Global merger control: Japan

The Japan Fair Trade Commission (JFTC) has been active in merger enforcement in 2020, despite the COVID-19 pandemic, and digital, data and technology markets continue to be key areas of focus

Japan

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December 17, 2019

The Japan Fair Trade Commission (JFTC) issued amended Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination and Policies Concerning Procedures of Review of Business Combination

April 1, 2020

The JFTC established a new division, the Office of Policy Planning and Research for Digital Markets

Key developments

The Japan Fair Trade Commission (JFTC) has been active in merger enforcement in 2019 and 2020, similar to recent years, despite the COVID-19 pandemic.

Digital, data and technology markets generally continue to be areas of focus for the JFTC. On December 17, 2019, the JFTC issued amended Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination and Policies Concerning Procedures of Review of Business Combination. The merger guidelines were originally prepared in 2004 and the merger policies in 2011.

The amendments followed the Japanese government's publication of its Growth Strategies Action Plan and Growth Strategies Follow-Up in June 2019. The plans included a pledge to update rules for merger review by the end of 2019, in order to conduct reviews appropriately in accordance with developments in the digital market.

In addition, on April 1, 2020, the JFTC established a new division, the Office of Policy Planning and Research for Digital Markets. The Office conducts large-scale, comprehensive and thorough surveys of the digital market, promotes an understanding of the reality of transactions in the digital market, and collects a wide range of information on the digital market with the cooperation of external experts.

How the competition authorities treat transactions involving nascent competitors or technology, or so-called "killer acquisitions," has been the focus of attention around the world, and Japan is no exception. In addition to clarifying its views on this in the amended merger guidelines and merger policies, the JFTC conducted reviews of six non-notifiable merger cases during 2019/20.

These included M3's acquisition of shares in medical database company Nihon Ultmark. The case did not meet requirements for a pre-notification with the JFTC under the Japanese Anti-Monopoly Act (AMA), but the JFTC investigated, apparently by its own initiative. The JFTC concluded the review subject to remedies proposed by the parties.

The transaction was consummated when the JFTC initiated the investigation, which is also remarkable. At the time the JFTC closed the investigation, the amended merger guidelines and merger policies had not been finalized, although drafts had been published.

In its review of Bristol-Myers Squibb's acquisition of Celgene, the JFTC reviewed the competitive influence of a pharmaceutical product that was still in the research and development stage by one of the parties, on the assumption that it was expected to be launched in the near future.

This was in accordance with the amendments made in the merger guidelines, which let the JFTC determine the effects of a merger on competition by considering the reality of research and development when the parties are engaged in the development of overlapping products or services.

In August 2020, the JFTC cleared the proposed integration of digital platforms, Z Holdings Corporation (including Yahoo) and LINE Corporation, subject to remedies. The JFTC focused its review on three business segments: news distribution, advertising and code settlement. The clearance was made subject to remedies for the code settlement business.

The JFTC continues to believe in the importance of economic analysis and used economic analysis in two out of ten cases published in FY2019 JFTC Annual Collection of Major Merger Cases. Economic analysis was also used to review the merger between Z Holdings and Line.

Recently, whether or how mergers of regional banks should be accepted has become a political issue. This was triggered by the merger of Fukuoka Financial Group and The Eighteenth Bank, which was pre-notified to the JFTC on June 8, 2016 and was given a clearance by the JFTC on

August 24, 2018 subject to proposed remedies in April 2019.

While the merger discussions were ongoing, Japan's Financial Services Agency (FSA) and the JFTC were debating the regulations governing banking mergers and in May 2020, a new law to exempt the application of the AMA for certain regional bank mergers was passed. The law is applicable for ten years from November 27, 2020. Under the legislation, certain regional bank mergers can be exempted from JFTC review subject to approval by the Prime Minister or the FSA commissioner.

In November 2020, the JFTC published proposed amendments to rules and regulations for online procedures, including the merger notification procedure. Triggered by the changes caused by COVID-19, the government is promoting online procedures, and the JFTC's proposed amendments form part of that push. The JFTC rules and regulations were amended on December 21, 2020. Accordingly, the JFTC started accepting merger notifications by email from February 1, 2021.

Impact on merging parties

Despite the numerous impacts of COVID-19 on all aspects of the economy and the regulatory agencies, the JFTC's work has continued mostly unabated, notwithstanding the disruptions and challenges caused by remote working.

However, due to potential COVID-19 disruptions, parties may want to build in time for potential delays in agency review. For example, companies may want to negotiate longer termination dates to account for slower than usual industry input necessary for agency investigations.

The JFTC has been placing more emphasis on internal documents and the amended merger policies clarify that it may ask parties to submit documents including board meeting minutes, documents analyzing the effect of the merger, or emails of officers or employees of the parties involved in the transaction.

Under the AMA, the JFTC has authority to review non-notifiable mergers, but it has not been actively doing so until recently. The amended merger policies clarify the JFTC's authority for review of non-notifiable

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mergers as well as clarifying situations where the JFTC would likely review non-notifiable mergers.

The JFTC conducted a review of six non-notifiable merger cases during 2019/20, including the M3-Ultmark deal. Companies should consider a pre-consultation with the JFTC when the planned transaction meets, or may meet, the criteria for which the Commission recommends pre-consultation, even if the deal does not require a pre-notification.

