



**CHAMBERS**  
Global Practice Guides

# Merger Control

Japan – Law & Practice

Contributed by  
Mori Hamada & Matsumoto

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# JAPAN

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## **LAW & PRACTICE:**

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The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

# Law & Practice

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# JAPAN LAW & PRACTICE

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**Mori Hamada & Matsumoto** is one of the largest full-service law firms based Japan, with its principal office in Tokyo and branch offices in Osaka Nagoya and Fukuoka, as well as overseas offices in Beijing, Shanghai, Singapore, Bangkok and Yangon. The firm provides comprehensive assistance on cross-border transactions and disputes. More than half

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## 1. Legislation and Enforcing Authorities

### 1.1 Merger Control Legislation

The Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (“Anti-Monopoly Law” or “AML”) (Act No 54 of 14 April 1947, as amended) prohibits certain transactions that will substantially restrict competition in any particular field of trade. The AML, along with the relevant provisions of the Cabinet Ordinance and Regulations, set out filing requirements, thresholds and relevant procedure.

The Guidelines on the Application of the Anti-Monopoly Act Concerning Review of Business Combination (Merger Guidelines) (31 May 2004, as amended) provide additional guidance on the details of filing requirements and criteria for substantive review.

Inward direct investments into Japan by foreign investors are subject to a prior approval requirement or an ex post reporting requirement under the Foreign Exchange and Foreign Trade Act. Prior approvals are required for certain areas of business such as:

- national security (eg arms, aeroplanes, nuclear energy and space development);
- public infrastructure (eg electricity, gas and heat supply, waterworks, sewage, telecommunications and broadcasting, railways and marine and other transportation);

- public safety (eg vaccine manufacturing and private security services); and
- domestic industry protection (eg agriculture, forestry and fisheries).

Industry-specific legislation restricts foreign ownership of shares, or otherwise regulates investments by foreign nationals in certain businesses, under:

- the Act on Nippon Telegraph and Telephone Corporation, etc;
- the Broadcast Act;
- the Radio Act;
- the Civil Aeronautics Act;
- the Consigned Freight Forwarding Business Act;
- the Mining Act;
- the Ships Act; and
- the Financial Instruments and Exchange Act.

### 1.2 Enforcement

The Japan Fair Trade Commission (JFTC), an external agency of the Cabinet Office, has sole jurisdiction over the enforcement of merger control under the AML.

The Ministry of Finance, and other ministries or agencies that have jurisdiction over the relevant business sectors, enforce the Foreign Exchange and Foreign Trade Act.

Relevant ministries or agencies that have jurisdiction over the relevant business sectors enforce the industry-specific legislation as discussed above.

## 2. Jurisdiction

### 2.1 Notification

Notification is compulsory for certain types of transaction if the jurisdictional threshold is met. There are no exceptions to this notification requirement.

### 2.2 Failing to Notify

Failure to notify can attract a criminal fine of up to JPY2 million, which may be imposed on the party and the representative/director/employee who made the transaction on behalf of the party. This fine may be imposed regardless of whether a transaction has or has not resulted in a substantial restriction of competition in any particular field of trade.

If the parties have effected the transaction without seeking the necessary clearance or waiting for it to be obtained, the JFTC may file a suit with the court to nullify any relevant merger, corporate split or joint share transfer.

There are no known cases in which criminal fines or nullification have actually been imposed.

### 2.3 Types of Transactions that are Caught

The following types of transaction are subject to a prior notification requirement if certain thresholds are met:

- share acquisitions;
- mergers;
- corporate splits (or demergers);
- joint share transfers; and
- business or asset transfers.

Transactions for which the proposed schemes involve more than one of the above transactions (for instance, where an acquirer merges with a target after acquiring shares in the target) are analysed at each step of the transaction and therefore may require separate filings (in this example, separate notifications may be required for the share acquisitions and the subsequent merger).

Internal restructurings or reorganisations are not considered as creating or strengthening a combination and therefore are not caught by merger control legislation.

