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## JAPAN



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### **No new regulation adopted or proposed**

Note that relevant regulations may be changed before your contemplated transaction is completed. Mergerfilers.com and our national experts keep information on regulations up to date and even provide alerts on adopted or proposed changes that have not come into force yet but may come into effect before the transaction is completed. When this field is green, we have no knowledge of such imminent changes to the relevant regulations.

#### **Relevant legislation and authorities**

##### **1) Is a merger control regulation in force ?**

Yes. Merger control regulation was introduced in Part 4 of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (the “Antimonopoly Act”).

##### **2) Which authorities enforce the merger control regulation?**

The Japan Fair Trade Commission (the “JFTC”) enforces the Antimonopoly Act including the merger regulation contained therein.

Decisions of the JTFC may be appealed to Tokyo District Court (see topic 50).

### 3) Relevant regulations and guidelines with links:

The merger regulation is contained in Part 4 of the Antimonopoly Act. More detailed rules are provided in executive orders and guidelines issued by the JFTC. Links to the major legislation, guidelines and forms are listed here:

Original Japanese version	Unofficial English translation
<a href="#">私的独占の禁止及び公正取引の確保に関する法律</a>	<a href="#">The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade</a>
<a href="#">私的独占の禁止及び公正取引の確保に関する法律第九条から第十六条までの規定による認可の申請、報告及び届出等に関する規則</a>	<a href="#">Rules on Applications for Approval, Reporting, Notification, etc. Pursuant to the Provisions of Articles 9 to 16 of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade</a>
<a href="#">企業結合審査に関する独占禁止法の運用指針</a>	<a href="#">Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination</a>
<a href="#">企業結合審査の手續に関する対応方針</a>	<a href="#">Policies Concerning Procedures of Review of Business Combination</a>
<a href="#">各種届出・報告様式</a>	Notification forms or information requirements (translation into English not available)

### 4) Does general competition regulation apply to mergers or ancillary restrictions?

Generally, restrictions on competition which are ancillary to the merger are considered inherent parts of the merger and are not subject to separate scrutiny under the general competition regulation if the JFTC reviews and clears the merger itself. However, restrictions that go beyond what may be considered ancillary may be caught by the general competition regulation. For instance, the general prohibition on unreasonable restraint of trade may be applied to price agreements made by parent companies of joint ventures to maintain product prices throughout the establishment of the joint ventures.

## 5) May an authority order a split-up of a business irrespective of a merger?

If a company violates rules against private monopolization or other provisions of the Antimonopoly Act, the JFTC has the authority to issue a cease-and-desist order, requiring the violator to take “necessary measure to eliminate the violation” including “partial divestiture of business.” (Article 7(1) of the Antimonopoly Act) Thus, theoretically, if the JFTC believes a split-up is necessary to eliminate the violation, it can do so under the Antimonopoly Act. However, in practice, it is highly unlikely that such a case will occur.

## 6) Other authorities that also require merger filing or may prohibit transaction

(Note that this may not be an exhaustive list and that industry - specific legislation should always be considered. Furthermore, a merger will often require change of registrations with – but not approval from – the companies register, land register and authorities that have issued permits for the activities of the merging parties.)

The JFTC is the sole authority that requires merger filing or may prohibit transaction.

## 7) Are any parts of the territory exempted or covered by particular regulation?

The Antimonopoly Act covers all territories of Japan.

## Voluntary or mandatory filing

## 8) Is merger filing mandatory or voluntary?

Merger filing is mandatory when the thresholds are met.

However, voluntary filing can also be considered, as the JFTC may request a notification and oppose a merger even if the thresholds are not met (see topic 24 and 25).

The JFTC, in its revised guidelines, recommends certain types of transactions in the digital market be reported voluntarily if the following requirements are met, even if a merger does not meet the threshold for mandatory filing.

The total consideration for the acquisition exceeds JPY 40 billion and the acquisition is expected to affect domestic 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.

## Types of transactions to file – what constitutes a merger

## 9) Is there a general definition of transactions subject to merger control?

Yes, according to the *Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination* a merger subject to merger control is defined as any of the following:

1. share acquisitions;

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

#### **10) Is 'change of control' of a business required?**

No. The Antimonopoly Act provides for a percentage of voting rights to be acquired as a threshold for triggering a filing, and “change of control” is not a filing threshold. Please see topic 14.

#### **11) How is “control” defined?**

N/A

#### **12) Acquisition of a minority interest**

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 topic 14a for details.

#### **13) Joint ventures/joint control – which transactions constitute mergers?**

There are no special rules about merger filing with respect to joint ventures or joint control in the Antimonopoly Act, and a joint venture transaction will trigger a filing if the relevant thresholds are met (see topic 14a).

