

# Amendments to the JFTC Merger Guidelines and Policies in accordance with Digital Economy

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The Japan Fair Trade Commission (“JFTC”) amended the “Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination” (“Guidelines”) and the “Policies Concerning Procedures of Review of Business Combination” (“Policies”) on December 17, 2019.<sup>1</sup>

The Guidelines were originally prepared in 2004 and the Policies in 2011. The amendments of the Guidelines and Policies this time (“Amendments”) were made pursuant to the Cabinet decision: “Growth Strategies Action Plan” and “Growth Strategies Follow-Up” made on June 21, 2019, including to update rules for merger review by the end of 2019 in order to conduct review appropriately in accordance with developments in the digital market.

The JFTC previously issued the draft of Amendments on October 4, 2019 and sought comments from the public by November 5, 2019.<sup>2</sup> The JFTC received 24 comments, and finalized the Guidelines and Policies after review and consideration of those comments.<sup>3</sup> The principle of the Guidelines and Policies basically stayed the same from the draft, and changes are made mainly for clarification.

## Amendments to the Guidelines

There are various amendments to the Guidelines. The following are some examples of the major amended points.

- Digital Platform

One of the substantial amendments to the Guidelines is supplementing the JFTC’s view about digital platforms. For example, the JFTC now provides its view as to how it defines a multi-sided market where multiple layers of users exist. According to the amended Guidelines, the JFTC basically defines a relevant market by each layer of users, and considers the characteristics of the multi-sided market when it determines the influence in the relevant markets by the proposed transaction.<sup>4</sup>

As to the characteristics of the market, the JFTC clarifies that it may determine the network effect and economies of scale when looking at the competitive influence on the relevant markets. For example, the JFTC

<sup>1</sup> The tentative English translation of the JFTC press release on December 17, 2019 is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217.html>

<sup>2</sup> The tentative English translation of the JFTC press release on October 4, 2019 is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191004.html>

<sup>3</sup> The tentative English translation of (i) the amended Guidelines is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/1912173GL.pdf> and (ii) the amended Policies is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/1912174Policy.pdf>

<sup>4</sup> P13 of the tentative English translation of the Guidelines.

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determines the so-called direct network effect when the value of the parties' products increases by securing a certain number of users subsequent to the proposed merger, and thereby a further increase in the number of users for the products is expected. Particularly in a case where many of the users use only one service (*i.e.*, single-homing), direct network effects are considered to affect competition to a greater extent than when many of the users use multiple services (*i.e.*, multi-homing). Further, the JFTC determines the indirect network effects when the parties' competitive power increases in a market as the result of the increase of the value in their product in another market by securing a certain number of users subsequent to the proposed merger.<sup>5</sup>

- Value of Data

The amended Guidelines explain that the JFTC may conduct substantial reviews for certain cases even when the combined share of the parties falls in the safe harbor. More specifically, if and when a party(ies) has potential competitiveness that is not reflected in the current market share, for instance, when the party(ies) has data and/or intellectual property rights that are important for competition, the JFTC may conduct substantial review.<sup>6</sup>

- Research & Development (R&D)

The amended Guidelines added a section about R&D as one of the factors to be considered when the JFTC determines the influence on the relevant market.<sup>7</sup>

- Vertical and Conglomerate Types of Merger

The Guidelines previously discuss vertical and conglomerate types of mergers all together in the same section with regard to the method for analyzing competitive influence. Now, they are separated and each of vertical and conglomerate types has an individual section respectively in the amended Guidelines.<sup>8</sup>

## Amendments to the Policies

The JFTC has authority to review merger cases, including for those notifications that are not required ("Non-Notifiable Cases"). The amended Policies clarifies that the JFTC will conduct review of Non-Notifiable Cases when the transaction value is large (*i.e.*, more than JPY40 billion which is approximately USD370 million) and is expected to affect domestic consumers. Further, the amended Policies suggest the parties consult with the JFTC voluntarily when the transaction value exceeds JPY40 billion and when one or more of the following factors is met:

- (i) When an acquired company has an office in Japan and/or conducts R&D in Japan,
- (ii) When an acquired company conducts sales activities targeting domestic consumers, such as providing its website and/or pamphlet in the Japanese language; or
- (iii) When the total domestic sales of an acquired company exceed JPY100 million (approximately USD920,000).<sup>9</sup>

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<sup>5</sup> PP29-30 of the tentative English translation of the Guidelines.

<sup>6</sup> P24 of the tentative English translation of the Guidelines.

<sup>7</sup> P29 of the tentative English translation of the Guidelines.

<sup>8</sup> PP43-52 of the tentative English translation of the Guidelines for vertical type of merger and PP53-58 of the tentative English translation of the Guidelines for conglomerate type of merger.

<sup>9</sup> P5 of the tentative English translation of the Policies.

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