Operations not involving the transfer of shares or assets may also be regulated by the AML. For example, the AML specifically prohibits the appointment of interlocking directorships that will lead to substantial restriction of competition in any particular field of trade, even though it does not give rise to any filing obligation. Also, types of business alliance other

than those described above are not subject to merger control regulations but may be regulated as unreasonable restraint of trade (cartel regulation).

### 2.4 Definition of Control

Japanese rules do not use the concept of “change in control” in defining filing requirements. In fact, for share acquisitions, thresholds are provided as percentages (20% or 50%) rather than through the concept of “control” as in some other jurisdictions. Therefore, even acquisitions of minority interests may be subject to a prior notification.

However, the concept of “control” is relevant for determining whether a company belongs to a “corporate group” and thus whether their turnover should be considered. Intra-group transactions are not reportable, and the concept of control becomes relevant in making this assessment.

The JFTC will also take into account the extent to which “control” is acquired before exercising its jurisdiction to investigate a transaction. The Merger Guidelines set forth the following criteria in selecting cases that could trigger the JFTC’s substantive review:

- If the voting ratio of the acquiring company and its consolidated company group will exceed 20% and that ratio stands alone as the top-ranked voting right, the acquisition will be subject to review; or
- If the voting ratio of the acquiring company and its consolidated company group will exceed 10% and that ratio is ranked among the top three voting right holders, the acquisition may be subject to review, taking into account factors including:
  - (a) the extent of the ratio of voting rights to be held;
  - (b) the rank as a voting right holder, the disparity of the voting right ratio and the relationship between shareholders;
  - (c) any cross-holding between the acquiring company and the acquired company;
  - (d) the existence of any interlocking directors; and
  - (e) the business relationship between the acquiring company and the acquired company.

### 2.5 Jurisdictional Thresholds

Jurisdictional thresholds are set out below for each type of transaction:

#### Share acquisitions

- The aggregate domestic turnover of the “corporate group” to which the acquiring company belongs exceeds JPY20 billion; AND
- the aggregate domestic turnover of the target company and its subsidiary/ies exceeds JPY5 billion; AND

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- as a result of the acquisition, the holding ratio of voting rights in the target company held by the “corporate group” as a whole will exceed either 20% or 50%.

### Mergers

- The aggregate domestic turnover of the “corporate group” to which any of the merging companies belongs exceeds JPY20 billion; AND
- the aggregate domestic turnover of the “corporate group” to which any of the other merging companies belongs exceeds JPY5 billion.

### Joint-incorporation corporate splits

EITHER:

- both parties transfer all of their businesses to a newly incorporated company (New-Co); AND
- the aggregate domestic turnover of the “corporate group” to which any one of the parties belongs exceeds JPY20 billion; AND
- the aggregate domestic turnover of the “corporate group” to which any one of the other parties belongs exceeds JPY5 billion;

OR:

any one of the parties transfers all of its business to New-Co and any one of the other parties transfers an important part of its business to New-Co; AND

EITHER:

(a) the aggregate domestic turnover of the “corporate group” to which any one of the parties which is transferring all of its business to New-Co belongs exceeds JPY20 billion; AND the domestic turnover from the business to be transferred from any one of the other parties exceeds JPY3 billion; OR

(b) the aggregate domestic turnover of the “corporate group” to which any one of the parties which is transferring all of its business to New-Co belongs exceeds JPY5 billion; AND the domestic turnover from the business to be transferred from any one of the other parties exceeds JPY10 billion;

OR:

- both parties transfer important parts of their businesses to New-Co; AND
- the domestic turnover of the business to be transferred from any one of the parties exceeds JPY10 billion; AND
- the domestic turnover the business to be transferred from any one of the other parties from exceeds JPY3 billion.

