



# The Sun Also Sets: Trending Away from Japanese Exceptionalism in Merger Control and Closer to Global Standards

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Having endured two lost decades, Japan has little appetite for a third. But as an export-driven country, there are limits to Japan's ability to will itself back to economic health, given limp global demand and bleak forecasts. The implicit medium-term strategy—just staying afloat—seems evident in the Cabinet's decision of June 18, 2010 to pursue a "New Growth Strategy".<sup>1</sup>

One interesting offshoot of the Strategy is a package of merger control reforms, effective July 1, 2011.<sup>2</sup> These took the form of an amendment to the Japan Fair Trade Commission's ("JFTC") notification rules and a revised set of guidelines.<sup>3</sup> The developments highlighted here are: the abolition of the prior consultation system; enhanced procedural transparency; confirmation of greater openness to wider geographic markets, and; early signs of how the reforms seem to be influencing the JFTC's merger practice.

## I. THE END OF PRIOR CONSULTATION

Prior to the 2011 merger control reforms, parties to a merger notifiable in Japan had the option of consulting with the JFTC before filing. Such informal consultations presented advantages, such as confidentiality pending discussions with case handlers. This system has now been abolished. From the JFTC's perspective, the main benefit of prior notification was the possibility to obtain information quickly and to head off problems at an early stage, thereby reducing

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1 For details, see <http://www.meti.go.jp/english/policy/economy/growth/index.html>; Randall Jones & Byungseo Yoo, *Japan's New Growth Strategy to Create Demand and Jobs*, (OECD Economics Department Working Papers, No. 890), available at <http://dx.doi.org/10.1787/5kg58z5z007b-en>.

2 See JFTC Press Release (14.06.2011), available at <http://www.jftc.go.jp/en/pressreleases/uploads/110620.pdf>.

3 For translations of the Rules on Applications for Approval, Reporting and Notification ("Notification Rules"), the Guidelines on the application of the Policies Concerning Procedures of Review of Business Combination ("Procedural Guidelines"), and the revised Guidelines on the Application of Antimonopoly Act Concerning Review of Business Combination ("Revised Guidelines"), see [http://www.jftc.go.jp/en/policy\\_enforcement/mergers/pdf/110713.2.pdf](http://www.jftc.go.jp/en/policy_enforcement/mergers/pdf/110713.2.pdf); [http://www.jftc.go.jp/en/policy\\_enforcement/mergers/pdf/rules\\_on\\_applications.pdf](http://www.jftc.go.jp/en/policy_enforcement/mergers/pdf/rules_on_applications.pdf); and <http://www.jftc.go.jp/en/pressreleases/uploads/110620attach2.pdf>.

the need to resort later to more drastic measures. This may also have seemed attractive to the parties if it led to quicker approval.<sup>4</sup> In practice, according to the business community, prior consultation sometimes bogged down the procedure and allowed for a *de facto* circumvention of statutory timelines.<sup>5</sup>

It is probably for that reason that the prior consultation system appears to have been used only infrequently in recent years. In 2008, 1008 notifications were filed with the JFTC, yet prior consultation was used in just 28 of those cases.<sup>6</sup> In 2009, prior consultation was used only 24 times as compared to 985 notifications. In 2010, when only 265 notifications were filed, prior consultation was used 13 times. The figures just recited (which do not take account of aborted deals that were never filed) imply that, at least with regard to garden-variety notifications, the impact of the reform may be limited. On the other hand, inasmuch as merging parties generally did avail themselves of prior consultation in large and complex cases, the statistics to some extent belie the qualitative importance of having an additional informal procedural tool.<sup>7</sup>

In the absence of prior consultation, the JFTC will have fewer opportunities to engage in informal, possibly opaque manoeuvring. Moreover, by bringing the procedure more squarely under the more formal framework, the JFTC may be more often obliged to introduce detailed economic analysis when presenting its concerns to the parties. Under the previous system, in cases where competitive concerns were discussed off the record, it was less imperative for the JFTC to build up sophisticated economic evidence to convince the parties and the public.

## II. REINFORCED RECOGNITION OF WORLDWIDE MARKETS

The “old” Merger Guidelines of 2007 already envisaged relevant geographic markets wider than the domestic market. Furthermore, the JFTC in fact accepted international markets, as it did, for example, in *Sony/NEC* (2005), a merger of optical disc drive businesses. In the European Union, by comparison, the parties argued for a worldwide market (given low transportation costs, no trade barriers, important trade flows, global product standards and globally active suppliers and

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<sup>4</sup> From the 1970s to the 1990s, the JFTC resolved competition problems informally and merging parties were quite content to have matters handled confidentially. See, e.g., Toshiaki Takigawa, *The Prospect of Antitrust Law and Policy in the Twenty-First Century: In Reference to the Japanese Antimonopoly Law and Japan Fair Trade Commission*, 1 WASH. U. GLOB. LEG. STUD. LAW REV. 275, 288 (2002). However, following changes made in 2002, general satisfaction with prior consultation seems to have declined.