Cross-jurisdictional merger control cooperation continues, despite COVID-19. During complex merger reviews that affect multiple jurisdictions, the JFTC may, in certain circumstances, communicate and share information with other antitrust enforcement agencies. It is therefore crucial for companies involved in cross-border deals to examine how they could get the authorities to have a positive influence on each other.

Recent changes in priorities

The JFTC applies merger control rules consistently across all industries. At the same time, the JFTC's enforcement priorities are also influenced to some extent by the government's public policies. Promoting competition and innovation in the digital market is one of the government's top priorities.

Recently, the JFTC has been actively investigating non-notifiable and consummated mergers. The JFTC may challenge any merger, regardless of whether it is reportable under the AMA.

Key enforcement trends

One of the JFTC's major interests is in killer acquisitions. In the amended merger guidelines, the JFTC added its views on competitive influence in deals involving digital platforms, acquisitions of nascent competitors and vertical or conglomerate mergers. The amendments to the merger policies with regard to non-notifiable transactions are made to catch killer acquisitions. In January 2021, the JFTC cleared Google's acquisition of Fitbit subject to proposed remedies. The target did not meet the domestic turnover threshold for a pre-notification, but the JFTC reviewed the case.

Acquisitions of nascent competitors in platform industries is one of the hottest topics, with questions arising over when the JFTC should be involved because such markets are prone to tipping—when a particular platform quickly gains market share—through enhanced network effects and economies of scale.

Recent studies and guidelines

The amendments to guidelines and policies issued in December 2019 were designed to help the JFTC conduct its reviews appropriately in accordance with developments in the digital market.

Amendments to the merger guidelines include, among others, the characterization of digital platforms, including multi-sided markets and a definition of relevant markets where competition is based on quality rather than price; exceptional situations where the JFTC conducts substantial review even when a transaction meets the safe harbor criteria; cases where parties are conducting research and development for overlapping products and services; and vertical and conglomerate mergers.

For example, the JFTC has clarified how it defines a multi-sided market where multiple layers of users exist. According to the amended merger 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 proposed transaction's influence in the relevant markets.

When competition is based on quality rather than price, the merger guidelines require the JFTC to "take into consideration the extent to which users replace the product with another product or purchase the product in another region in cases where, in a certain region, a product suffers a deteriorating quality".

On market characteristics, the JFTC has clarified that it may determine the network effect and economies of scale when looking at competitive influence on the relevant markets. For example, the JFTC 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, resulting in a further increase in the number of users for the products.

Particularly in a case where many users use only one service, direct network effects are considered to affect competition to a greater extent than when many of the users use multiple services. The JFTC also determines indirect network effects when the parties' competitive power increases in a market because of the increased value of their product in another market, as a result of securing a certain number of users subsequent to the proposed merger.

When it comes to the JFTC's focus on deals involving nascent competitors or technology, the amended merger guidelines clarify when the Commission should conduct a substantial review even when such transactions meet safe harbor criteria.

For example, the JFTC would conduct substantial reviews when a party has potential competitiveness that is not reflected in the market share—for instance when it owns competitively important data or intellectual property rights, even if such transactions meet the safe harbor criteria. The merger guidelines now provide guidance as to how the JFTC should analyze competitive influence when it comes to acquisitions of startup companies holding important data.

The merger policies clarify that the JFTC will conduct merger review for non-notifiable cases when the transaction value exceeds ¥40 billion (US$370 million) and the deal is expected to affect domestic consumers.

The amended policies therefore suggest companies should consult with the JFTC voluntarily when the transaction value exceeds ¥40 billion and when one or more of the following factors is met: the acquired company has an office in Japan or conducts research and development in Japan; the acquired company targets domestic consumers, for example by having a website in Japanese; or the total domestic sales of the acquired company exceed ¥100 million.

As the exemption rules for mergers between regional banks apply from November 2020 until November 2030, certain mergers between regional banks would be exempted from the JFTC's review.

Looking ahead

Promoting competition and innovation in the digital market is one of the most important public policies for the Japanese government. The JFTC is therefore likely to investigate transactions in this market, whether or not they are notifiable, if they are likely to affect the competitive or innovative environment in Japan.

THE INSIDE TRACK

What should a prospective client consider when contemplating a complex, multijurisdictional transaction?

Early planning and coordination with advisers and colleagues worldwide is important to obtain timely clearance for complex, multi-jurisdictional transactions. The timing of filings should be planned backwards, starting from the expected closing or long-stop date.

In your experience, what makes a difference in obtaining clearance quickly?

Thorough pre-filing analysis can make all the difference in obtaining clearance quickly. Front-loading the process and ensuring all parties involved have a deep understanding of the business before making a JFTC filing ensures swift engagement with the Commission.

In addition, establishing a good relationship with the JFTC case team and communicating with them closely is key to effective and smooth proceedings.

What merger control issues did you observe in the past year that surprised you?

A non-notifiable and consummated merger case the JFTC investigated on its own initiative. Under the AMA, the JFTC has authority to do so, but it had not been common for the JFTC to investigate such cases previously.