### Absorption-type corporate split

EITHER:

- any one of the parties transfers all of its business to the company which will succeed the said business (Succeeding Co); AND

EITHER:

(a) the aggregate domestic turnover of the “corporate group” to which any of the parties which is transferring all of its business to Succeeding Co belongs exceeds JPY20 billion; AND the aggregate domestic turnover of the “corporate group” to which Succeeding Co belongs exceeds JPY5 billion; OR

(b) the aggregate domestic turnover of the “corporate group” to which any of the parties which is transferring all of its business to Succeeding Co belongs exceeds JPY5 billion; AND the aggregate domestic turnover of the “corporate group” to which Succeeding Co belongs exceeds JPY20 billion;

OR:

- any one of the parties transfers an important part of its business to Succeeding Co; AND

EITHER:

(a) the domestic turnover from the business to be transferred from any one of the parties which is transferring an important part of its business exceeds JPY10 billion; AND the aggregate domestic turnover of the “corporate group” to which Succeeding Co belongs exceeds JPY5 billion; OR

(b) the domestic turnover from the business to be transferred from any one of the parties which is transferring an important part of its business exceeds JPY3 billion; AND the aggregate domestic turnover of the “corporate group” to which Succeeding Co belongs exceeds JPY20 billion.

### Joint share transfer

- The aggregate domestic turnover of the “corporate group” to which any of the companies transferring all of their issued shares to a newly incorporated company belongs exceeds JPY20 billion; AND
- the aggregate domestic turnover of the “corporate group” to which any of the other companies transferring all of their issued shares to the newly incorporated company belongs exceeds JPY5 billion.

### Business/asset transfer

- The aggregate domestic turnover of the “corporate group” to which the acquiring company belongs exceeds JPY20 billion; AND

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- the domestic turnover from the business/asset to be transferred, which constitutes either the entirety or an important part of the business/assets of the transferring company, exceeds JPY3 billion.

It should be noted that both the acquisition of entire businesses and of parts of businesses can be caught where the domestic sales pertaining to that part exceed JPY3 billion.

## 2.6 Calculating Thresholds

Domestic turnover is the total amount of the price of goods and services supplied in Japan during the latest fiscal year. The Rules on Applications for Approval, Reporting, Notification etc. under Articles 9 to 16 of the AML provide that the following three categories of sales would constitute domestic turnover for the purposes of calculating jurisdictional thresholds:

- sales amounts derived from the sale of goods (including services) sold to domestic consumers (excluding individuals who are transacting business);
- sales amounts derived from the sale of goods (including services) supplied in Japan to business entities or individuals who are transacting business (business entities) (excluding sales of goods where it is known that such goods will be shipped outside Japan at the time of entering into the contract, without any changes made to their nature or characteristics); and
- sales amounts derived from the sale of goods (including services) supplied outside Japan to business entities where it is known that such goods will be shipped into Japan at the time of entering into the contract, without any changes made to their nature and characteristics.

Sales booked in a foreign currency should be converted into Japanese yen using the conversion rate used for the account settlement (and, in the absence of such rate, using the average rate during the relevant period).

The “corporate group” consists of all of the subsidiaries of the ultimate parent company. It should be noted that a parent-subsidiary relationship is recognised not only when more than 50% of the voting rights of a company are held by another company, but also when a company has control over another company’s business or financial decision-making, taking into account various factors such as a minimum voting stake of over 40%, board representation and loans. A seller’s turnover does not need to be included with that of the target. Changes in the business during the referenced period may need to be reflected on a case-by-case basis.

## 2.7 Foreign-to-Foreign Transactions

Foreign-to-foreign transactions are subject to merger control if the thresholds are met. There is no separate test for local effects as they are already taken into account when cal-

culating domestic turnover. No local presence is required. Filing can be required when a target has no sales and no assets in Japan if the target’s subsidiary or other corporate group companies has sales in Japan.

## 2.8 Market Share Jurisdictional Thresholds

There is no market share jurisdictional threshold in Japan.

## 2.9 Joint Ventures

Joint ventures are subject to the same filing requirements and jurisdictional thresholds as discussed above. There are no special rules for determining whether joint ventures meet the jurisdictional thresholds. No concept of joint control exists.

## 2.10 Powers to Investigate a Transaction

The JFTC has the power to investigate a transaction even when a transaction does not meet the jurisdictional thresholds. There is no statute of limitations on its ability to investigate a transaction.

## 2.11 Closing Before Clearance

The completion of a transaction must be suspended until the end of a 30-day statutory waiting period. If parties close the deal before the expiry of this period, criminal fines of up to JPY2 million may be imposed. To the best of our knowledge, there is no case where such penalties have actually been imposed; however, there is a risk that the JFTC may exercise its power to do so. Also, if parties try to close the deal before clearance, the JFTC may petition a court to issue a temporary restraining order against the transaction.

