

# Legal 500

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**Japan**

**Merger Control**

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This country-specific Q&A provides an overview of merger control laws and regulations applicable in Japan.

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# Japan: Merger Control

## 1. Overview

The Japan Fair Trade Commission (JFTC) has authority to review transactions, whether notifiable or non-notifiable, and enforces merger controls under the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (the "Antimonopoly Act") and its associated regulations.

Under the Antimonopoly Act, premerger notification is compulsory in certain types of transactions if they meet certain filing thresholds. The thresholds are articulated based on domestic turnovers and/or voting rights ratios, but not on domestic assets or market share.

M&A transactions are prohibited if they would substantially restrain competition in a relevant market.

Under the Antimonopoly Act, there is no exemption for foreign-to-foreign transactions or joint ventures/joint control. All transactions that meet the thresholds are subject to merger control. A transaction that involves minority share acquisition may be reportable in Japan.

The merger review process by the JFTC is divided into the following two stages: Phase I and Phase II. The JFTC reviews transactions within 30 days from the date when the notification is accepted (Phase I). Parties may not close their transactions until the 30-day waiting period has expired. If the JFTC has a reason to believe that further review is necessary to determine whether a transaction would substantially restrain competition, the JFTC will open the Phase II review by issuing detailed requests for submission of additional reports. The in-depth review in Phase II is 120 days from the date of the effective notification or 90 days from the date of all requested reports being received by the JFTC, whichever is later.

## 2. Is notification compulsory or voluntary?

Notification is compulsory when the thresholds explained in A6 are met.

On top of the compulsory notifications, voluntary notification should also be considered when the transaction may be regarded as causing substantial competition concerns, as the JFTC has jurisdiction to oppose a merger even if the thresholds are not met. Thus,

it is highly recommended to reach out to Japanese antitrust counsels when the parties have high market share in Japan, even if the transaction does not meet the compulsory notification thresholds.

Furthermore, along with the global trend to tighten scrutiny into mergers in the digital market, the JFTC, in its recent guidelines revised in December 2019, recommends M&A transactions be reported voluntarily if the following requirements are met, even if a merger does not meet the threshold for compulsory notifications.

The total consideration for the acquisition exceeds JPY 40 billion and the acquisition is expected to affect domestic (Japanese) consumers, for instance by satisfying one of the following criteria:

- 1) the business base or research and development base of the acquired company is located in Japan;
- 2) the acquired company conducts business activities targeting domestic consumers, such as opening a Japanese website or using a brochure in Japanese; or
- 3) the total domestic turnover of the acquired company exceeds JPY 100 million.

## 3. Is there a prohibition on completion or closing prior to clearance by the relevant authority? Are there possibilities for derogation or carve out?

Parties are prohibited from implementing a merger without making a compulsory notification and obligated to wait 30 days from the date when the formal notification is accepted. The parties may legally close the transaction even if the JFTC initiates a Phase II investigation as the statutory waiting period lapses at the time of the Phase II review. However, in such a scenario, the JFTC may apply to the court for an emergency injunctive order against the merger. Therefore, in practice, the parties should not implement the merger before clearance.

If the merging parties obtain clearance from the JFTC before the end of the 30-day waiting period, the JFTC can shorten this period by the request of the party filing for the merger.

There are no specific rules as to whether and on what

condition the JFTC will accept "carve-out" measures on the Japanese part of a transaction to avoid delaying implementation in the rest of the world pending clearance in Japan.

#### 4. What types of transaction are notifiable or reviewable and what is the test for control?

Types of notifiable transaction are as follows (notably, "change of control" itself is not a filing threshold under Japanese merger control):

- 1) share acquisitions;
- 2) establishing interlocking directorates;
- 3) mergers;
- 4) company splits;
- 5) joint share transfers; and
- 6) acquisitions of business or assets.

Intra-group transactions are generally exempted from notification. A company group consists of the company, its subsidiaries, its ultimate parent company, and subsidiaries of the ultimate parent company. Under the Antimonopoly Act, "subsidiaries" means companies whose management are substantially controlled by the other company through, among other things, holding a majority of the voting rights, holding a majority of the board seats, or establishing a contractual controlling relationship.

#### 5. In which circumstances is an acquisition of a minority interest notifiable or reviewable?

When the ratio of total voting rights pertaining to shares of the target company held by the acquiring company group exceeds 20% as a result of share acquisitions, a merger notification is required if other thresholds are met. See A6 for details.