### **Thresholds that decide whether a merger notification must be filed**

#### **14) Which thresholds decide whether a merger notification must be filed?**

##### **a) Turnover thresholds**

Merger notification rules are different for each type of transaction. The thresholds are based on the total domestic turnover of the merging parties or domestic turnover generated from a business or asset to be purchased (in the case of business/asset transfer transaction). In addition, in the case of share acquisition, the threshold of voting rights ratio is applied.

(As stated in topic 25 the JFTC may request a notification and oppose a merger even if the thresholds are not met.)

##### 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:

A company split is a transaction whereby a company transfers all or part of its rights and obligations to another company. This is qualified as an absorption-type company split when the other company (the absorbing company) is an existing entity. When two or more companies transfer their rights and obligations to another company which is established as a newly incorporated entity for the purpose of the transaction, this is called a joint incorporation-type company split (click [here](#) for JFTC's illustration).

These two types of company splits may trigger merger filing but the applicable thresholds are different depending on the types of corporate 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 these types.

In the case of joint incorporation-type company splits, notification is required if any of the following conditions are met:

1. 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;
2. 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;
3. 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
4. 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.

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

1. 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;
2. 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;
  3. 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 billion; or
  4. 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 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.

### **b) Market share thresholds**

N/A

### **c) Value of transaction thresholds**

None for mandatory filing system. Please see the answer to topic 8 regarding voluntary notification system for an acquisition with large transaction value.

### **d) Assets requirements**

See topic 14a.

### **e) Other**

N/A

## **15) Special thresholds for particular businesses**

### Banking and insurance

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 or confirmation that the transaction falls under exemptions specified in topic 20.

## **16) Rules on calculation and geographical allocation of turnover**

Rules on calculation and geographical allocation of turnover are contained in the [Rules on Applications for Approval, Reporting, Notification, etc. Pursuant to the Provisions of Articles 9 to 16 of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade](#).

‘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 supplied 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 corporate companies 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 sales” or its equivalent.

## **17) Special rules on calculation of turnover for particular businesses**

### Banking or Insurance undertakings

For a banking and insurance undertaking, ‘turnover’ refers to ordinary profit of the most recent financial year of the undertaking.

### Type I Financial Instruments undertakings

For a Type I Financial Instrument undertaking, ‘turnover’ refers to operating profit of the most recent financial year of the undertaking.

## **18) Series of transactions that must be treated as one transaction**

Each transaction must be assessed independently on whether the transaction triggers the merger filing. However, if the parties try to circumvent the merger filing by dividing a transaction piecemeal, the JFTC will regard this as a reportable transaction and impose a sanction.

**Exempted transactions and industries (no merger control even if thresholds ARE met)**

## **19) Temporary change of control**

The Japanese merger control regime does not have a concept of "change of control", either temporary or permanent, and merger filing will be required if the transaction fulfills the relevant thresholds, even if it is temporary.

## **20) Special industries, owners or types of transactions**

### Banking and bus undertakings

Local banking and bus undertakings from application of the merger filing rules in the Antimonopoly Act under certain conditions. A merger between local banking undertakings or local bus undertakings doesn't have to be filed with the JFTC, but requires approval from the Financial Services Agency or the Ministry of Land, Infrastructure and Transport, if:

1. it may be difficult for the undertaking to provide its basic service sustainably in the future in all or a substantial part of the area where the undertaking provides the service;
2. due to a merger, improvement of the business related to the basic service provided by the undertaking is expected and the service shall be maintained in the area specified in (1);
3. as a result of a merger, there is no risk of causing an unreasonable increase in the price of the basic service provided by the undertaking or other unfair disadvantages to users of the service;
4. the merging parties do not use unfair trade practices;
5. in areas other than specified in (1) above, competition for the basic service provided by the undertaking will not be substantially limited; and
6. competition for products or services other than the basic service provided by the undertaking group companies will not be substantially limited.

Investigations as to whether a merger meets above conditions will be conducted by the Financial Services Agency or the Ministry of Land, Infrastructure and Transport with the consultation to the JFTC.

## **21) Transactions involving only foreign businesses (foreign-to-foreign)**

There is no exemption for foreign-to-foreign transactions. All transactions that meet the thresholds are subject to merger control regardless of where the undertakings concerned are registered, operate or own assets.

## **22) No overlap of activities of the parties**

There is no exemption for transactions with no overlap of activities.

## **23) Other exemptions from notification duty even if thresholds ARE met?**

Transactions within the same company group are generally exempted from notification.