## 2.12 Exceptions to Suspensive Effect

There is no exception to the suspensive effect. It is not possible to seek a waiver or get derogation from the suspensive effect. However, the 30-day waiting period may be shortened by the JFTC in light of a petition from the parties.

# 3. Procedure: Notification to Clearance

## 3.1 Deadlines for Notification

There are no deadlines for prior notification.

## 3.2 Requirement for a Binding Agreement

Parties may file a notification on the basis of a less formal agreement such as a letter of intent or a memorandum of understanding.

## 3.3 Filing Fees

No filing fees are required.

In the case of share acquisitions and business/asset transfers, the acquiring party is responsible for filing. In other types of transactions, both parties are responsible for filing.

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### 3.4 Information Required for Filing

The JFTC rules require that filings must be made in the specific format prescribed by the JFTC. These formats require, among other information, descriptions of the companies involved, financial information for the latest fiscal year, the purpose of and background to the transaction, the corporate group profile, high-level market information including types of products or services subject to horizontal overlap or vertical relationships between the parties, and the market ranking and market share of main competitors.

Certain documents must accompany the filing depending on the type of transaction, such as a copy of the transaction agreement, a copy of the resolution approving the transaction, a financial statement, a list of shareholders and a power of attorney.

The filing form must be in Japanese. Some accompanying documents must be translated, but not all. Even if required, translation may be limited to relevant sections only.

For certain documents, certifications by the company representative are required. However, beyond this, no other specific requirements (such as notarisations or apostilles) are required.

### 3.5 Penalties for Incomplete Notification

Normally, parties engage in a pre-notification consultation with the JFTC in which a draft notification form is submitted to the JFTC for its review. If the notification is deemed incomplete, then the JFTC may prolong the process of pre-notification consultation while the parties amend the draft notification form.

If the notification is deemed incomplete after the formal notification is made, there is a possibility that the review will go into the second stage or that the JFTC will request the parties to withdraw and resubmit the notification once amendments are ready.

### 3.6 Phases of the Review Process

Parties can and often do engage in pre-notification consultation with the JFTC. After the acceptance of notification, the standard 30-day statutory waiting period applies to all filings (Phase I). Parties may petition the JFTC to shorten this waiting period. The JFTC is not obliged to do so, but in many cases the period is shortened to some extent (for example, out of the 275 cases that were cleared during Phase I in 2014, 119 cases received early clearance).

It is normal for the JFTC to provide requests for information throughout the pre-notification consultation and Phase I review process. The frequency and number of such requests will vary on a case-by-case basis. Such requests do not stop the clock or suspend the review.

If the JFTC wishes to review the transaction in greater detail, Phase II review starts. At the initiation of Phase II review, the JFTC announces the transaction is currently being reviewed and seeks public comments on its website. The JFTC must reach a conclusion within either 120 calendar days from the date of receipt of the initial notification or 90 calendar days from the date of the JFTC's receipt of all of the additionally requested information (whichever is the longer).

### 3.7 Accelerated Procedure for Review

There is no short form, fast-track or other type of accelerated procedure for review except for the possibility of shortening the statutory waiting period as discussed above.

## 4. Substance of Review

### 4.1 Substantive Test

The legal standard for examining a business combination under the AML is whether a proposed business combination may substantially restrict competition in any particular field of trade (ie in a relevant market) (Article 10.1). This is the same standard used when reviewing other anti-competitive activities, such as horizontal or vertical agreements, except that the authority will also consider the future likelihood of competition being restricted in the relevant markets.

The JFTC reviews a proposed business combination in accordance with its Merger Guidelines.