#### 6. What are the jurisdictional thresholds (turnover, assets, market share and/or local presence)? Are there different thresholds that apply to particular sectors?

The Japanese merger control regulations provide for different jurisdictional thresholds for each type of transaction. The thresholds are based on the total domestic turnover of the parties or domestic turnover

generated from a business or asset to be purchased (in the case of business/asset transfer transaction).

##### Share acquisitions:

Notification is required if:

- 1) the total domestic turnover of the acquiring company group exceeds JPY 20 billion;
- 2) the total domestic turnover of the target company and its subsidiaries exceeds JPY 5 billion; and
- 3) the ratio of total voting rights pertaining to shares of the target company held by the acquiring company group exceeds 20% or 50%.

##### Mergers:

Notification is required if:

- 1) the total domestic turnover of one of the company groups participating in the merger exceeds JPY 20 billion; and
- 2) the total domestic turnover of one of the other company groups participating in the merger exceeds JPY 5 billion.

##### Company splits:

There are two types of company splits which may subject to merger filing; 'joint incorporation-type company splits' which mean causing the company incorporated in a company split to succeed to all or part of the rights and obligations that one or multiple companies hold in connection with their business undertakings and 'absorption-type company splits' which mean causing another company to succeed to all or part of the rights and obligations that a company holds in connection with its business undertakings. The thresholds are different for the respective types.

- 1) In the case of joint incorporation-type company splits, notification is required if any of the following conditions are met:
  - a. the total domestic turnover of one of the company groups splitting all of its business exceeds JPY 20 billion and the total domestic turnover of another company group splitting all of its business exceeds JPY 5 billion;
  - b. the total domestic turnover of one of the company groups splitting all of its business exceeds JPY 20 billion and the total domestic turnover of another company group splitting a substantial part of its business exceeds JPY 3 billion;

c. the total domestic turnover amount of one of the company groups splitting all of its business exceeds JPY 5 billion and the total domestic turnover of another company group splitting a substantial part of its business exceeds JPY 10 billion; or

d. the total domestic turnover amount of one of the company group splitting a substantial part of its business exceeds JPY 10 billion and the total domestic turnover of another company group splitting a substantial part of its business exceeds JPY 3 billion.

2) In the case of absorption-type company splits, notification is required under any of the following conditions.

a. the total domestic turnover of one of the company groups splitting all of its business exceeds JPY 20 billion and the total domestic turnover of the absorbing company group exceeds JPY 5 billion;

b. the total domestic turnover of one of the company groups splitting all of its business exceeds JPY 5 billion and the total domestic turnover of the absorbing company group exceeds JPY 20 billion;

c. the total domestic turnover amount of one of the company groups splitting a substantial part of its business exceeds JPY 10 billion and the total domestic turnover of the absorbing company group exceeds JPY 5 billion; or

d. the total domestic turnover of one of the company groups splitting a substantial part of its business exceeds JPY 3 billion and the total domestic turnover of the absorbing company group exceeds JPY 20 billion.

#### Joint share transfers:

Joint share transfers mean any transfer whereby one or multiple companies cause all of its issued shares to be acquired by a newly incorporated holding company. Notification is required if:

1) the total domestic turnover of one of the company groups participating in the joint share transfer exceeds JPY 20 billion; and

2) the total domestic turnover of one of the other company groups participating in the joint share transfer exceeds JPY 5 billion.

#### Acquisition of business or assets:

Notification is required if:

1) the total domestic turnover of one of the acquiring company groups exceeds JPY 20 billion; and

2) the transaction involves any of the following: (i) acquiring all business of the transferring company whose domestic turnover exceeds JPY 3 billion; or (ii) acquiring a substantial part of the business or the whole, or a substantial part of the fixed assets for business of the transferring company, and the domestic turnover of such acquired parts exceeds JPY 3 billion.

#### Industry-specific rules:

There are special thresholds for transactions involving share acquisitions by companies engaged in banking or insurance businesses. The companies engaged in banking business are prohibited from acquiring more than 5% (10% for the companies engaged in insurance business) of the voting rights pertaining shares of the target company engaging in non-financial businesses in Japan without prior approval by the JFTC.

In addition, a merger between local banking companies or local bus operators does not have to be filed with the JFTC, but requires an approval from the Financial Services Agency or the Ministry of Land, Infrastructure and Transport respectively.