## **Merger control even if thresholds are NOT met**

## **24) May a merging party file voluntarily even if the thresholds are not exceeded?**

Yes, even if a merger does not meet the thresholds, a merging party can consult with the JFTC, if the merger will present a competition concern in the Japanese market. Because the JFTC has jurisdiction over any transaction that does not meet thresholds, the merging party may want to consult with the JFTC voluntarily if the transaction poses a competition concern in Japan. When a merging party consults with the JFTC voluntarily, the JFTC reviews the transaction based on the same guidelines as the mandatory filing transaction.

**25) May the competition authority request a merger notification or oppose a transaction even if thresholds are not met?**

Yes, the JFTC has the authority to oppose a transaction even if thresholds are not met.

### **Referral to and from other authorities**

**26) Referral within the jurisdiction**

N/A

**27) Referral from another jurisdiction**

N/A

**28) Referral to another jurisdiction**

N/A

**29) May the merging parties request or oppose a referral decision?**

N/A

### **Filing requirements and fees**

**30) Stage of transaction when notification must be filed**

A merger notification must be filed and cleared before implementation (i.e. closing) of transactions. There is no specific deadline for a filing, but when considering the overall schedule for the transaction, the parties should be aware that they are prohibited from implementing transactions for 30 days from the date when the formal merger notification is accepted by the JFTC, unless the JFTC decides to shorten this period.

**31) Pre-notification consultations**

The JFTC accepts pre-notification consultations by a merging party.

**32) Special rules on timing of notification in case of public takeover bids and acquisitions on stock exchanges**

There is no special rule in merger control regulations for acquisition on stock exchange and public takeover bids. The Parties involved in these types of acquisitions also have to submit a prior notification to the JFTC if the thresholds are met and they are prohibited from implementing the acquisition. It is a standard practice in Japan that a company acquiring shares through public takeover bid obtains clearance from the JFTC before the launch/announcement of the bid.

### **33) Forms available for completing a notification**

There are various notification forms according to each type of transaction (see links under topic 3).

### **34) Languages that may be applied in notifications and communication**

Only Japanese. If documents supplied with the notification (see topic 35) are in a foreign language, a merger filing party must prepare the translation, although some documents do not require translation.

### **35) Documents that must be supplied with notification**

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 of 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 specifying the property and profit of the company groups; and
7. power of attorney (if a merger notification is filed by attorney).

### **36) Filing fees**

Filing fee is not required.

## **Implementation of merger before approval – “gun jumping” and “carve out”**

### **37) Is implementation of the merger before approval prohibited?**

Merging parties are prohibited from implementing a merger without notifying and waiting for the waiting period of 30 days from the date when the formal notification is accepted. If the parties submit a merger notification and the waiting period expires, the parties can implement the merger before approval (this situation might arise when the JFTC initiates Phase II investigation, where the statutory waiting period lapses, and therefore the party can legally close the transaction, but the JFTC is able to continue its review). However, in this case, the JFTC may apply for an emergency stop order for the merger to the court.

Therefore, in practice, the parties should not implement the merger before approval.

### **38) May the parties get permission to implement before approval?**

No, there is no permission rule before approval. However, if the merging parties acquire approval by the JFTC before the end of the 30-days waiting period, the JFTC can shorten this period by the request of the merger filing party.

### **39) Due diligence and other preparatory steps**

Due diligence before the approval of merger is generally allowed but special care must be made to prevent sensitive market information from being used for purposes other than assessing the viability of the merger if the parties are in competition in a specific market in Japan. In practice, the parties establish a 'clean team' consisting of people who are not in positions to influence the competition between the merging parties, and provide safeguard measures to make sure that sensitive information stays within the clean team.

### **40) Veto rights before closing and 'Ordinary course of business' clauses**

An "ordinary course of business" clause that prevents the target company from taking decisions outside the course of its ordinary business until the closing date is generally considered acceptable.

However, beyond maintaining corporate value, if the merger parties establish a clause which requires prior consent for specific conduct that may affect the target's business activity, it may be regarded as 'gun-jumping' in violation of the pre-notification obligation.

### **41) Implementation outside the jurisdiction before approval – 'Carve out'**

There are no specific rules, but the merger parties can agree with the JFTC about "carve out" of the Japanese part of a transaction to avoid delaying implementation in the rest of the world pending approval in Japan

However, whether it is possible to carve out the Japanese part of a transaction must be assessed carefully on a case-by-case basis. The JFTC may oppose the "carve-out" measure if the implementation of the merger even with carve-out will have negative impact on competition in Japan.

### **42) Consequences of implementing without approval/permission**

The parties may be fined JPY 2 million or less if the merger is implemented without filing.

Furthermore, if the merging parties implement the merger without filing or waiting for the waiting period of 30 days, the JFTC can file a lawsuit invalidating the merger.

## **The process – phases and deadlines**

### **43) Phases and deadlines**

Phase	Duration/deadline
<p><u>Pre-notification phase:</u></p> <p>It is normally advisable to inform the JFTC of the intended transaction at an early stage and to enter into pre-notification consultations that will include submitting draft notifications. In unproblematic cases the JFTC will often be ready to approve the merger very shortly after receiving the formal notification, if there have been enough pre-notification consultations.</p>	<p>No set duration or deadline</p>
<p><u>Assessment of completeness of notification:</u></p> <p>When the draft notification has been submitted, the JFTC will assess whether the notification is completed at first. If the notification is deemed incomplete, the JFTC will ask the parties to revise. When the the notification form has been completed, the JFTC must accept it. It will take from several days to a week for the JFTC to check the completeness of the notification.</p>	<p>No set duration or deadline</p>
<p><u>Phase I:</u></p> <p>The merger is either approved or it is decided to initiate phase II investigation of the merger.</p> <p>If the JFTC approves the merger, it shall provide the merging party with a notice stating that it shall not make a cease-and-desist order.</p> <p>On the other hand, if the JFTC decides to initiate a phase II investigation, it requests the merger filing party within the period of phase I to submit reports including additional materials or information required to decide whether the merger may be approved or not.</p> <p>The JFTC, upon the initiation of Phase II, invites comments from third parties to assess the merger’s influence on competition. The JFTC may do so informally during Phase I.</p>	<p>30 days from the date when the formal notification is accepted. If the merger can be approved and the merger filing party requests so in writing, the JFTC may shorten the 30-day waiting period.</p>
<p><u>Phase II:</u></p> <p>The merger is either approved or the JFTC orders the merging parties to take measures necessary to eliminate the act in violation of the provisions of merger control (“cease-and-desist</p>	<p>the later of 120 days from the date when the formal notification is accepted or 90 days from the date when all additional reports are received by the JTFC.</p>

order”). If any remedy measure is offered by the parties and the JFTC decides the remedy will eliminate the merger’s competitive concern, the JFTC will approve the transaction conditionally upon the implementation of the remedy.

After the JFTC requests the merger filing party to submit additional reports and starts phase II investigation, the JFTC announces it on its website and at the same time ask opinions from third parties. Anyone can offer an opinion within 30 days from the date of the announcement. In addition, the JFTC can conduct a hearing and questionnaire for competitors or consumers to examine the influence of the merger on competition.

As a result of investigation in phase II, if the JFTC approves the merger, it shall issue a notice stating that it shall not make a cease-and-desist order and explaining why it approves the merger.

On the other hand, if the JFTC determines that the merger poses a competitive concern, after issuing an advance notice to the merger filing party and conducting an opinion hearing procedure, the JFTC issues cease-and-desist order.

If the parties submit a remedy proposal and the JFTC believes the remedy will resolve its competitive concern, the JFTC can also approve the merger conditioned upon the remedy. A remedy proposal can be made at any time during the merger review, either before or after the issuance of advance notice above, or even within Phase I.

## Assessment and remedies/decisions

### 44) Tests or criteria applied when a merger is assessed

The JFTC assesses whether the merger will "*substantially restrain competition in any particular field of trade*".

A "*particular field of trade*" is a concept equivalent to "market" and the JFTC will define the product market and geographic market. "*Substantially restrain competition*" means "*to bring about a state in which competition itself has significantly decreased and a situation has been created in which a specific business operator or a group of business operators can control the market by determining price, quality, volume, and various other terms with some latitude at its or their own volition*" according to the [Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination](#).

### 45) May any non-competition issues be considered?

No.

#### **46) Special tests or criteria applicable for joint ventures**

N/A

#### **47) Decisions and remedies/commitments available**

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 merger filing party offers appropriate remedies.

The JFTC provides several types of appropriate remedies in the [Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination](#); the JFTC provides that a remedy shall in principle be a structural remedy, while behavioral remedy is allowed in limited circumstances. Structural remedy includes divestiture of business, or long-term commitment to provide goods to a third-party on cost-basis. Behavioral remedy includes a measure for enabling new entry/import, 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.

### **Publicity and access to the file**

#### **48) How and when will details about the merger be published?**

The JFTC will make a public announcement after it requests the merger filing party to submit additional reports to initiate a phase II investigation. In addition, after the investigation of phase II, 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.

#### **49) Access to the file for the merging parties and third parties**

##### **The merging parties:**

During the investigation stage by the JFTC, the merging party does not have access to any file retained by the JFTC. When the JFTC decides to block the transaction and issue prior notice of cease-and-desist order, the party is given an opportunity to access to file and provide argument to the JFTC.

##### **Third parties:**

Third parties do not have access to the file. They can only access the merger information which is

published by the JFTC on its website.

## **Judicial review**

### **50) Who can appeal and what may be appealed?**

Under the law, the merging parties can file a lawsuit to invalidate a cease-and-desist order to block a merger 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.