The Guidelines set out a safe harbour under which the JFTC considers that business combinations fulfilling any of the following Herfindahl-Hirschman Index (HHI) thresholds will generally not be anti-competitive:

- In the case of horizontal business combinations:
  - (a) The HHI following the business combination is less than 1,500.
  - (b) The HHI following the business combination is more than 1,500 but not more than 2,500, while the increase in the HHI due to the business combination is not more than 250.
  - (c) The HHI after the business combination is more than 2,500 while the increase in the HHI due to the business combination is not more than 150.
- In the case of vertical or conglomerate business combinations:
  - (a) The market share of the company group after the combination is not more than 10% in all relevant markets.
  - (b) The HHI is not more than 2,500 and the market share of the company group after the business combination is not more than 25% in all relevant markets.



The JFTC will perform a simple review once it confirms that the business combination will fall under any of the safe harbour thresholds.

In addition to above, the Guidelines state that, in both horizontal and vertical/conglomerate business combination cases, if the HHI post-business combination is not more than 2,500, and the market share post-business combination is not more than 35%, the possibility that a business combination may substantially restrict competition is usually thought to be limited. Nevertheless, in contrast to “safe harbour” cases, it is common practice for the JFTC to perform a substantial review in these cases.

While market share should generally be based on volume under the Guidelines, the Guidelines also allow parties to rely on a market share calculated by reference to sales amounts if that measure is more appropriate. An example of this approach is seen in cases where there is a substantial price gap between products, and where it is common in the industry to express sales data in sales amounts.

For the purpose of calculating the HHI, the party may rely on an approximate HHI calculation if an exact HHI calculation is not feasible (due to lack of data, for example). The approximate HHI calculation is as follows:  $\text{HHI} = \text{squared market share of top company (\%)} \times 0.75 + \text{cumulative market shares of the top three companies (\%)} \times 24.5 - 466.3$ .

If a business combination does not fall within the safe harbour, the JFTC will take into account various elements when evaluating whether the business combination may substantially restrict competition in any particular field of trade. Among others, elements to be considered include market share and ranking, the nature of previous competition dynamics, market share difference among competitors, any excess capacity of competitors, the degree of differentiation of the relevant products, imports, new entrants, neighbouring markets, competitive pressure from purchasers, the overall scale of the combining parties’ business, efficiencies and the financial condition of the combining parties.

#### 4.2 Competition Concerns

As the AML does not limit the types of competition issues the JFTC may investigate, the JFTC investigates various competitive concerns in accordance with its Guidelines (see 4.1), including horizontal and vertical effects and conglomerate or portfolio effects, with respect to both unilateral and coordinated effects. While it is horizontal effects in horizontal business combination cases that arise most frequently as an issue, the JFTC actively investigates vertical and conglomerate/portfolio effects in many cases. Recent examples include ASML/Symer (vertical) and Chubu Electric Power/Diamond Power (conglomerate/portfolio). In a recent Novartis/GSK

investigation, the JFTC examined the competition for pre-marketing drugs in the pharmaceutical industry.

#### 4.3 Economic Efficiencies

The JFTC does take into consideration economic efficiencies in accordance with its Guidelines (see 4.1), and it is common practice for the parties to raise efficiency arguments. Under the Guidelines, the following three criteria must be met for an efficiency argument to be justifiable: (i) efficiencies should be improved specifically as a result of the business combination; (ii) improvements in efficiencies should be materialised; and (iii) improvements in efficiency should contribute to the interests of consumers. The Guidelines add that business combinations that create a state of monopoly or quasi-monopoly will almost never be justifiable on the basis of their efficiencies.

In practice, it is difficult to justify a business combination resulting in substantial market power solely on efficiency grounds.

#### 4.4 Non-Competition Issues

While other legislation in Japan such as the Foreign Exchange and Foreign Trade Control Law may be applied by other government agencies, it is generally fair to say that the investigation by the JFTC will focus on competition issues.

The Act on Special Measures on Industrial Revitalisation enables a government authority to discuss a pending business combination case with the JFTC. The NSC/Sumitomo Metal case is a key precedent where the parties took advantage of this Act. However, the Act was not intended to encourage the JFTC to take into consideration non-competition issues.

