite broadcasting company are owned by a controlling shareholder of another satellite broadcasting company, as authorised by the Ministry of Internal Affairs and Communications, the licence of that satellite broadcasting company can be nullified.

17. Are there any post-closing or foreign investment review filing requirements?

The Anti-Monopoly Act does not provide post-closing filing requirements or a required filing system for foreign investment review.

The Foreign Exchange and Foreign Trade Act requires that foreign investors who make investments in Japan submit an *ex post facto* report to the relevant ministries. Further, the Foreign Exchange and Foreign Trade Act requires prior filings for certain limited investments that involve particular areas of business (for example, national security and public infrastructure), or particular geographic areas or countries. These foreign investors cannot close the transactions during the 30-day period from the acceptance of the notifications. The Minister of Finance and the Ministry of Energy, Trade and Industry are the competent authorities to review filings under the Foreign Exchange and Foreign Trade Act. All filings and reports must be submitted through the Bank of Japan. There are no filing/application fees.

## Joint ventures

18. 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

19. 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 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

20. What notable recent developments, trends or notable recent mergers or proposed mergers have been reviewed by the regulatory authority in your jurisdiction and why is it notable? Are there any statistics published on annual merger reviews conducted in the jurisdiction?

The JFTC conducted a Phase II review regarding the acquisition of 51.5% of the shares of common stock of Sanyo Special Steel Co., Ltd. (Sanyo) by Nippon Steel & Sumitomo Metal Corporation (NSSMC, at that time) and, in January 2019, granted clearance subject to a number of remedies, even though the combined market share of the parties was 100% in the relevant market.

Specifically, the JFTC accepted the remedy proposal from the parties to create a new competitor in the small-diameter-type seamless steel pipe for bearings market, where the parties would have had a combined market share of 100%.

To create a new competitor, the remedies require the parties to, among other things:

- Divert a partial stake of Sanyo's manufacturing site and manufacture the product in agreement with Sanyo.
- Provide information necessary for sales and marketing.

- Transfer a certain marketing area and perform certain processes under contract for the new competitor for three years from the time the transfer is implemented.

In the past decade or so, the Japanese steel industry has undergone a reorganisation and therefore it is a relatively concentrated market. Against such a background, this case in the Japanese steel industry is notable because the JFTC granted clearance, despite the high combined market shares of the parties in some of the relevant markets that were reviewed by the JFTC.

According to the JFTC's latest press release on 19 June 2019 on its website, during the 2018 fiscal year (1 April 2018 to 31 March 2019), 321 notifications were accepted and out of those 321 cases, 315 were granted clearance during the Phase I review, four cases were withdrawn during the Phase I review and two cases were subject to a Phase II review. The JFTC did not issue any cease and desist orders to formally block a case. However, in practice, parties usually voluntarily withdraw notifications pursuant to informal suggestions from the JFTC that a clearance would not be granted. The number of cases in which remedies were required is not published.

## Proposals for reform

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

At the same time as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP also known as TPP11) came into force and which incorporates, by reference, most of the provisions of Trans-Pacific Partnership Agreement (TPP), certain provisions of the Anti-Monopoly Act have been amended to implement the commitment procedure. The commitment procedure enables an alleged violator to voluntarily resolve violations of the Anti-Monopoly Act through the conclusion of agreements with the 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 entered into force on the day the TPP became effective with respect to Japan on 30 December 2018.

Also, in light of the concerns that these digital platformers may lessen competition in R&D by accumulating big data, or acquiring key technologies or personnel resources through mergers that have not been reportable due to the small size of the target companies, the JFTC published its draft amendments to the Merger Guidelines on 4 October 2019 and opened the public comment procedure (which will conclude on 5 November 2019).

## Contributor profiles

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

#### Recent transactions

- Acquisition of Sanyo Special Steel Co., Ltd. by Nippon Steel & Sumitomo Metal Corporation.
- Merger review by JFTC with regard to the acquisition of Twenty-First Century Fox, Inc. by The Walt Disney Company.
- Aisin Seiki Co., Ltd. Joint venture with Denso Corporation to develop electrification driving modules.

**Languages.** Japanese, English

**Professional associations/memberships.** Daiichi Tokyo Bar Association.

#### Publications

- *Co-author, GCR Know how - Antimonopoly & Unilateral Conduct 2019 (Japan Chapter), Law Business Research (2019).*
- *Co-author, Corpus Juris M&A - Completely Revised Edition, Shojihomu Co., Ltd. (2019).*
- *Chambers Global Practice Guides - International Trade 2018 (Japan Chapter), Chambers and Partners (2017).*

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#### Recent transactions

- Idemitsu Kosan's business integration with Showa Shell Sekiyu.

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**Professional associations/memberships.** Daiichi Tokyo Bar Association.

#### Publications

- *Co-author, Chambers Global Practice Guides - Merger Control 2019 (Japan Law & Practice), Chambers and Partners (2019).*
- *Co-author, Corpus Juris M&A - Completely Revised Edition, Shojihomu Co., Ltd. (2019).*

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#### 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, big data and standard essential patents.



**Languages.** Japanese, English

**Professional associations/memberships.** Daini Tokyo Bar Association.

**Publications**

- *Co-author, GCR Know how - Antimonopoly & Unilateral Conduct 2019 (Japan Chapter), Law Business Research (2019).*
- *Co-author, Chambers Global Practice Guides - Merger Control 2019 (Japan Law & Practice), Chambers and Partners (2019).*
- *Co-author, Big data and Unilateral Conduct, Jurists No. 1508 (2017).*

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