### **7. How are turnover, assets and/or market shares valued or determined for the purposes of jurisdictional thresholds?**

The JFTC rule provides for detailed methods for calculating turnover as follows:

'Turnover' is calculated based on the most recent financial year of the company. It includes the following sales:

1) all sales to domestic consumers;

2) sales to companies in Japan (except for sales of the products which are sent to other countries, and the merging party recognizes at the time of concluding the contracts that the companies in Japan will send the products to other countries); and

3) product sales supplied to companies in other countries wherein the companies send the products to Japan and the merging party recognizes at the time of concluding the contracts that the companies will send the products to Japan.

Notwithstanding the above, if a company files the annual report, including balance sheet, to a financial regulator,

the company may refer to the number reported to the financial regulator as “domestic turnover” or its equivalent.

There are special rules on calculation of turnover for companies in the financial sector. For example, regarding a banking and insurance company, ‘turnover’ refers to ordinary profit of the most recent financial year of the company.

#### **8. Is there a particular exchange rate required to be used to convert turnover and asset values?**

Domestic turnover booked in a foreign currency should be converted to Japanese yen (JPY) according to the exchange rate used in the company's financial statements. If there is no such exchange rate, the average exchange rate during the relevant accounting period, such as the telegraphic transfer middle rate published by a major Japanese bank.

#### **9. In which circumstances are joint ventures notifiable or reviewable (both new joint ventures and acquisitions of joint control over an existing business)?**

The Antimonopoly Act does not provide any special rules about merger filing regarding joint ventures or joint control, and a joint venture transaction will trigger a notification if the relevant thresholds are met (please see A6 above).

#### **10. Are there any circumstances in which different stages of the same, overall transaction are separately notifiable or reviewable?**

In practice, the JFTC determines reportability of the transaction in each stage of the transaction, and the same overall transaction may trigger multiple notifications. Typical example is a triangular merger, where an acquiring entity creates an SPC, which merges with the target, which results in the acquiring entity obtaining the shares of the target. Under the Japanese rules, separate notifications, one for the merger between the SPC and the target and the other for the acquisition of shares of the target by the acquiring entity, will be necessary.

#### **11. How do the thresholds apply to “foreign-to-foreign” mergers and transactions involving a**

#### **target /joint venture with no nexus to the jurisdiction?**

There is no exemption for foreign-to-foreign mergers and transactions involving a target /joint venture with no nexus to the jurisdiction. All mergers and transactions that meet the thresholds are subject to merger control regardless of where companies concerned are registered, operate, or own assets.

#### **12. For voluntary filing regimes (only), are there any factors not related to competition that might influence the decision as to whether or not to notify?**

N/A

#### **13. What is the substantive test applied by the relevant authority to assess whether or not to clear the merger, or to clear it subject to remedies? Are there different tests that apply to particular sectors?**

The JFTC assesses whether the merger will “substantially restrain competition in any particular field of trade (i.e. relevant market)”.

The JFTC issued a detailed guideline as to the substantive tests applied to its merger review. Similar to merger reviews by other competition agencies, the guideline provides a detailed test to assess horizontal, vertical, and conglomerate mergers. The guideline also stipulates a safe harbour rule based on HHI.

#### **14. Are factors unrelated to competition relevant?**

No. The JFTC will review the transaction based solely on competition factors.

#### **15. Are ancillary restraints covered by the authority's clearance decision?**

There is no particular rule regarding ancillary restraints in Japanese merger control regulations. The JFTC may consider restraints ancillary to a transaction in assessing whether the transaction would substantially lessen competition in the relevant market.

## 16. For mandatory filing regimes, is there a statutory deadline for notification of the transaction?

N/A

## 17. What is the earliest time or stage in the transaction at which a notification can be made?

The Antimonopoly Act does not provide any rules as to how early a transaction can be notified. If parties can show that they are seriously considering the potential transaction by, among other things, showing a draft contract or memorandum of understanding, a pre-merger notification can be made.

## 18. Is it usual practice to engage in pre-notification discussions with the authority? If so, how long do these typically take?

Although it is not mandatory to go through pre-notification consultation, it is normally advisable to inform the JFTC of the intended transaction at an early stage and to enter into pre-notification consultations especially in a case where the transaction may be seen as problematic. The time for pre-notification consultation depends on how serious the competition concern will be.