#### 4.5 Joint Ventures

The Guidelines include a section specifically dealing with the review of joint ventures. Under the Guidelines, joint ventures are classified into two categories. The first category is a joint venture under which certain business departments of the joint-venture parents are completely spun off and consolidated into a joint investment company. Under the second category, only parts of the business departments of each joint-venture parent are transferred to the joint investment company. According to the Guidelines, the formation of a joint venture under the first category is unlikely to cause co-ordination issues between joint-venture parents. Under the second category, however, the Guidelines states that co-ordinated relationship between the joint-venture partners may arise through the operation of the joint-venture parents. To determine whether a co-ordinated relationship between the joint venture partners will emerge or not, the JFTC examines various factors, including specific details of the joint investment agreement, the actual nature of the combination and transactions between the joint-venture partners. The

planned production joint venture between BHP Billiton and Rio Tinto is a well-known example of the second category.

### 5. Decision: Prohibitions and Remedies

#### 5.1 Prohibition of Transactions

The JFTC has the ability to prohibit or interfere with a transaction. If the JFTC considers that a transaction would substantially restrict competition in any relevant market, irrespective of whether such transaction is reportable or not, it will issue a cease and desist order instructing the party/ies to halt the transaction or to take measure(s) to dissolve the anti-competitive concern. Before issuing such order, the JFTC will hold a hearing procedure where the investigators explain the expected contents of the order, finding of facts and evidence. During the hearing procedure, the parties to the transaction may ask the investigators questions and provide their opinions and evidence to rebut the investigators' assertions. However, the JFTC has not issued a cease and desist order in relation to a merger since 1973, and all cases in which the JFTC identified post-transaction anti-competitive concerns have been voluntarily withdrawn by the parties or been approved with remedies proposed by the parties prior to a cease and desist order being issued.

#### 5.2 Negotiation of Remedies

The parties to the transaction are able to negotiate remedies. The JFTC states that such remedies in principle should be structural (eg divestiture of assets), but it has accepted behavioural remedies in cases where behavioural remedies have been appropriate or sufficient to dissolve the concerns.

#### 5.3 Typical Remedies

In the Guidelines, the JFTC states that remedies should be considered on a case-by-case basis, but in principle should be structural (eg divestiture of assets) so as to maintain competition which would otherwise be harmed by the transaction. However, the JFTC also states that behavioural remedies may be appropriate or sufficient in some cases. Behavioural remedies include: (i) supply of relevant products to the competitors at production cost so that the competitors can compete with the parties; (ii) licence of IP which is necessary to enter into the relevant market and compete with the parties; and (iii) measures to maintain competition between the parents of the joint venture (eg setting firewalls between the parents and the joint-venture company). Remedies have not been required to address non-competition issues such as national security issues and national industrial policies.

#### 5.4 Remedial Procedures

The parties can begin negotiating remedies with the JFTC at any time during the investigation, even in Phase I. Typically, the negotiation begins with the JFTC explaining its concerns to the parties. The JFTC does not demand remedies, and the parties need to take initiative in proposing them. When

the parties propose remedies, the JFTC will comment as to whether the proposed remedies are sufficient to dissolve the concerns or not.

#### 5.5 Standard Approach for Divestitures and Other Remedies

The Guidelines provide that the remedies in principle should take place before the implementation of the transaction, and even if this is not possible, they should be carried out before the appropriate deadline, which is to be clearly provided in the remedy proposal. In addition, if the remedies include the divestiture of any or all of the overlapping business, for example, the buyer of such business should be fixed before the implementation of the transaction, otherwise the parties may have to obtain the JFTC's approval of the buyer before divesting the business. If remedies are not fully complied with, the JFTC is able to issue a cease and desist order to dissolve the concern.

#### 5.6 Formal Decisions

The JFTC will issue a notice that it will not issue a cease and desist order if it decides to permit the transaction, and it will issue a cease and desist order if it decides not to permit the transaction. The JFTC will make public its decision, including the overview of the transaction, relevant issues and the JFTC's fact findings and analyses if the cases progress to Phase II or even in Phase I, if the JFTC considers it appropriate as a reference to other companies.

#### 5.7 Examples of Prohibitions and Remedies

There have been several cases per year (two cases in 2014, one case in 2013 and three cases in 2012) in which the JFTC has given a conditional approval, the condition being sufficient remedies. The JFTC does not treat foreign-to-foreign transactions differently from transactions involving domestic parties in requesting remedies. For example, in March 2015, the JFTC approved Zimmer/Biomet, which contemplated the consolidation of the companies' medical device businesses, with remedies including the divestiture of certain brands.