<sup>5</sup> In theory, time should have been running according to “phase 1” and “phase 2” of the prior consultation phase (note: these periods bore no correspondence to the familiar Phase I and Phase II in other jurisdictions). However, the JFTC was criticized for holding up the process, in particular by insisting that submitted documents were incomplete and imposing vast data requirements. See, e.g., Kaori Nakano, *The Recent Developments in Merger Investigation*, 320 RIPPON CHOSA [Legislation and Investigation] 79, 81 (2011).

<sup>6</sup> JFTC, [www.jftc.go.jp/kenkyukai/dk-kondan/110404/188-1.pdf](http://www.jftc.go.jp/kenkyukai/dk-kondan/110404/188-1.pdf) (in Japanese).

<sup>7</sup> For the impact of the end of prior consultation, see, e.g., Masahiro Murakami, *Review of the merger procedure of 2011*, 1357 HANREI TIMES 36, 44 (2011).

customers), but the European Commission left the question open because it did not affect its competitive assessment.

Nevertheless, perhaps to quell lingering doubts, the revised Merger Guidelines add clarity with regard to when the JFTC will recognize a worldwide or regional (i.e., East Asian) market. According to Section 2.3 (2), such instances include those where domestic or overseas suppliers are selling products in the worldwide (or East Asian) market for almost same price, and buyers are purchasing mainly from worldwide (or East Asian) sellers.

### III. MORE PROCEDURAL TRANSPARENCY

The reforms were also designed to achieve more transparent procedures, a seemingly perpetual concern in Japan. Under the new framework, when the JFTC requests a report from the parties, it should indicate the purpose of its request, thus giving the parties a better understanding of what precisely is needed.<sup>8</sup> At the parties' request, the JFTC should also explain its concerns.<sup>9</sup> This was already a matter of informal practice but it is now made explicit. Furthermore, an approval decision (which previously was not announced in written form) should be provided in writing to the parties.<sup>10</sup> Yet another helpful feature, found in the revised Guidelines,<sup>11</sup> is a description of cases falling outside the jurisdiction of the JFTC.

On substantive analysis, the revised Guidelines also provide more detailed explanations of the elements that determine whether a merger will substantially restrain competition. These include, among other things, the supply posture of other producers, competitive pressure from neighboring markets, and competitive pressure exerted by customers.<sup>12</sup>

### IV. THE JFTC'S EARLY PRACTICE FOLLOWING THE REFORMS

The impact of the reforms will be felt mostly in mega-mergers and otherwise complex transactions. The news of the moment concerns not a cross-border deal but the NSC/Sumitomo Steel merger, approved conditionally on December 14, 2011 under Japan's revised framework.<sup>13</sup> This is a headline merger of the number one and number three Japanese producers and, if consummated, it will spawn, next to ArcelorMittal, the world's largest steel producer. Notably, the JFTC's new emphasis on speedier procedures played a significant role. Whereas mergers of

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<sup>8</sup> See *supra* Note 3, Notification Rules, Article 8; Procedural Guidelines, Section 6(1).

<sup>9</sup> *Id.*, Procedural Guidelines, Section 4.

<sup>10</sup> *Id.*, Notification Rules, Article 9; Procedural Guidelines, Sections 3, 5 and 6.

<sup>11</sup> *Id.*, Revised Guidelines, Section 1.1 (1).

<sup>12</sup> *Id.*, Section 4.2.

<sup>13</sup> See <http://www.jftc.go.jp/en/pressreleases/uploads/2011-Dec-14.pdf>. As of this writing, review of the transaction is still pending in certain jurisdictions.

comparable size might have previously taken up to a year to gain clearance,<sup>14</sup> here approval was granted in just over six months. One hopes that brisk procedures will not be reserved exclusively for cases involving Japanese ‘clients’ with an industrial policy subtext, although this hope remains to be tested.

## V. CONCLUSION

Merger control is one area of competition policy, like cartel busting, in which states of convergence matter greatly because its effects redound, in the aggregate, upon both domestic and foreign consumers. Ideas and practices converge, of course, not toward a fictitious end state but toward common, indefinite trajectories. The years 2010-2011 have been marked by significant refinements of merger policy in several jurisdictions, partly motivated by the convergence bug, often transmitted through the work of the International Competition Network.<sup>15</sup> The reforms discussed above seem to confirm that Japan, too, is participating in a nascent *ius commune quasi-universalis*—one that must be flexible enough to accommodate, where appropriate, informed divergence and other creative tensions.

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<sup>14</sup> See Naoyuki Fukuda citing an unnamed JFTC official, in *FTC gives green light to Nippon Steel, Sumitomo Metal merger*, ASAHI SHIMBUN, Dec. 15 2011, available at <http://ajw.asahi.com/article/economy/business/AJ201112150041>.

<sup>15</sup> Many of these developments are discussed in EUROPEAN COMPETITION LAW ANNUAL 2010: MERGER CONTROL IN EUROPEAN AND GLOBAL PERSPECTIVE (Hart Publishing, Philip Lowe & Mel Marquis, eds., forthcoming 2012).