In unproblematic transactions, it is a standard practice that parties contact the JFTC and submit the draft notification form for the JFTC's review around a week before the targeted date of the notification.

## 19. What is the basic timetable for the authority's review?

Procedures after the notification consist of Phase I (a primary review) and Phase II (a secondary review).

The JFTC reviews transactions within 30 days from the date when the formal notification is accepted (Phase I). Parties may not close their transactions until the 30-day waiting period has expired. If the JFTC has reason to believe that further review is necessary to determine whether a transaction would substantially restrain competition, the JFTC will open the Phase II review by issuing requests for the parties to submit necessary reports. The in-depth review in Phase II is 120 days from the date of the effective notification or 90 days from the date of all requested reports being accepted by the JFTC, whichever is later.

## 20. Under what circumstances may the basic timetable be extended, reset or frozen?

Under Phase II, as explained in A19, the clock for the deadline will not start to run until all requested reports have been accepted.

Parties may use the tactic of pulling-and-refiling during the Phase I period to avoid Phase II review.

## 21. Are there any circumstances in which the review timetable can be shortened?

Parties can submit a petition to shorten a waiting period. Although the JFTC has the sole discretion to decide whether it grants a petition, the JFTC typically shortens the review period in a simple transaction without any competitive concern.

## 22. Which party is responsible for submitting the filing?

For share acquisition, the party that acquires the shares of the target is responsible for submitting the filing.

For merger, company split, and joint share transfer, all parties involved in the transaction are responsible for jointly submitting the filing.

For business transfer, the party to which the business is transferred is responsible for submitting the filing.

## 23. What information is required in the filing form?

The format of the filing form of a transaction plan and the documents for the filing are prescribed in the JFTC's rules. The form is available at the JFTC's website (<https://www.jftc.go.jp/dk/kiketsu/kigyoketsugo/dl/kaiseiyoushiki.html>) but only in Japanese. What information needs to be described depends on the type of the transaction. In the case of share acquisition, the purpose of acquisition, the outline of the acquiring company and its group, the outline of the target company and its subsidiaries, information about common and inter-related raw materials and services that the acquired company and the target use, and the basic description on the relevant markets which would be affected by the acquisition (including market share) are required.

## 24. Which supporting documents, if any, must be



## filed with the authority?

Depending on the type of transaction, the following documents must be supplied with a merger notification:

- 1) articles of association for each of the parties to the merger (except in the case of share acquisitions);
- 2) the most recent audited annual business reports, balance sheets, and financial statements for each of the parties to the merger;
- 3) a copy of the agreement concerning the merger;
- 4) shareholder registers for each of the parties to the merger (except in the case of share acquisitions);
- 5) a copy of the record of the resolution if there is a resolution of the general meeting of shareholders, or a copy of the consent of all employees;
- 6) securities report prepared by the ultimate parent company of the company groups to which each of the parties belong (or a merger filing party in the case of acquisitions of business or assets) or other documents showing the property and profit of the company groups; and/or
- 7) power of attorney (if a merger notification is filed by attorney).

## 25. Is there a filing fee?

Filing fee is not required.

## 26. Is there a public announcement that a notification has been filed?

The JFTC will make a public announcement after it requests the party to submit additional reports to initiate the Phase II investigation. In addition, upon the conclusion of the Phase II review, the JFTC also publishes the result of its review.

For mergers that were filed and cleared during Phase I, the JFTC discloses the list of transactions (without any detail) once each quarter. Also, the JFTC annually selects important cases and discloses its review in detail. If the merging parties have not published the plan of the merger, they can ask that the transaction not be disclosed.

## 27. Does the authority seek or invite the views of third parties?

After the JFTC requests the party to submit additional reports and starts Phase II review, the JFTC announces it on its website and at the same time asks opinions from third parties. Anyone can offer an opinion within 30 days from the date of the announcement. In addition, the JFTC can conduct an interview or send questionnaire to relevant third parties including competitors or consumers to examine the influence of the merger on competition.

## 28. What information may be published by the authority or made available to third parties?

When seeking an opinion from third parties upon the initiation of the Phase II review, the JFTC publishes the parties' names and business areas in which the parties operate.

Regarding quarterly disclosure of the list of transactions, basic information such as the name of the company conducting the transaction, its main business, the type of the transaction, and the date of clearance are published every quarter.