### 6. Ancillary Restraints

The JFTC normally reviews not only the transaction causing the concentration between the parties (such as a share acquisition, merger or business/asset transfer), but also related arrangements (ancillary restraints) in its substantive review, assessing the magnitude of their impact. However, the extent to which the JFTC will explore these arrangements will vary on a case-by-case basis. Generally, the JFTC tends to conduct an in-depth review of ancillary restraints when a case has serious antitrust problems. If ancillary restraints include a transaction that itself meets the thresholds, it may trigger another notification under the AML.

## 7. Third-Party Rights, Confidentiality and Cross-Border Co-operation

### 7.1 Third Parties' Involvement

Third parties such as customers, competitors and others are able to informally submit their complaints to the JFTC at any time, although there is no formal procedure in which third parties could participate (for example, by making arguments, accessing evidentiary documents, or being heard by the JFTC). The JFTC normally takes such complaints into account in its substantive review.

At the initiation of a Phase II review, the JFTC will seek public comments on the proposed transaction, and any person is permitted to submit their opinion in writing to the JFTC. The JFTC is not obliged to respond to such opinions. It will, however, consider them, particularly in the case of opinions submitted by customers.

### 7.2 Confidentiality

JFTC does not make public the fact that a notification has been made, or provide a description of the transaction during a Phase I review. As a result, the parties are able to obtain clearance without any disclosure of the transaction if the case is cleared in Phase I.

However, when the case moves to Phase II, JFTC will announce that the proposed transaction is being reviewed on its website, and seek public comments from third parties. This disclosure is normally a simple one, summarising the relevant market and the transaction while avoiding the disclosure of business secrets and other sensitive information. JFTC will normally announce the result of a Phase II assessment on its website once business secrets have been redacted.

The JFTC also publishes an annual report detailing major cases in the last fiscal year, including cases reviewed at Phase I and Phase II level which the JFTC believes are important or useful. The JFTC normally seeks the parties' prior consent

for inclusion in this publication, and offers them a chance to make comments on the description and the scope of disclosure in advance.

### 7.3 Co-operation with Other Jurisdictions

Where transactions trigger multi-jurisdictional filings, it is not uncommon for the JFTC to co-operate with authorities in other jurisdictions. This co-operation will take place not only at a general policy level, but also will allow for information exchange in the context of specific transactions. Article 43-2 of the AML authorises the JFTC to exchange information with foreign counterparties unless it runs contrary to the national interest. However, this does not override the strict confidentiality obligations to which the JFTC is subject under Article 39 of the AML and Article 100 of the National Public Service Act. Therefore, when the JFTC is willing to exchange relevant information with other regulators as to specific transactions, it must seek the parties' permission (by means of a waiver) in advance.

## 8. Appeals and Judicial Review

The parties can appeal the JFTC's order to the Tokyo District Court within six months of being made aware of the order. An amendment to the AML abolishing the administrative hearing procedure of the JFTC came into force in April 2015 and parties can now directly seek judicial review of a JFTC order.

## 9. Recent Developments

### 9.1 Recent or Impending Changes to Legislation

An amendment of the AML was enacted in April 2015, abolishing the administrative hearing procedure in the JFTC. As a result, parties who object to a JFTC order can now directly appeal to the court. There have been no other major changes to merger control regulations.

### 9.2 Recent Enforcement Record of Authorities

Failure to notify, or providing false information, can lead to a criminal fine of up to JPY2 million under Article 91-2 of the AML, though there has been no case where the JFTC has actually imposed such a fine. However, the risk of such fines cannot be excluded despite this enforcement record. In no recent case has the JFTC prevented outright the transaction in question; however, between one and three cases were cleared with conditions in each of 2012, 2013 and 2014.

### 9.3 Current Competition Concerns

The JFTC is tending to use economic analysis more often in its substantive reviews, in particular for cases with significant antitrust concerns. The JFTC employs its own economists within the merger control division, who analyse data relating to relevant markets using various econometric tools.

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