論説

Merger Control in Japan: "In Informal Remedies We Trust"

Professor of Law, The University of Tokyo
Simon VANDE WALLE[1)]

Abstract: This article aims to shed light on Japan's experience with merger remedies, i.e. the measures which companies take to obtain the Japan Fair Trade Commission's approval of a deal that would otherwise harm competition. Japan's system of *ex ante* merger control is the oldest in the world and remedies have played a key role in the system. Remarkably, the Japan Fair Trade Commission (JFTC) has not prohibited a single merger for more than half a century. Merger control has functioned without court intervention for more than seventy years. The process through which remedies are negotiated and approved is informal and operates based on guidelines issued by the JFTC. This article argues that, although the system seems to grant the JFTC significant power and discretion, the JFTC has not used this power to extract far-reaching remedies. Instead, from the viewpoint of the companies involved, it has shown restraint and been pragmatic rather than principled.

I. The Importance of Merger Remedies in Japan

It is difficult to overstate the importance of remedies in Japanese merger control. The Antimonopoly Act[2)] gives the Japan Fair Trade Commission (JFTC) the power to block[3)] mergers and acquisitions[4)] that "[may][5)] substantially restrain competition in any particular field of trade"[6)] Until present, this has never happened.[7)] Instead, when the JFTC has concerns about a merger's anticompetitive effects, the parties to the deal typically offer remedies to remove the JFTC's con-

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2) Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu [Act on Prohibition of Private Monopolization and Maintenance of Fair Trade], Law No. 54 of 1947, as amended [hereinafter Antimonopoly Act].

3) Antimonopoly Act, Art. 17-2 empowers the JFTC to issue a cease-and-desist order in case of a violation of the various provisions in Chapter IV of the Antimonopoly Act, which prohibit share acquisitions, mergers, etc. that "may substantially restrain competition in any particular field" or, put differently, that are anticompetitive.

4) In the remainder of this article, the term "merger" is used as shorthand for acquisitions, mergers, joint ventures, and

cerns, paving the way for a clearance. In the last twenty-five years, the JFTC has accepted remedies in more than eighty cases.[8)]

The JFTC is keen to point out that the lack of prohibitions does not imply that merger control in Japan is ineffective. According to the JFTC, parties either offer adequate remedies or, if they do not, they abandon their merger and withdraw the notification.[9)] To give this claim more credence, the JFTC publishes a list of deals that were abandoned by the parties, after the JFTC identified competition problems.[10)] At the time of writing,

various other types of transactions that combine the business activities of independent companies. The equivalent term in Japanese is *kigyō ketsugō*, often translated as business combination.

5) Oddly enough, in the English translation of the Antimonopoly Act made available on the JFTC's website and on the Japanese Ministry of Justice's website with translations of Japanese laws (www.japaneselawtranslation.go.jp), the words "*koto to naru*", which I have translated here as "may", have not been translated. As a result, the English translation of the phrase "*kyōsō wo jisshitsuteki ni seigen suru*" (substantially restrain competition), which is part of the Antimonopoly Act's legal test for cartels (Antimonopoly Act, Art. 2(6)) and private monopolization (Antimonopoly Act, Art. 2(5)), is the same as the translation of the phrase "*kyōsō wo jisshitsuteki ni seigen suru koto to naru*", which is part of the legal test for mergers. Although the difference was lost in translation, there is no doubt that the standard in merger control is different from the standard in cartels and monopolization cases. According to the JFTC guidelines the words "*koto to naru*" indicate that the substantial restraint of competition must not occur inevitably but that it is *probable* that the business combination leads to conditions that could easily lead to a substantial restraint of competition. JFTC, Kigyō ketsugō shinsa ni kansuru dokusenkinshihō no unyō shishin [Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination], 31 May 2004, as last amended on 17 December 2019, Part III, 1, (2) (Interpretation of "The Effect May Be").

6) Antimonopoly Act, Chapter IV. The Antimonopoly Act does not contain one single provision that prohibits all anticompetitive business combinations but instead has specific provisions for each type of transaction, so separate provisions for acquisitions, mergers, etc.. However, these provisions all have the same legal test for illegality. Specifically, they prohibit each type of transaction when it "[may] substantially restrain competition" (*kyōsō wo jisshitsuteki ni seigen suru koto to naru bāi*) in a particular field of trade. See Chapter IV of the Antimonopoly Act, Art. 10 (acquisition of shares), Art. 15 (mergers), Art. 15-2 (company splits), Art. 15-3 (joint share transfers) and Art. 16 (acquisition of a business or part of a business).

7) Arguably, the *Tōho / Subaru* case, decided by the JFTC in 1950, is the sole exception, although the transaction in that case hardly qualifies as a merger, even in the broad meaning given to it in this article. The case involved what was essentially a lease between two companies that owned movie theatres: Tōho would lease two movie theatres from Subaru in downtown Tokyo. The JFTC found that the lease amounted to "the lease of the whole or a substantial part of the business of another company" in the sense of (then) Art. 16(iii) of the Antimonopoly Act (now Art. 16(1)(iii)), and prohibited the agreement in a *shinketsu* [(formal) decision]. JFTC, Shinketsu [Decision] of 29 September 1950, 2 SHINKETSUSHŪ 146. Such lease transactions are no longer notifiable under the current Antimonopoly Act. The JFTC's decision was affirmed on appeal by the Tokyo High Court. *See* note 42. Another case in which the JFTC took action that came close to a prohibition is the *Hiroshima Dentetsu* case, in which the JFTC ordered Hiroshima Dentetsu to dispose of part (but not all) of the shares which it had acquired in competitor Hiroshima Bus, and the resignation of interlocking directors. JFTC, Dōi shinketsu [Consent decision] of 17 July 1973, 20 SHINKETSUSHŪ 62.

8) My own count based on the yearly statistics published by the JFTC relating to merger control (Kigyō ketsugō kankei todokede tō no jōkyō [The State of Affairs in Relation to Notifications of Business Combinations and Other Matters]), the JFTC's yearly reports (Kōseitorihikiiinkai nenjihōkoku [JFTC Annual Report]) and, for the years prior to 2009, the JFTC's yearly reports about the main merger cases (Shuyō na kigyō ketsugō jirei [Major Business Combination Cases]). The precise number of remedies is unknown because prior to 2009 (Heisei 21), neither the yearly merger control statistics nor the JFTC's annual report mentioned the total number of remedies cases. Although the yearly reports about the "Major Business Combination Cases" describe most cases with remedies, they are not exhaustive.

9) OECD, *Agency Decision-making in Merger Cases: From a Prohibition Decision to a Conditional Clearance – Note by Japan*, 28-29 November 2016, p. 2 (explaining that the JFTC has not issued a cease and desist order because parties have either offered adequate remedies or abandoned their business combination and withdrawn their notification).

10) JFTC, Kōhyō jirei ni oite mondaiten wo shiteki shite tōjigaishagawa ga keikaku wo dannen shita jirei [Cases (Among Cases in the Public Domain) Where the Parties Involved Abandoned Their Plan After Problems Were Identified], https://www.jftc.go.jp/dk/kiketsu/toukeishiryo/mondai/index.html. The list tracks abandoned deals since 1998. Some of these are global deals such as the abandoned iron ore joint venture between BHP Billiton and Rio Tinto, and Lam Research's attempted acquisition of KLA-Tencor, two deals which also ran into objections from, respectively, EU and U.S. competition authorities. But the list also features domestic deals, such as a four-to-three merger conceived in 2004 that would have created a market leader in the Japanese polystyrene market, with a 50% market share. On that last case, see JFTC, Heisei 16-nendo ni okeru shuyō na

in 2023, the list featured eight abandoned deals, with the count starting in 1998.

The JFTC's heavy reliance on remedies is by no means unique. Competition authorities in Europe, with the exception of Germany[11], also rely mostly on remedies, not prohibitions, to protect competition. Likewise, in the United States, most problematic mergers are not blocked by the courts or by the Federal Trade Commission but cleared with remedies, through consent decrees (in the case of the Department of Justice) and consent orders (in the case of the Federal Trade Commission).[12]

The frequent use of remedies by competition authorities has come in for criticism recently. Scholars in the U.S. have argued that the fundamental shortcomings of remedies have become clear over the years and that competition authorities often deviate from their stated remedies policies, accepting less than effective remedies.[13] They suggest, hence, that competition authorities should simply prohibit or clear, possibly after the parties have implemented some changes themselves.[14] These views are part of a broader movement to invigorate antitrust enforcement in the U.S. and have had some impact on enforcement. Under the Biden administration, the U.S. antitrust agencies have shown greater scepticism towards mergers remedies,[15] and have litigated more cases,[16] meaning they are seeking prohibitions rather than settling cases with remedies. Despite this recent trend in the U.S., the frequent use of remedies, as opposed to prohibitions, is a firmly established practice globally[17] and there are no signs of this changing any time soon.

Although authorities everywhere rely heavily on remedies, as opposed to prohibitions, Japan's complete lack of prohibitions nonetheless appears rather unique for a mature merger control system such as the one of Japan. Japan's *ex ante* merger control system has indeed been in place since 1947, making it the world's oldest system of *ex ante* control.[18] In the EU, *ex ante* merger control was introduced only in 1989, by the EU Merger

kigyō ketsugō jirei [The Major Business Combination Cases in Fiscal Year 2004], 30 May 2005, Case 12 (PS Japan K.K. and Dai Nippon Ink Chemicals), p. 63.

11) In Germany, the number of clearances with remedies and the number of prohibitions is more balanced. In recent years, prohibitions have even outnumbered remedies decisions. In the twelve-year period from 2010 to 2021, the *Bundeskartellamt* prohibited 16 concentrations and approved 15 concentrations with remedies. Own calculation based on Monopolkommission, Wettbewerb 2022, XXIV. Hauptgutachten [Competition 2022, XXIV - Main Report], p. 116, Abbildung II.2 [Figure II.2], https://www.monopolkommission.de/images/HG24/HGXXIV_Gesamt.pdf. The numbers were obtained by counting 'Untersagungen' [prohibitions] and 'Freigaben mit Nebenbestimmungen' [clearances with remedies] in the period from 2010 to 2021.

12) Logan Billman & Steven C. Salop, *Merger Enforcement Statistics: 2001-2020*, 85 Antitrust Law Journal 1, p. 12 (Table 1) (2023) (showing that the number of cases "Settled simultaneously with complaint" (367) and "Settled post complaint" (11) together far outnumber cases "Litigated to a decision" (26)).

13) John Kwoka & Spencer Weber Waller, *Fix It or Forget It: A "No-Remedies" Policy for Merger Enforcement*, CPI Antitrust Chronicle, p. 3 (August 2021).

14) *Id.* at p. 3.

15) *See, e.g.*, Assistant Attorney General Jonathan Kanter of the Antitrust Division Delivers Remarks to the New York State Bar Association Antitrust Section, US Department of Justice, 24 January 2022 ("I am concerned that merger remedies short of blocking a transaction too often miss the mark. . . . [I]n my view, when the [Department of Justice's antitrust] division concludes that a merger is likely to lessen competition, in most situations we should seek a simple injunction to block the transaction.").

16) Billman & Salop, *supra* note 12, at p. 37.

17) OECD, OECD Competition Trends 2023, Volume II, Global Merger Control, http://www.oecd.org/competition/oecd-competition-trends.htm, p. 29-30 (stating that prohibitions constituted 0.2% of all merger decisions in 2021 in 65 jurisdictions on which the OECD collected data, while remedies decisions constituted 1.4%).

18) The Antimonopoly Act as enacted in 1947 was very strict and required prior approval of all mergers and acquisitions but a 1949 amendment abolished the requirement for stock acquisitions, leaving intact the requirement to notify *ex ante* true mergers and asset acquisitions to the JFTC. *See* Masako Wakui, Antimonopoly Law – Competition Law and Policy in Japan 13-14 (2nd ed., 2018).

Regulation.[19] In the U.S., the Clayton Act of 1914 specifically dealt with mergers but the *ex ante* notification system was only introduced in 1976, with the Hart-Scott-Rodino Antitrust Improvements Act.[20]

In other mature jurisdictions such as the EU and the United States, mergers are at least occasionally blocked[21], either because the remedies offered by the parties are not adequate or because the merger is so problematic that an effective remedy is simply not conceivable.

In the author's experience as case handler in merger cases, prohibitions are important for a competition authority to obtain effective remedies, as the credible threat of a prohibition will make parties more willing to offer solid remedies. Prohibitions, even when rarely issued, are also considered important to deter future anticompetitive mergers[22], the so-called deals that never leave the boardroom, meaning deals that are contemplated but never materialize because the parties realize they would not be approved by competition authorities.

It is unclear whether the JFTC's remedies practice has a similar effect. One would expect a merger control regime that never prohibits to deter fewer anticompetitive mergers than a regime that does.[23] On the other hand, the idea that Japanese merger control has been less effective in deterring anticompetitive mergers seems difficult to square with the empirical evidence about the level of competition in Japanese markets. Markups of firms, a good proxy for market power, have stagnated in Japan, while they have gone up significantly in the EU and the U.S.,[24] and, at least in the manufacturing industry, profit ratios have fallen, not risen.[25]

19) Council Regulation (EC) No 4064/89 of 21 December 1989 on the control of concentrations between undertakings, OJ L 395, 30.12.1989, p.1, later replaced by Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings, OJ L 24, 29.1.2004, p. 1–22.

20) 15 U.S.C. § 18a.

21) For the EU, *see* Simon Vande Walle, *Remedies*, *in* EU Competition Law Volume II: Mergers and Acquisitions 763, at 764, figure 1 (Christopher Jones & Lisa Weinert eds., Edward Elgar, 3d ed. 2021) (10 prohibitions in the period 2011 to 2020). For the U.S., *see* Billman & Salop, *supra* note 12, at p. 12 (Table 1) (17 cases labelled as "Government wins at trial", meaning cases where the Department of Justice or the Federal Trade Commission obtained an injunction blocking the merger).

22) *See, e.g.*, Pedro Pita Barros, Joseph A. Clougherty & Jo Seldeslachts, *Remedy for Now but Prohibit for Tomorrow: The Deterrence Effects of Merger Policy Tools*, 52(3) The Journal of Law & Economics 607 (2009).

23) *See*, in this sense, *id.* at p. 612-613 (explaining why, in theory, prohibitions would have a stronger deterrent effect), p. 626 (finding empirical results support the importance of blocked mergers – but not negotiated settlements and monitorings – in terms of deterrence).

24) Hiroshi Ohashi & Tsuyoshi Nakamura, *Stagnation of markups and (non-)existence of superstar firms in Japan* (VoxEU columns, 20 October 2020), https://cepr.org/voxeu/columns/stagnation-markups-and-non-existence-superstar-firms-japan (figure 1); Federico J. Díez, Daniel Leigh & Suchanan Tambunlertchai, *Global Market Power and its Macroeconomic Implications*, p. 25, figure 6 (IMF Working Papers Vol. 2018, issue 137, June 2018), https://doi.org/10.5089/9781484361672.001 (showing a moderate increase in markups for Japan in the period from 1980 to 2020 but a steep increase for the United States, Canada and Europe); Ufuk Akcigit et al, *IMF Staff Discussion Note - Rising Corporate Market Power: Emerging Policy Issues*, p. 10, figure 2 (Breakdown of the Markup Increase) (IMF Staff Discussion Notes, Vol. 2021, issue 1, March 2021), https://doi.org/10.5089/9781513512082.006 (finding a significant difference in the increase in markups between 1980 and 2016 in the U.S. and the euro area (almost 40 percent) and the increase in Japan and Korea (around 20 percent)). See also Jesper Koll, *Japan's Problem? Too much competition*, The Japan Times, 6 February 2020 (pointing out that, in Japan, the top four companies in each industry control approximately 11 percent of their industry's revenues, while, in the U.S., this is 35 percent).

25) Toshiko Igarashi & Jun Honda, *Nihon no seizōgyō ni okeru shijōshūchūdo to kyōsōkankyō [Concentration and Competition in Japanese Manufacturing Industries]* (CPRC Discussion Papers, November 2022), p. 14, figure 7 (Nihon zentai ni okeru rijunritsu no suii [Change of profits ratios in Japan]), https://www.jftc.go.jp/cprc/reports/disucussionpapers/r4/index_files/CPDP-91-J.pdf (showing that profit ratios in the manufacturing industry have fallen since 2008, based on an analysis of data taken from METI's annual Current Survey of Production).

II. Merger Remedies in Numbers: How Often Does the JFTC Intervene?

As mentioned, over the past twenty-five years, the JFTC has accepted remedies in more than eighty cases. On a yearly basis, this corresponds to a handful of cases, as shown in Table 1 for the period from 2010 to 2022.[26)]

In discussions about remedies, international organisations[27)] and competition authorities[28)] sometimes refer to the "intervention rate", that is the percentage of merger cases in which competition authorities intervened by either prohibiting a merger or approving it with remedies. For instance, if an authority reviews one hundred mergers in a year, and intervenes in ten mergers by prohibiting the merger or accepting remedies, that authority's intervention rate would be 10% in that year.

Table 1: Number of notifications and cases cleared with remedies (2010-2022)

Year (Japanese fiscal year)	Number of notifications	Cases cleared with remedies
2022 (Reiwa 4)	306	1
2021 (Reiwa 3)	337	3
2020 (Reiwa 2)	266	6
2019 (Reiwa 1)	310	4
2018 (Heisei 30)	321	8
2017 (Heisei 29)	306	6
2016 (Heisei 28)	319	3
2015 (Heisei 27)	295	1
2014 (Heisei 26)	289	2
2013 (Heisei 25)	264	1
2012 (Heisei 24)	349	3
2011 (Heisei 23)	275	3
2010 (Heisei 22)	265	2

I have calculated the JFTC's intervention rate[29)] by taking the number of cases in which the JFTC intervened by accepting remedies[30)] and dividing that by the number of notifications made to the JFTC. The number of notifications is a good

26) The numbers in the table were taken from the JFTC's yearly publication "Kigyō ketsugō kankei todokede tō no jōkyō [The State of Affairs in Relation to Notifications of Business Combinations and Other Matters]", after cross-checking them in the JFTC's yearly report (Kōseitorihikiiinkai nenjihōkoku [JFTC Annual Report]). For some fiscal years, the "State of Affairs" publication mentions the number of phase II cases with remedies and therefore leaves it unclear whether there were also phase I cases with remedies. However, the JFTC Annual Reports clearly mention the number of remedies cases (both Phase I and Phase II) for the whole fiscal year and therefore confirm that the number in the "State of Affairs" publication corresponds to the total number of remedies cases in that fiscal year.

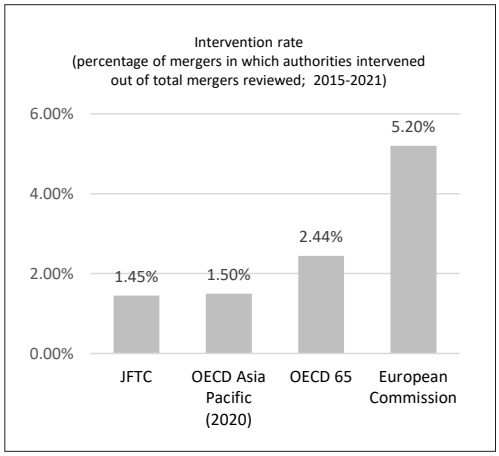
27) The OECD started collecting statistics from enforcement authorities in 2018 and, since 2020, publishes a yearly overview of enforcement trends in a publication called "OECD Competition Trends". This publication tracks the intervention rate in merger control calculated based on data from a large number of competition authorities, and without disclosing data on specific competition authorities.

28) *See, e.g.*, European Commission, *Commission Staff Working Document: Evaluation of Procedural and Jurisdictional Aspects of EU Merger Control*, 26 March 2021, p. 17, figure 6 ("Commission's intervention rate in procedures under the EUMR (1991-2020)"); Autorité de la concurrence, Les Engagements Comportementaux, p. 63, p. 65 (Direction de l'information légale et administrative, 2019), www.autoritedelaconcurrence.fr/fr/publications/engagements-comportementaux (comparing the "taux d'intervention" [intervention rate] of the French competition authority with that of other EU competition authorities); Carles Esteva Mosso, Merger Enforcement: Getting the Priorities Right, 19 May 2017, p. 4-5; Claes Bengtsson, Josep M. Carpi & Anatoly Subočs, *The Substantive Assessment of Mergers*, *in* EU Competition Law Volume II: Mergers And Acquisitions, p. 329, figure 3 (Evolution of the intervention rate in the period 1991-2020 by types of intervention) (Christopher Jones & Lisa Weinert eds., Edward Elgar, 3d ed. 2021).

29) Defined as the proportion of cases in which the competition authority prohibited the merger or cleared it with remedies, out of the total number of mergers reviewed (even summarily) by the authority.

30) Sometimes, competition authorities also count abandoned deals as an intervention, when it is clear that the deal was abandoned as a result of the competition authority expressing competition concerns. In my calculation, I did not include abandoned deals, because the OECD's intervention rate is calculated based on remedies cases and prohibitions only. In any event, if deals that were abandoned because of opposition from the JFTC had been included, the results for Japan would have been virtually the same, as, based on the list which the JFTC publishes (see note 10) there was only one deal that was abandoned after the JFTC pointed out competition problems in the 2015 to 2021 period (*Lam Research Corporation / KLA-Tencor*). As mentioned in section I, there have been no prohibitions in Japan.

Graph 1: Intervention rate



proxy for the number of deals reviewed because the Japanese merger control system is essentially a notification-based system. Admittedly, each year, the JFTC also reviews a handful of non-notifiable deals, but these numbers are negligeable compared to the total number of notifications.[31)]

Graph 1 shows the intervention rate of the JFTC[32)], and compares it with (1) the average intervention rate of competition authorities in the Asia-Pacific region[33)], (2) the average intervention rate across sixty-five jurisdictions in the world[34)], and (3) the intervention rate of the European Commission.[35)] The calculation was made based on interventions in the period from 2015 to 2021, except for the Asia-Pacific intervention rate, for which the data relate to the year 2020, the only year for which data were available.

The graph shows that the JFTC's intervention rate is somewhat low compared to other jurisdictions, and significantly lower than the European Commission's intervention rate. In interpreting these numbers, one must be mindful of the complex dynamics underlying the intervention rate. The rate depends not only on the number of interventions (the numerator) but also on the number of mergers reviewed (the denominator). In addition, the number of interventions will and should depend on the number of problematic mergers that the authority faces. This number may, in turn, depend on the economic conditions of a particular jurisdiction, for instance the level of market concentration or the level of market power of firms. Hence, one cannot simply conclude that a high intervention rate is tantamount to aggressive enforcement, while a low intervention rate means lax enforcement.

Take the German competition authority, for instance. It reviews more than 1000 mergers each year, because the German notification thresholds

31) These cases are cases where the parties spontaneously consult the JFTC, even if their deal is not notifiable, or cases which the JFTC investigates *ex officio*. A 2019 amendment to the JFTC's Policies Concerning Procedures of Review of Business Combination encourages parties to consult the JFTC if the value of their deal exceeds 40 billion yen. This consultation system, which aims to capture "killer acquisitions" that fall below the turnover-based notification thresholds, leads to some extra mergers being reviewed by the JFTC, but the impact on the intervention rate is marginal, because the number of consultations is only a fraction of the number of notifications.For instance, in 2021, the number of non-notifiable deals that was reviewed was fourteen, see JFTC, Reiwa 3 nendo ni okeru kigyō ketsugō kankei todokede tō no jōkyō [The State of Affairs in Relation to Business Combination Notifications and Other Matters in fiscal year 2021], p. 1.

32) Own calculation based on number of notifications and interventions mentioned in table 1. Number of interventions = 31: total number of mergers reviewed = 2154. In Japan, all interventions are remedies, as there are no prohibitions.

33) OECD, OECD Asia-Pacific Competition Law Enforcement Trends (2021), p. 40. https://www.oecd.org/daf/competition/oecd-asia-pacific-competition-law-enforcement-trends.htm The rate is based on data from twelve jurisdictions in the Asia-Pacific Region that had an active merger control regime (see p. 33 of the report). The report does not specify which jurisdictions are included in the 12, but they are likely: Australia, Taiwan, India, Indonesia, Japan, Korea, New Zealand, China, Philippines, Singapore, Thailand, and Vietnam.

34) OECD, OECD Competition Trends 2023, OECD Publishing, Paris, p. 7, p. 26 (2023), https://doi.org/10.1787/bcd8f8f8-en. Since the OECD only gives percentages per year, not the absolute number of interventions and mergers reviewed, the average rate for the period 2015 to 2021 was calculated by averaging the yearly intervention rates as shown on the graph in the 2023 report: 2.50% (2015), 2.50% (2016), 2.80% (2017), 2.70% (2018), 2.50% (2019), 2.50% (2020), and 1.60% (2021).

35) Own calculation: 137 interventions (131 remedies and 6 prohibitions) divided by 2641 notifications. The data were taken from: European Commission, Statistics on Merger Cases (updated regularly), https://competition-policy.ec.europa.eu/mergers/statistics_en.

are rather low. With a handful of interventions (prohibitions and remedies) each year, it has an intervention rate that lies well below 1%. This is not because the German competition authority is lax in merger control, but simply because it is faced with a large number of mostly unproblematic mergers.

In the case of Japan, the JFTC receives roughly 300 notifications per year, at least since a 2009 amendment to the Antimonopoly Act replaced the asset size-based thresholds with turnover-based notification thresholds. That number is not so different from the yearly number of notifications to the European Commission, which typically lies between 300 and 400.[36] Hence, in the comparison between the JFTC and the European Commission, the difference in intervention rates does not stem from the fact that the JFTC reviews a larger number of deals.

What explains the different intervention rate then? Several explanations are possible, and they are not mutually exclusive. First, the JFTC could simply be less strict, i.e. less quick to find anticompetitive effects than the European Commission, in spite of the similarities in the two authorities' merger guidelines. But an alternative explanation may be that the JFTC is faced with fewer problematic mergers. This, in turn, could be due to the fact that markets in Japan are less concentrated than those in Europe, meaning there is still more competition and more room for mergers and acquisitions, or perhaps because, in spite of increased concentration,[37] profits and markups of firms are low, suggesting firms do not have market power.[38] Japan's shrinking population and the resulting decline in demand is sometimes mentioned as a possible reason for this.[39] Another possible explanation is the alleged hostility of Japanese companies towards M&A deals with strategic competitors. Allegedly, the different corporate cultures and the desire to avoid layoffs in these companies leads to strong resistance to such mergers.[40]

In short, comparing intervention rates across jurisdictions is not easy, but the JFTC's relatively low intervention rate does merit reflection and should prompt further research on what can explain the difference with other jurisdictions. It will also be interesting to see how the JFTC's intervention rate evolves in the coming years.

III. Legal Framework: Guidelines and Discussions in the Faint Shadow of the Law

The JFTC's practice on merger remedies has developed virtually without hard law. The Antimonopoly Act simply does not mention remedies. At the end of 2018, a system for the submission and approval of commitments (確約手続 *kakuyaku tetsuzuki*) was introduced. In principle, merger remedies could take the shape of commitments under this system, but this has not happened. The commitments system has only been used in non-merger cases.[41]

Case law on remedies is also non-existent. No

36) European Commission, DG COMP, Statistics on Merger Cases, https://competition-policy.ec.europa.eu/mergers/statistics_en

37) *See* Igarashi & Honda, *supra* note 25, p. 9-10 (finding concentration in the Japanese manufacturing industry has increased but not as much as in the UK, some major EU economies, and the United States).

38) *See supra* text accompanying notes 24 and 25.

39) Hiroshi Ohashi, Kyōsōseisaku no Keizaigaku [Economics of Competition Policy], p. 72 (Nikkei Business Publications 2021).

40) In 2011, rumours surfaced of a full-fledged merger between industrial giants Hitachi and Mitsubishi Heavy Industries. The possible merger was considered ground-breaking, among others because "[t]raditionally seen as a last resort of failing firms, Japanese companies until recently have largely avoided strategic mergers." Taiga Uranaka & Mayumi Negishi, *Hitachi, Mitsubishi edge towards ground-breaking merger*, Reuters, 4 August 2011. Ultimately, the parties did not pursue the deal.

41) An influential commentary on the JFTC merger guidelines, written by JFTC officials, explains that the JFTC cannot force parties to use the commitments system. If the parties offer merger remedies in the same way as they have done during the past decades, by incorporating them in the notification form, the JFTC cannot disregard these remedies. Masanori Fukamachi,

Japanese court has ever dealt with merger remedies. In fact, merger control in Japan as a whole operates virtually without court precedents. The last court decision on a merger case dates back to the beginning of the 1950s, the early years of the Antimonopoly Act, when the Tokyo High Court and, ultimately, the Supreme Court, decided the *Tōho / Subaru* case.[42] That case is still a leading precedent on what constitutes a "substantial restraint of competition" and on how to define the relevant market.[43] Since then, the courts have not had the opportunity to rule on any merger.

If not statutory provisions and court precedents, then what governs merger control in Japan? The key documents are the guidelines issued by the JFTC, both on substance[44] and procedure.[45] The JFTC has also issued a set of rules dealing with technical procedural matters, and prescribing various notification forms.[46]

The JFTC's guidelines are by nature rather abstract but they are complemented by another important source of law (in a broad sense): the JFTC's prior decisions or, more accurately, the JFTC's prior practice. It would be wrong to speak of decisions because, in fact, the JFTC has not issued a formal decision in merger control for more than half a century, as will be explained in the next section. However, for important cases, the JFTC publishes a document explaining why it has closed its investigation and did not pursue a cease-and-desist order. Practically speaking, these documents read like a decision and practitioners and scholars refer to them almost as if they were decisions. They contain details about the transaction and the parties, the relevant markets, the competitive assessment and, in cases with remedies, the remedies submitted and their assessment. The explanatory document is either published immediately after the JFTC has ended its investigation[47] or as part of an annual overview of important cases published each year in June.[48] The annual overview typically contains about a dozen cases and includes both cases where remedies were accepted and some unconditional clearances that the JFTC considered worthy of interest.

What does all of this mean for the submission and negotiation of remedies? With very few hard rules and no court precedents, the discussions between the JFTC and the parties on remedies occur in the shadow of the law,[49] but the shadow is

KIGYŌ KETSUGŌ GAIDORAIN (DAI 2 HAN) p. 387-388 (Shōjihōmu 2021).

42) Tokyo Kōtō Saibansho [Tokyo High Ct.] 19 September 1951, 4(14) KŌMINSHŪ 497, 3 SHINKETSUSHŪ 166, *affirmed by* Saikō Saibansho [Sup. Ct.] 25 May 1954, 8(5) MINSHŪ 950, 8 SHINKETSUSHŪ 102.

43) Although more than 70 years old, the case is still very much alive. It is of course a fixture in all leading casebooks on the Antimonopoly Act but one can also find a YouTube video explaining the case (Tadashi Shiraishi, Tōho / Subaru - Tokyo kōsai hanketsu no kandokoro [Key Points of the Tokyo High Court's Judgment in Tōho / Subaru], YOUTUBE (8 Feb. 2021) https://www.youtube.com/watch?v=Q5klULopPM8), and a study redoing the analysis using contemporary econometric techniques (Mitsuru Sunada, *Competition among movie theaters: an empirical investigation of the "Toho-Subaru" antitrust case*, 36(3) JOURNAL OF CULTURAL ECONOMICS 179 (2012).

44) JFTC, Kigyō ketsugō shinsa ni kansuru dokusenkinshihō no unyō shishin [Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination], 31 May 2004, as last amended on 17 December 2019.

45) JFTC, Kigyō ketsugō shinsa no tetsuzuki ni kansuru taiō hōshin [Policies Concerning Procedures of Review of Business Combination], 14 June 2011, as last amended on 17 December 2019.

46) JFTC, Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu daikyu jō kara dai jūroku jō made no kitei ni yoru ninka no shinsei, hōkoku oyobi todokede tō ni kansuru kisoku [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], 1 September 1953. The rules have been amended several times.

47) As per its guidelines, the JFTC publishes its reasoning immediately after closing the investigation in cases that end in Phase II. JFTC, *supra* note 45, part 4, (3) (Procedures of secondary review). In recent years, the JFTC has also published its reasoning immediately in cases involving digital platforms (e.g. in *Microsoft / Activision* and *Google / Fitbit*), even when those cases end in Phase I.

48) This annual overview is entitled Shuyō na kigyō ketsugō jirei [Major Business Combination Cases]. The archive of overviews, starting from 1993 (Heisei 5), can be consulted on the JFTC website: https://www.jftc.go.jp/dk/kiketsu/jirei/index.html

very faint. Ultimately, only the Antimonopoly Act's legal standard looms over the process: mergers should not substantially restrain competition and so the remedies have to ensure that this does not happen.

That abstract standard, coupled with the lack of court precedents, seems to give the JFTC significant powers and discretion in shaping its remedies practice. Yet, in spite of this, the JFTC has shown remarkable restraint. The JFTC's guidelines are by no means extreme. Rather, they tend to follow the practices of other major jurisdictions,[50] and international best practices, as embodied in discussions at the International Competition Network and the OECD. In other words, the gap left by legislation and precedents has been filled by the JFTC's guidelines which in turn have been inspired by soft law.

The JFTC has also shown restraint in how it has applied these guidelines. As explained in section V below (Structural vs. Behavioural Remedies), the JFTC has often shown flexibility towards the parties and accepted behavioural remedies. In addition, the structural remedies it has accepted have often involved the transfer of specific assets or parts of a business, rather than businesses as a whole.

It is also remarkable that, in cross-border cases, the JFTC's approach to remedies has shown a high degree of convergence with other major jurisdictions, accepting similar remedies. Recent examples where this was the case include *Google / Fitbit* (behavioural remedies similar to those accepted in the EU) and *DIC / BASF Colors & Effects Japan* (structural remedies similar to those accepted in the EU). It would not be a stretch to say that the JFTC has developed its remedies practice in cooperation with other competition agencies, and through international organisations such as the ICN.

IV. The Remedies Process in Practice

Each year, hundreds of deals are notified to the JFTC[51], as required under the Antimonopoly Act's prior notification system.[52] Acceptance of the notification by the JFTC triggers a thirty-day waiting period (*kinshikikan*, literally prohibition period), during which the parties are not allowed to close their transaction.[53] During this thirty-day period – called Phase I – the JFTC either clears the notified transaction or, if it considers a more in-depth review is necessary, opens a Phase II review.[54]

The vast majority of transactions notified to the JFTC do not raise competition concerns and are cleared in Phase I. The JFTC does not formally

49) In the sense that the outcome of the back-and-forth discussions between the parties and the JFTC on the remedies will be determined by what both sides consider to be the applicable legal standard and how that standard would be applied by a court if it came to a confrontation between the parties and the JFTC. Even though such confrontation in court is highly unlikely to occur, the parties negotiate and discuss "in the shadow of the law". The expression was popularized by Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88(5) YALE LAW JOURNAL 950 (1979).

50) Commentators have, for instance, noted that the part on merger remedies in the JFTC's merger guidelines is broadly in line with the European Commission's Remedies Notice. *See, e.g.*, Etsuko Hara, Vassili Moussis & Ezaki Shigeyoshi, *Japan: Merger Control*, THE ASIA-PACIFIC ANTITRUST REVIEW 2008, https://globalcompetitionreview.com/review/the-asia-pacific-antitrust-review/the-asia-pacific-antitrust-review-2008/article/japan-merger-control (under the heading "Merger remedies: policies and practices").

51) The JFTC publishes statistics each year in June on its website. The number of notifications in the past three years were: 306 (fiscal year 2022), 337 (fiscal year 2021) and 266 (fiscal year 2020).

52) Antimonopoly Act, Art. 10(2) (for acquisitions of shares), Art. 15(2) (for mergers), Art. 15-2(2) and 15-2(3) (for company splits), Art. 15-3(2) (for joint share transfers), Art. 16(2) (for acquisition of a business or part of a business)

53) Antimonopoly Act, Art. 10(8) (for acquisitions of shares). This provision is also applicable to the other types of transactions, as per Antimonopoly Act, Art. 15(3), Art. 15-2(4), Art. 15-3(3) and Art. 16(3).

54) Antimonopoly Act, Art. 10(9) (for acquisitions of shares). This provision is also applicable to the other types of transactions.

clear these deals by issuing a clearance decision but it sends a letter to the parties, informing them that it will not issue a cease-and-desist order.[55] Once the thirty-day waiting period has expired, or if the JFTC has granted early termination of the waiting period, the parties can then close their deal. It is unclear how third parties could bring a legal action against the JFTC's decision not to issue a cease-and-desist order. It seems no third party has ever tried, and neither scholars nor practitioners seem to show much interest in this topic.[56]

When a transaction does raise competition concerns, the parties will typically propose remedies, a set of measures that are supposed to remove the competition concerns identified by the JFTC. The Japanese term for remedies reflects this purpose: *mondai kaishō sochi* 問題解消措置 , which literally means "measures that resolve problems".

Parties can propose remedies and discuss them with the JFTC at any time: during Phase I, Phase II or even before notification. Technically, however, the remedies must ultimately be incorporated in the notification form[57], which has a specific section for them.[58] Either the parties incorporate the remedies in the notification form at the time of notification, or, alternatively, they can add them to the notification form after notification. This is done through a so-called report with changes (*henkō hōkokusho*), which amends the notification.[59]

The reason parties can already propose remedies at the time of the notification is because, in cases that are likely to raise competition concerns, parties usually contact the JFTC well before notification to discuss the transaction, in so-called pre-notification consultations (*todokede mae sōdan*).[60] They submit the draft notification and various documents, and obtain feedback from the JFTC.[61] Based on the feedback from the JFTC in

55) JFTC, Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsudai kyū jō kara dai jūroku jō made no kitei ni yoru ninka no shinsei, hōkoku oyobi todokede tō ni kansuru kisoku [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], Art. 9. This can happen after a Phase I investigation or after a Phase II investigation. The practice was introduced in 2011, through an amendment of the merger notification rules.

56) Most commentators simply do not discuss the issue and the few that do, give it short shrift. *See, e.g.*, Yusuke Nakano, Vassili Moussis & Kiyoko Yagami, *Japan*, *in* THE MERGER CONTROL REVIEW, p. 297 (6th ed., Law Business Research, 2015) (Ilene Knable Gotts ed.) ("Although third parties may file a lawsuit to ask the court to order the JFTC to issue a cease-and-desist order, the legal path to successfully do so is extremely narrow and does not merit a detailed explanation here."). *But see Makoto Kurita, Enfōsumento*, *in* JŌBUN KARA MANABU DOKUSEN KINSHI HŌ [ANTIMONOPOLY LAW: TEXT, OUTLINE, AND CASES], p. 328 (Kazuhiro Tsuchida et al. eds.,Yūhikaku, 2nd ed., 2019) (explaining that the key issue for such a lawsuit would be whether the plaintiff meets the requirements for a mandamus action set out in Art. 37-2 of the Gyōsei jiken soshō hō [Administrative Case Litigation Act], Law No. 139 of 1962).

57) JFTC, Kigyō ketsugō shinsa no tetsuzuki ni kansuru taiō hōshin [Policies Concerning Procedures of Review of Business Combination], 14 June 2011, as last amended on 17 December 2019, 5 ("Explanation of issues…), third para.

58) *See, e.g.*, section 5 in the notification form for the acquisitions of shares (Form 4), annexed to JFTC, Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsudai kyū jō kara dai jūroku jō made no kitei ni yoru ninka no shinsei, hōkoku oyobi todokede tō ni kansuru kisoku [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]. That section asks the notifying party to list: "*kabushiki shutoku ni kansuru keikaku to shite toru koto to suru sochi no naiyō oyobi sono kigen*" [Details of the measures to be taken as part of the planned share acquisition and the timeframe for these measures].

59) JFTC, Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu daikyu jō kara dai jūroku jō made no kitei ni yoru ninka no shinsei, hōkoku oyobi todokede tō ni kansuru kisoku [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], Art. 7(3).

60) JFTC, Kigyō ketsugō shinsa no tetsuzuki ni kansuru taiō hōshin [Policies Concerning Procedures of Review of Business Combination], 14 June 2011, as last amended on 17 December 2019, 2 (Consultation Prior to Notification). During these consultations, which are not mandatory but optional for companies, the JFTC is not supposed to give any definitive views on the legality of the transaction. Prior to 2011, the JFTC often did give a conclusive view but that system – called prior consultation (*jizen sōdan*) – was abolished in 2011 through an amendment of the JFTC guidelines.

this pre-notification phase, the parties can get an understanding of the JFTC's concerns about the deal and then propose remedies to deal with those concerns, by including remedies in the notification.

If the JFTC deems the proposed remedies adequate, it gives the deal the green light. In most cases, this happens already in Phase I. Occasionally, it happens in Phase II. Phase II lasts ninety days, but the clock only starts ticking once the JFTC has received all the information it has requested. This allows parties to stop the clock by withholding some of the requested information, a practice that seems reminiscent of the stop-the-clock practice under the EU Merger Regulation.[62] An extended Phase II period can give the JFTC and the parties the opportunity to discuss remedies. A well-known case where this happened was *Fukuoka Financial Group / The Eighteenth Bank*,[63] a merger between two regional banks. In that case, the JFTC's Phase II investigation lasted more than two years, giving the JFTC and the parties the time to agree on remedies, ultimately leading to a clearance.

The JFTC's green light, whether in Phase I or Phase II, is given in the same way as an unconditional clearance, that is by sending a letter to the merging parties that the JFTC will not issue a cease-and-desist order. The remedies are not incorporated or made binding in a JFTC decision. Instead, the JFTC simply conducts its analysis taking into account the remedies that were submitted and then finds that, assuming the remedies will be implemented, there will be no substantial restraint of competition.

All of this means that the remedies process is characterized by a high degree of informality. The remedies are neither assessed nor incorporated in a formal decision, and the threat of a third party challenging the JFTC's acceptance of the remedies seems remote.

In principle, the process could be more formal. If the JFTC finds that a merger may substantially restrain competition, it can issue a cease-and-desist order. That cease-and-desist order could prohibit the merger but it could also order the parties to implement remedies. However, the JFTC has not issued a formal decision in merger control for more than half a century. The last two such decisions were issued in the early 1970s in the *Yawata / Fuji Steel* merger[64] and the *Hiroshima Dentetsu* case.[65]

As in other jurisdictions, when investigating the impact of a transaction, the JFTC seeks information and the views from third parties, such as customers, suppliers and competitors, to gauge the impact of the deal on competition. This too happens on a rather informal basis. The only formal prescription can be found in the JFTC's guidelines, which state that, when the JFTC opens

61) The JFTC's investigation of the business integration of Z Holdings Corporation and LINE Corporation offers an example. *See* JFTC, Press Release: The JFTC reviewed the proposed M&A operations between Z Holdings Corporation and LINE Corporation, 4 August 2020, Part 3 (Sequence of Events). In that case, the parties publicly announced their deal on 18 November 2019 and, prior to notification, submitted written opinions and materials on the effects of the deal. The JFTC subsequently had a series of meetings and exchanged views with the parties, conducted interviews with competitors and reviewed internal documents. Eight months after the deal became public, on 14 July 2020, the parties filed the notification with the JFTC and, less than one month later, on 4 August 2020, the JFTC cleared the deal with remedies.

62) EU Merger Regulation, *supra* note 19, Art. 10(4). This provision does not allow the European Commission to stop the clock for mere convenience, even with the agreement of the parties, but it does allow a "stop the clock" when a party fails to provide the information requested by the European Commission.

63) Case 10 in the JFTC's Annual Overview of Major Business Combinations in FY 2018.

64) JFTC, Dōi shinketsu [Consent decision] of 30 October 1969, 16 SHINKETSUSHŪ 46. The case concerned the merger that created Nippon Steel, at the time the world's second largest steelmaker. The JFTC challenged the merger but ultimately agreed with the parties to issue a consent decision in which the JFTC ordered the divestiture of assets and shares to two smaller competitors.

65) JFTC, Dōi shinketsu [Consent decision] of 17 July 1973, 20 SHINKETSUSHŪ 62 (accepting and making binding the remedies proposed by Hiroshima Dentetsu (Hiroshima Electric Railway), consisting in a reduction of its shareholding in competitor Hiroshima Bus and the resignation of interlocking directors).

a Phase II, it will make this fact public and invite comments from third parties.[66] In practice, in cases that are likely to raise competition concerns, the JFTC also seeks the opinions of third parties in Phase I and even prior to notification. The JFTC can and does consult third parties on the remedies that have been submitted, but it has no obligation to do so, and it does not conduct a "market test" by sending third parties a copy of the remedies that have been proposed. In short, the JFTC consults third parties, including on remedies, when it deems it useful and in the manner that it deems most effective.

V. Structural vs. Behavioural Remedies

Like most competition authorities in the world,[67] the JFTC's stated policy is to favour structural remedies over behavioural remedies.[68] Structural remedies are not defined in the JFTC's guidelines but the term is generally used to denote remedies that require the merging parties to sell (divest) a business or assets to a third party. Likewise, selling a stake in a company to a third party is also typically regarded as a structural remedy. By contrast, behavioural remedies require the merged entity to engage in certain conduct (other than selling a business, which is of course also a type of conduct, albeit a very specific type). These behavioural constraints typically apply over a significant period of time, often years. Examples include commitments to grant access to a facility, ensure interoperability, not to discriminate, or set up Chinese walls within a corporate group.

Structural remedies such as divestitures are preferred by competition authorities for various reasons, but a key reason is that they rely on a third party – the buyer of the divested business – to maintain competition, based on that third party's own incentive to maximize profits. By contrast, behavioural remedies require the merged entity to engage in certain conduct that typically goes against its own interest. This, in turn, creates incentives for the merged entity to circumvent the remedies or implement them half-heartedly. To prevent this, behavioural remedies need to be monitored regularly, a task made difficult because of information asymmetries between the companies and the competition authority. Another advantage of divestitures is that they can be accomplished in a relatively short span of time and, when successful, provide a lasting solution to the competition problem, while behavioural remedies are by nature a temporary solution.

Frequently, the merging parties' interest is to get a clearance with behavioural remedies, while competition authorities seek exactly the opposite, i.e. a structural remedy. When the parties do accept that a structural remedy is required, they naturally want to divest as little as possible, while competition authorities often seek a broader divestiture, to ensure the competitiveness and viability of the divested business.

The JFTC's guidelines give the JFTC some flexibility to deal with these discussions, but nonetheless clearly favour structural remedies. While acknowledging that "appropriate remedies are considered based on the facts of individual cases", the JFTC guidelines state that "remedies should, in principle, be structural measures such as the transfer of business (*jigyō jōto*) and should basically be those that restore competition lost as

66) JFTC, *supra* note 45, part 4 (2) ("Hearing of third party opinions").

67) The ICN's Remedies Guide, which embodies a compromise text agreed upon by over 140 competition authorities, states that 'competition authorities generally prefer structural relief in the form of a divestiture to remedy the anticompetitive effects of mergers, particularly horizontal mergers'. International Competition Network (ICN), Merger Remedies Guide, p. 9 (2016), www.internationalcompetitionnetwork.org/wp-content/uploads/2018/05/MWG_RemediesGuide.pdf.

68) JFTC, Kigyō ketsugō shinsa ni kansuru dokusenkinshihō no unyō shishin [Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination], 31 May 2004, as last amended on 17 December 2019, Part VII, 1. (Basic Framework).

a result of the combination in order to prevent the company group from controlling price and other factors to a certain extent."[69)]

At the same time, the guidelines explicitly allow for behavioural remedies in rapidly changing markets: "in a market featuring a rapidly changing market structure through technological innovations, there may be cases where it is appropriate to take certain types of behavioural measures."[70)]

For mature markets, the guidelines also give the JFTC some leeway to accept a specific type of behavioural remedy, namely a long-term supply agreement:

> When, as an exceptional example, it is difficult, because of declining demand, to find a transferee to take over all or part of the company group's business (for example, a production, sales or development division), and research and development or services such as the improvement of goods in response to user requests are of less importance because the goods are in the stage of maturity, effective remedies may involve giving competitors trading rights at a price equivalent to the production cost of the goods (in other words, to make long-term supply agreements).[71)]

This type of remedy is referred to as "cost-based purchasing rights" (*kosuto bēsu hikitoriken*) and has been accepted with some frequency, as will be explained below.

How have the JFTC guidelines been applied in practice? In practice, the JFTC has not been as strict as its guidelines suggest. The JFTC has frequently accepted behavioural remedies, and overall it has been very pragmatic. Illustrative of this pragmatic approach is a 2012 merger between the Tokyo and Osaka stock exchanges, which led to a near-monopoly in some markets. The JFTC cleared the deal with behavioural remedies, after finding that structural remedies were "not realistic" and that behavioural remedies would also eliminate the competition problems.[72)] The JFTC's frequent acceptance of behavioural remedies has led some scholars to argue that the difference between structural and behavioural remedies is mostly relevant for the parties' burden of persuasion: when parties propose structural remedies, their burden to explain to the JFTC why these remedies are adequate will be lighter.[73)]

Out of the last twenty-one cases with remedies made public by the JFTC, the JFTC cleared thirteen with behavioural remedies[74)] and eight with structural remedies.[75)] Many of the cases where the JFTC obtained divestiture remedies involved cross-border cases where the parties offered the

69) *Id.*

70) *Id.*

71) *Id.* at Part VII, 2., (1) (Types of Remedies).

72) Case 10 in the JFTC's Annual Overview of Major Business Combinations in FY 2012. As remedy in that case, the parties promised to put in place an advisory committee that would monitor the fees charged by Japan's only remaining stock exchange. A more recent example of a horizontal merger cleared with behavioural remedies is *Z-Holdings / LINE* (case 10 in the JFTC's Annual Overview FY 2020).

73) Tadashi Shiraishi, Dokusenkinshihō [Competition Law of Japan], p. 603 (Yūhikaku, 4th ed. 2023).

74) These were *Imabari Zōsen [Imabari Shipbuilding] / Hitachi Zōsen [Hitachi Shipbuilding]* (case 6 in the JFTC's Annual Overview of Major Business Combinations in FY 2022; vertical concerns), *Fuji Film / Hitachi Seisakusho* (case 4 in FY 2020; vertical concerns), *Google / Fitbit* (case 6 in FY 2020), *Z-Holdings / LINE* (case 10 in FY 2020, horizontal concerns), *TDK / Shōwa Denkō* (case 2 in FY 2019, vertical concerns), *Toyota / Panasonic Batteries* (case 6 in FY 2019, vertical concerns), *M3 / Nihon Ultmarc* (case 8 in FY 2019, vertical and conglomerate concerns), *USEN – Next Holding / Can System* (case 7 in FY 2018, horizontal concerns), *JX Metals Deutschland / H.C. Starck Tantalum and Niobium* (case 6 in FY 2018, vertical concerns), *Hitachi Metals / Santoku* (case 2 in FY 2017, vertical concerns), *Qualcomm / NXP* (case 3 in FY 2017, conglomerate concerns; this case was ultimately abandoned by the parties), *Broadcom / Brocade* (case 4 in FY 2017, vertical and conglomerate concerns), *Nippon Dynawave Packaging / Weyerhaeuser NR* (case 1 in FY 2016, horizontal concerns). The case number refers to the number in the JFTC's yearly publication: Shuyō na kigyō ketsugō jirei [Major Business Combination Cases].

75) These were *Kobe Steel / Nippon Steel* (road-related business) (case 3 in the JFTC's Annual Overview of Major Busi-

divestiture as part of a global solution for concerns raised by various competition authorities,[76] although some domestic horizontal mergers have also been cleared with divestitures.[77] In the aggregate, however, divestitures make up much less than half of all remedies accepted by the JFTC.

A more comprehensive count of all publicly available remedies in the period from 1993 to 2019, conducted by a Japanese researcher, yielded similar figures. In eighty-four merger cases, there were thirty-four divestiture remedies and sixty-two non-divestiture remedies.[78] The sixty-two non-divestiture remedies consisted of twelve remedies involving cost-based purchasing rights, eight remedies involving the offering of infrastructure to facilitate imports or market entry, eight remedies involving the licensing of patents, six remedies involving guidance concerning technology or the provision of technology, twenty-six remedies involving Chinese walls, twenty-one remedies involving the prohibition of discriminatory conduct and five commitments not to abuse a dominant position.[79]

In short, various types of behavioural remedies have been quite common. These statistics suggest that the JFTC is more accepting of behavioural remedies than the European Commission, which has relied on divestitures in a little more than 70% of its cases.[80] The JFTC's practice is more in line with that of the French competition authority, which also frequently uses behavioural remedies.[81]

To some extent, the reason for the relatively high proportion of behavioural remedies can be linked to the rather high proportion of cases in which the JFTC raised vertical and conglomerate concerns. It is often more difficult to resolve those concerns through divestitures than in case of horizontal mergers, where parties can typically divest one of the two merging party's overlapping businesses in the markets where there are concerns.

Although the JFTC's guidelines do not treat vertical and conglomerate mergers as a specific category that may warrant behavioural remedies, in reality, the JFTC has invariably accepted be-

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ness Combinations in FY 2021; horizontal concerns; although the JFTC labels the remedy in this case as a divestiture, namely a transfer of facilities (*setsubi jōto*), the label is doubtful, see the discussion of the case later in this section), *DIC / BASF Colors & Effects Japan* (case 3 in FY 2020, horizontal concerns), *Nippon Steel / Sanyō Special Steel* (case 4 in FY 2018, horizontal concerns), *Fukuoka Financial Group / The Eighteenth Bank* (case 10 in FY 2018, horizontal concerns), *Dow / DuPont* (case 2 in FY 2016, horizontal concerns), *Idemitsu Kosan / Shōwa Shell Sekiyu and JX Holdings / TōnenGeneral Sekiyu* (case 3 in FY 2016, horizontal concerns), *Nippon Steel and Sumitomo Metal / Nisshin Steel* (case 5 in FY 2016, horizontal concerns), *Abbott Laboratories / St. Jude Medical* (case 9 in FY 2016, horizontal concerns).

76) Recent examples include *DIC / BASF Colors & Effects Japan* (*cf.* European Commission, M.9677 - DIC / BASF Colors & Effects), *Dow / DuPont* (*cf.* European Commission, M.7932 – Dow / DuPont), *Abbott Laboratories / St. Jude Medical* (*cf.* European Commission, M.8060 – Abbott Laboratories / St Jude Medical), and *Zimmer / Biomet* (Case 7 in the JFTC's Annual Overview of Major Business Combinations in Fiscal Year 2014 (Heisei 26)) (*cf.* European Commission, M.7265 – Zimmer / Biomet).

77) An often-mentioned example is *Yamada Denki / Best Denki* (Case 9 in the JFTC's Annual Overview of Major Business Combinations in Fiscal Year 2012) (divestiture of eight retail electronics stores to a third party).

78) Yoshihiro Sakano, Kigyō ketsugō ni okeru mondaikaishōsochi no arikata ni kansuru kentō (2021) (doctoral thesis, Kobe University), p. 60, Hyō 3 [Table 3], https://da.lib.kobe-u.ac.jp/da/kernel/D1007662/D1007662.pdf. The numbers add up to more than 84 cases because some cases had both a divestiture remedy and non-divestiture remedy.

79) *Id.*, at p. 60, Hyō 3 [Table 3].

80) Simon Vande Walle, *Remedies*, *in* EU Competition Law Volume II: Mergers and Acquisitions 763, at 796, para. 7.91 (Christopher Jones & Lisa Weinert eds., Edward Elgar, 3d ed. 2021).

81) Autorité de la Concurrence, Les Engagements Comportementaux, p. 61, p. 65 (Direction de l'information légale et administrative, 2019), www.autoritedelaconcurrence.fr/fr/publications/engagements-comportementaux (noting that each year, the authority issues between five and ten clearance decisions with remedies, of which a significant proportion ("une forte proportion") with behavioural remedies). *See also* Michaël Tiralongo, *La comparaison franco-japonaise du contrôle des concentrations*, Doctoral thesis of 2012, p. 312, para. 788, https://hal.science/tel-00787250/.

havioural remedies in such cases. Some scholars have suggested the JFTC's guidelines should be modified to reflect that reality.[82] Recent vertical or conglomerate cases where behavioural remedies were accepted include *Imabari Shipbuilding / Hitachi Shipbuilding*, *Google / Fitbit* and *M3 / Nihon Ultmarc*. In Japan, Microsoft's acquisition of Activision was cleared without conditions,[83] based on Japanese market realities, which included a very strong position for Sony and Nintendo, and the fact that Activision's most successful game (Call of Duty) is not so popular in Japan. However, if the deal had raised competition concerns, one can surmise that the JFTC would have accepted behavioural remedies.

In domestic cases where the JFTC has accepted structural remedies, the divestitures have often been narrow, entailing the transfer of assets rather than full-fledged businesses, and, in some cases, with serious limitations on the competitiveness of the divested assets. For instance, in the steel sector, a recent 3-to-2 merger between Nippon Steel and Kobe Steel's road-related businesses was cleared after the parties offered to divest a 45% stake in the machinery that makes the relevant products, leaving a 55% stake of the machinery, as well as the rest of the plant, in the hands of the merged entity. In addition, the volume of products to which the third party would be entitled was capped at the market share of the smallest of the two merging parties prior to the merger.[84] Parties likely argued that such limitations made the remedy proportional to the harm, but it also means the competitive restraint introduced by the so-called divestiture is blunted.

A somewhat peculiar element in the JFTC's practice is the rather favourable attitude towards cost-based supply agreements as a remedy. They are used with some frequency. A well-known example where such a remedy was accepted by the JFTC is the merger between Nippon Steel and Sumitomo Metal,[85] a merger that resulted in the formation of the world's second largest steel maker in 2012. The JFTC found that the merger would harm competition in the Japanese market for non-oriented electrical steel sheets, a type of steel used in the iron core of motors. The merged entity would have a 55% market share in that market, with only one competitor left. As remedy, the JFTC accepted that one of the merging parties would supply a third party (Sumitomo Corporation) at a price equal to the production cost, for five years after the merger. Such a temporary remedy, less drastic than a divestiture, was considered appropriate by the JFTC because imports were increasing and would increasingly put pressure on the Japanese producers.

VI. Implementation and Enforcement of Remedies

The informal process through which the JFTC negotiates and accepts remedies no doubt offers benefits to the JFTC and the parties alike. For the JFTC, it means it can deploy its limited resources in the most efficient way, without having to follow procedures that it does not deem necessary. For the parties, informality gives them some control over the timing of the merger review process, as they can discuss remedies with the JFTC at any point in time, also prior to notification. It also avoids surprises, and, to some extent, the involve-

82) Megumi Tahira, *Kigyō ketsugō kisei ni okeru shinsa to tetsuzuki no arikata [How Does Merger Control Work in Japan?]*, