



# Recent updates on merger review practices in Japan

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## In brief

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### The impact of merger control regimes under the Antimonopoly Act of Japan on M&A transactions

Under the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 14 April 1947), commonly known as the Antimonopoly Act ('AMA'), certain M&A transactions involving the acquisition of shares and other transactions as prescribed by the AMA<sup>1</sup> ('Merger') are prohibited if they 'substantially restrain competition in any particular field of trade'. Furthermore, in conducting a Merger that meets certain thresholds, a prior notification to the Japan Fair Trade Commission ('JFTC'), the enforcement agency of the AMA, is required by the AMA<sup>2</sup>. For Merger transactions whose impact on competition is relatively significant, such as Mergers between rivals ('Horizontal Mergers') in markets where oligopoly is progressing, the JFTC will use various specialised review methods. In such cases where specialised review methods are used, the period for obtaining clearance<sup>3</sup> from the JFTC may be prolonged. This may delay the completion schedule of the Merger, while imposing constraints on preparation for the execution of the transaction from the perspective of preventing so-called 'gun jumping' under competition laws. Moreover, as a result of the JFTC's use of various specialised review methods, the review could be more burdensome than the parties to the Merger would have initially expected. Furthermore, as a result, they may have to consider implementing remedial measures to address the JFTC's concerns, or even abandoning the Merger altogether.

In this newsletter, we will outline the review methods that have been emphasised as important by the JFTC in recent cases, as well as the practical considerations in dealing with such review methods. Please note that the opinions expressed in this newsletter are the personal views of the authors, and do not represent the official views of PwC Legal Japan or the department to which they belong.

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<sup>1</sup> For example, under Article 10(1) of the AMA, acquisition of shares is prohibited if such acquisition would substantially restrain competition in any particular field of trade. Similar prohibitions also exist regarding other forms of transaction, such as interlocking directorates, mergers, joint incorporation-type company splits, absorption-type company splits, joint share transfers and business transfers.

<sup>2</sup> For example, under Article 10(2) of the AMA, a prior notification to the JFTC is required in relation to certain acquisitions of shares which meet certain criteria under the provision.

<sup>3</sup> In Japan, this refers to the issuance of a notice that the JFTC will not issue a cease-and-desist order regarding the Merger in question.

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## In detail

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### 1. Review methods that have been emphasised as important by the JFTC in recent cases, and practical considerations in dealing with such reviews

In making a prior notification under the AMA, the parties must submit a notification form to the JFTC containing the necessary information and enclose the relevant documents. However, the information and documents required are relatively simple compared to those required in some foreign jurisdictions. In particular, in relation to market situation, only limited information, such as market share, is required. As a result, there may be cases where the JFTC needs to conduct a thorough examination of the 'theory of harm', a mechanism leading to competition restraint. In such cases, the JFTC may request the submission of additional materials or information that are necessary to draw a conclusion supported by sufficient evidence. The most orthodox process of information submission by the parties is to respond to the 'Request for Information' ('RFI') issued by the JFTC. As mentioned below, it should be kept in mind that requests for submission of special materials may be added on to this initial RFI. As for the JFTC's review practice, formerly, we were only able to understand the situation on a piecemeal basis by referring to the relevant JFTC guidelines and the review results for individual cases that were published in limited numbers. However, since the revision of the JFTC Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination<sup>4</sup> and the Policies Concerning Procedures of Review of Business Combination<sup>5</sup> ('Policy') in December 2019, there has been a tendency for more specific and detailed contents to be published. In this newsletter, we will highlight and explain three of the review methods that have been emphasised as important by the JFTC in recent cases; namely, (1) the implementation of economic analysis, (2) the review of internal documents and (3) the solicitation of opinions from third parties. We will also highlight the practical considerations for the parties to the Merger that are subject to those reviews.

#### (1) Implementation of economic analysis

Even before, there have been several published cases where the results of specialised analysis based on a knowledge of economics and related fields were considered in the JFTC's review process. Such analysis includes both those conducted by the parties in collaboration with experts, and those conducted independently by the JFTC. For example, in relation to the theory of harm of 'arbitrary price increase after the Merger' by the Horizontal Merger, it is thought that a price increase after the Merger is more likely to occur, if the parties were in a particularly intense competitive relationship than if they were not. Therefore, in order to measure the strength of the competitive relationship between the parties (i.e. between the products of each company), an analysis may be conducted on whether the change in price or quantity of one product affects the price or quantity of the other based on the sales performance data of each company<sup>6</sup>. In addition, there have also been cases where indicators such as CMCR (Compensating Marginal Cost Reduction) and GUPPI (Gross Upward Pricing Pressure Index) using data on prices or costs were used to consider the presence or absence of incentives for price increases after the Merger<sup>7</sup>. The JFTC established the Economic Analysis Office in April 2022 to

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<sup>4</sup> Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination issued by the JFTC: [https://www.jftc.go.jp/en/policy\\_enforcement/mergers/191217002.pdf](https://www.jftc.go.jp/en/policy_enforcement/mergers/191217002.pdf)

<sup>5</sup> Policies Concerning Procedures of Review of Business Combination issued by the JFTC: [https://www.jftc.go.jp/en/legislation\\_gls/imonopoly\\_guidelines\\_files/191217policy.pdf](https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/191217policy.pdf)

<sup>6</sup> For example, see Major Business Combination Cases in Fiscal Year 2022, Case 4: <https://www.jftc.go.jp/en/pressreleases/yearly-2023/June/230628.html>

<sup>7</sup> For example, see Major Business Combination Cases in Fiscal Year 2021, Case 3: [https://www.jftc.go.jp/en/policy\\_enforcement/mergers/](https://www.jftc.go.jp/en/policy_enforcement/mergers/)

strengthen the implementation of such economic analysis<sup>8</sup>. In addition to having several staff members with Ph.Ds. in the office, it is also the intention of the JFTC to actively outsource such economic analysis to consulting firms or university researchers<sup>9</sup>. In May 2022, the JFTC issued the Points to Consider when Submitting an Economic Analysis Report and Data<sup>10</sup> as the points to note in the following two situations: (1) when the parties prepare an economic analysis report, and (2) when the parties or third parties (e.g. competitors of the parties) respond to data requests by the JFTC, which intends to independently conduct an economic analysis based on the parties' internal data.

Situation (1) above outlines the general matters to be described in economic analysis reports, such as explanations on the data used for the analysis. It also provides a list of matters to be particularly noted for each type of analysis, such as 'econometric analysis' and 'economic analysis using theoretical models'.

The data requested by the JFTC in situation (2) above would be sales performance data, monthly income statements and so forth, which is more detailed than financial data and related information that are generally disclosed externally by the enterprises. For example, in the case of monthly data, the JFTC often requests data for a period of more than five years. The JFTC also publicly stated that it will conduct data requests on a sampling basis for a limited period before making such a wide-ranging request. In practice, it is often the case that the JFTC examines the situation of data retention and management (the existence and granularity of the relevant data) of the business operators based on the submission status of the sample data, and considers what sort of economic analysis to conduct. In this regard, there may also be situations where the parties who received a request try to obtain clearance without going through the economic analysis that the JFTC attempts, such as in cases where the parties do not have data that conforms to the JFTC's requests. There have been cases where the parties submitted an economic analysis report based on different data from what the JFTC requests because they could not submit such required data<sup>11</sup>.

## (2) Review of internal documents

Internal documents are documents that were created and used internally by the parties, such as board materials, board minutes and so forth. The JFTC's request for submission of internal documents to the parties has been made in the past, especially when proceeding to the phase II review (the next review stage when it is determined that further review is necessary as a result of the phase I review that is conducted for 30 days after the acceptance of the notification<sup>12</sup>). It is also taken into account the fact that there are cases where it is necessary to examine such internal documents in order to understand

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<sup>8</sup> Towards the Active Promotion of Competition Policy in response to Socioeconomic Changes as represented by Digitalization - Coordination and Strengthening of Competition Policy Advocacy and Law Enforcement -, 4. (4):

[https://www.jftc.go.jp/en/policy\\_enforcement/220616\\_1.pdf](https://www.jftc.go.jp/en/policy_enforcement/220616_1.pdf)

<sup>9</sup> Tsukada, M., October 2023. *Kigyo Ketsugo Shinsa no Tomen no Kadai* [Immediate Challenges in Merger Review], Kosei Torihiki No. 876, p. 5.

<sup>10</sup> Points to Consider when Submitting an Economic Analysis Report and Data:

[https://www.jftc.go.jp/en/legislation\\_qls/220617EN.pdf](https://www.jftc.go.jp/en/legislation_qls/220617EN.pdf)

<sup>11</sup> Major Business Combination Cases in Fiscal Year 2020, Case 10:

[https://www.jftc.go.jp/en/policy\\_enforcement/mergers/](https://www.jftc.go.jp/en/policy_enforcement/mergers/)

<sup>12</sup> In recent years, the number of cases that proceeded to the second phase review has remained at a level of only a few cases per year, and there were no applicable cases in fiscal year 2022. See the status of notifications regarding business combinations and the results of reviews of major business combinations in fiscal year 2022: <https://www.jftc.go.jp/file/230628EN.pdf>

the purpose of the Merger (especially Mergers in the digital sector). Therefore, the policy was revised in 2019, where it was announced that the request for submission would be made not only in cases of the phase II review, but also for cases under the phase I review, with a high necessity to do so<sup>13</sup>.

Furthermore, in June 2022, the JFTC issued the Practices of the JFTC concerning the submission of internal documents in review of business combinations (**'Internal Documents Guidance'**)<sup>14</sup>. This guidance states that in order to conduct a prompt and accurate merger review, it is extremely important to collect accurate facts regarding the planned Merger, and internal documents are one of the optimal materials for that purpose. The JFTC also published detailed practical contents on the scope, timing and method of submission of the internal documents to be requested. Examples of internal documents listed in the Internal Documents Guidance include, (i) meeting minutes and related materials of the board meetings in which the planned Merger was discussed, (ii) documents in relation to the purpose and impacts of the planned Merger, (iii) emails of officers or employees who were involved in the discussions relating to the planned Merger, and (iv) market research, market forecasts and market surveys of the products or services relating to the business that is the subject of the planned Merger. In many cases, the submission of two years' worth of documents would be requested<sup>15</sup>. Further, when the parties are selective as to the documents that will be submitted, an explanation of the reasons and methodology of the selection is required<sup>16</sup>.

In fact, among the review results published since around 2020, there have consistently been cases where the JFTC mentioned that it requested and examined the materials and minutes of various meetings. Examples include board meetings of the parties' group related to the Merger, even in cases where the review was completed in the phase I review, or in cases involving markets other than the digital sector<sup>17</sup>. For example, in a JFTC review result, the parties' recognition of the competitive relationship between the services they provided, which can be understood from their internal documents, was referred to in the market definition<sup>18</sup>. There was also a case where it was revealed that a description that supports the likelihood of theory of harm (mentioned in paragraph 1(1) above) was found in the internal documents (such documents are sometimes called 'hot documents') that was examined in the case<sup>19</sup>.

As seen above, the JFTC tends to actively use the internal documents of the parties, and it can be foreseen that there will be a considerable burden to respond to any request for submission (forensic tools for the collection of documents to be submitted could be used on a case-by-case basis). In addition, recognition of the socioeconomic environment may differ depending on the document creator. Therefore, it is also necessary to pay attention to whether the contents of the internal documents to be submitted are consistent with the contents of other submitted documents. If the documents to be submitted contain misleading descriptions, it may be worth considering taking measures such as supplementing the misleading descriptions when submitting internal documents.

### (3) Solicitation of opinions from third parties

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<sup>13</sup> Fukamachi, M. et al., 2021. *Kigyo Ketsugo Gaidorain [Dai Ni Han]* [Corporate Merger Guidelines [Second Edition]], Shoji Homu, p. 379.

<sup>14</sup> Practices of the Japan Fair Trade Commission concerning the submission of internal documents in review of business combination: [https://www.jftc.go.jp/en/policy\\_enforcement/mergers/index\\_files/internal\\_documents.pdf](https://www.jftc.go.jp/en/policy_enforcement/mergers/index_files/internal_documents.pdf)

<sup>15</sup> Ibid., 2. Scope of internal documents required to submit.

<sup>16</sup> Ibid.

<sup>17</sup> Major Business Combination Cases in Fiscal Year 2022, Case 1.

<sup>18</sup> Major Business Combination Cases in Fiscal Year 2020, Case 10, and Major Business Combination Cases in Fiscal Year 2021, Case 6.

<sup>19</sup> Major Business Combination Cases in Fiscal Year 2020, Case 10.

If a merger review proceeds to the phase II review (mentioned in paragraph 1(2) above), this fact will be published by the JFTC, along with the solicitation of opinions from third parties on the case<sup>20</sup>. However, in June 2022, it was explicitly stated that the solicitation of opinions would be made even if a particular merger review does not proceed to the phase II review, as long as it was deemed necessary<sup>21</sup>. In fact, two cases in the same year and two cases in 2023 were published on the JFTC's website where information and opinions were solicited<sup>22</sup>. In addition, apart from the public solicitation of opinions as mentioned above, the JFTC also conducts hearings or written surveys individually to the parties' customers or competitors<sup>23</sup>, which has also been done in the past.

If the opinions or answers submitted to the JFTC through these procedures contradict the parties' opinions (for example, in case the customer's strong bargaining power, which the parties claim exists, is denied by the customer's response), it may be necessary for the parties to respond by submitting additional explanatory materials to support their claims. Additionally, in cases where there will be hearings or written surveys conducted by the JFTC, it may be worth requesting the JFTC for an opportunity to review and comment on the questions to be asked before those surveys are conducted. This would help avoid erroneously leading to answers that deviate significantly from the understanding of the parties.

## 2. Other points to keep in mind when responding to the JFTC's request for submission of various documents

As mentioned above, the JFTC may request the parties to submit various documents and information, but attending to these requests is generally voluntary. However, in June 2022, the JFTC made it clear that it would exercise its compulsory investigative authority under the AMA within the necessary and reasonable scope, if the JFTC struggled with the voluntary information collection<sup>24</sup>. In any case, practically, it would be desirable to respond promptly to JFTC's requests in order to obtain clearance as early as possible.

In addition, there are cases where the same Merger is subject to merger reviews by other foreign competition authorities in parallel with the JFTC due to circumstances such as having a large volume of sales or assets in various countries. In such cases, information exchanges between the JFTC and other competition authorities on individual cases have become common<sup>25</sup>. There are many past cases where the JFTC stated that it has exchanged information with other competition authorities during the

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<sup>20</sup> Policy, 4 (1) and (2).

<sup>21</sup> Towards the Active Promotion of Competition Policy in response to Socioeconomic Changes as represented by Digitalization - Coordination and Strengthening of Competition Policy Advocacy and Law Enforcement -, 4. (1).

<sup>22</sup> However, there was a case in the past where opinions were solicited in the phase I review. Major Business Combination Cases in Fiscal Year 2011, Case 2:

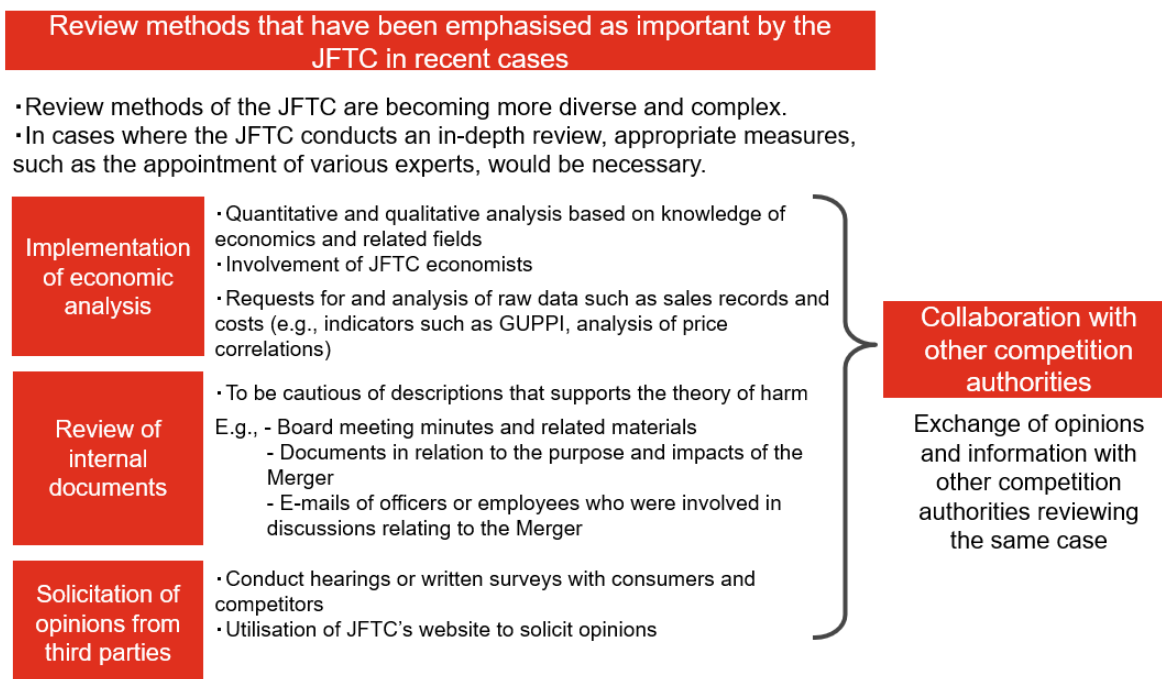
[https://www.jftc.go.jp/en/policy\\_enforcement/mergers/index\\_files/Major\\_Business\\_Combination\\_Cases2011.pdf](https://www.jftc.go.jp/en/policy_enforcement/mergers/index_files/Major_Business_Combination_Cases2011.pdf)

<sup>23</sup> In such cases, the JFTC may request the parties to submit a list of the names and contact information of enterprises which would be candidates for hearings or written surveys.

<sup>24</sup> Towards the Active Promotion of Competition Policy in response to Socioeconomic Changes as represented by Digitalization - Coordination and Strengthening of Competition Policy Advocacy and Law Enforcement -, 4. (2).

<sup>25</sup> Tsukada, M., October 2023. *Kigyo Ketsugo Shinsa no Tomen no Kadai* [Immediate Challenges in Merger Review], Kosei Torihiki, No. 876, pp. 5-6.

review process<sup>26</sup>. In such multi-jurisdictional merger filing cases, it is desirable that the review status of other competition authorities be shared in a timely manner with the parties' personnel and experts who are dealing with the JFTC. This not only enables such personnel and experts to provide consistent explanations across jurisdictions, but also allows them to anticipate the possibility that the JFTC will conduct additional reviews using methods (including the above-mentioned economic analysis and internal document submission requests) adopted in other competition authorities.



Source: Prepared by PwC Legal Japan

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## The takeaway

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There are no particular legal requirements on the specific timing when the parties should make a prior notification to the JFTC. However, if the various review methods mentioned above are used after the notification, it is realistically difficult to expect the review to be completed within the period of the phase I review (30 days after the receipt of the notification form). Therefore, except for cases where the possibility of being questioned by the JFTC is extremely low, it is advisable to consider using the opportunity of prior consultation with the JFTC, which can be voluntarily offered, to explain the case. It is also advisable to move to a formal notification when there are prospects of obtaining clearance within 30 days after the acceptance. Taking this into account, it is desirable to prepare for the review by evaluating how in-depth the examination will be and the difficulty of obtaining clearance by involving experts before contacting the JFTC.

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<sup>26</sup> Since the JFTC is obligated to maintain confidentiality regarding information submitted by enterprises, the JFTC collects a waiver of confidentiality from the source of the information before disclosing such information to other authorities.

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## Let's talk

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For a deeper discussion of how this issue might affect your business, please contact:

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