## 29. Does the authority cooperate with antitrust authorities in other jurisdictions?

Yes. The JFTC has concluded international cooperation agreements with other antitrust authorities including US, EU, and China, which allows agencies to exchange information related to a particular merger case. In actual international merger review cases in which multiple antitrust authorities conduct their review simultaneously, the JFTC has cooperated with other antitrust authorities. When the JFTC cooperates with other antitrust authorities, it will request that the parties submit a waiver letter.

## 30. What kind of remedies are acceptable to the authority?

At the conclusion the JFTC's review, a merger may be approved or ordered to "cease-and-desist". Even if the JFTC determines that the merger poses a competitive concern, it can still approve the merger when the party offers appropriate remedies to resolve the competitive concern.

The JFTC provides several types of appropriate remedies in its guideline; the JFTC provides that a remedy shall in

principle be a structural remedy, while behavioral remedies are allowed in limited circumstances. Structural remedies include divestiture of business, or long-term commitment to provide goods to a third-party on a cost-basis. Behavioral remedies include measures for enabling new entry/import, and licensing of important IP rights.

These remedies should be completed before the implementation of the merger and if remedies are not completed before the merger, it is required that an appropriate and definite deadline for the remedies is decided.

### **31. What procedure applies in the event that remedies are required in order to secure clearance?**

The Japanese merger control rules do not specifically set forth the timeline and procedures of remedy proposal. In most cases, the proposal of the remedies by parties is made after the notification, but it may also be made at the time of the notification.

The remedies need to be completed before the implementation of the transaction in principle. Even when parties are allowed to complete the remedies after the closing of the transaction, the parties usually need to complete the remedies by a certain definite deadline set by the JFTC.

### **32. What are the penalties for failure to notify, late notification and breaches of a prohibition on closing?**

If a company fails to file a notification, or if the company conducts a transaction before the 30-day waiting period has expired, the company may be imposed a fine of up to JPY 2 million. This penalty has never been imposed.

The JFTC may, in cases where the company fails to file a notification and the transaction at issue is likely to substantially restrain competition, bring a lawsuit for invalidation of a merger.

### **33. What are the penalties for incomplete or misleading information in the notification or in response to the authority's questions?**

If a company submits a notification with false information, the company may be imposed a fine of up to JPY 2 million, although this penalty has never been imposed.

### **34. Can the authority's decision be appealed to a court?**

The parties can file a lawsuit to invalidate a cease-and-desist order to block a merger issued by the JFTC, but in practice, the parties rarely do that. Normally, the parties just abandon the transaction if the JFTC expresses that it would not clear the transaction.

### **35. What are the recent trends in the approach of the relevant authority to enforcement, procedure and substantive assessment**

Addressing the increasing challenges brought in the digital market in recent years, the JFTC amended the Business Combination Guidelines and the Business Combination Procedures Policies in December 2019.

- The amended guidelines stipulate views regarding market definition in multi-sided markets. Specifically, the guidelines state, while the relevant market is basically defined on each side separately, the relevant market may be also defined as a single market comprising each side's users if a platform mediates business transactions between different users on each side and causes a strong indirect network effect.
- The amended guidelines stipulate views on competitive analysis based on the characteristics of digital platforms. For example, a direct network effect needs to be considered in analysing how the transaction affects competition. In addition, an indirect network effect also needs to be considered in analysing how a transaction regarding a multi-side platform affects competition.
- The amended guidelines also stipulate views on elimination of the possibility for new entry into the market by acquiring startup companies.

### **36. Are there any future developments or planned reforms of the merger control regime in your jurisdiction?**

In response to the increasing focus on mergers in the digital market described in A35 above, the JFTC has improved its review procedures.

First, in relation to merger cases in the digital market or in complex and rapidly changing market conditions, the JFTC can ask opinions from third parties regardless of



whether or not Phase II review is initiated.

And in the digital market case, the JFTC has to understand what objectives the company groups try to achieve with the transaction, what impact the transaction is expected to have on various stakeholders such as consumers and competitors, and how the future of the market is expected to be affected as a result of the transaction under rapidly changing market conditions.

Therefore, from the early stages of the review, the JFTC will request the submission of internal documents, such as materials from the board of directors and materials related to internal competition analysis.

In addition, JFTC also proceeds utilising more sophisticated economic analysis to understand the impact on competition, effectiveness of measures, etc. in the complex digital market.

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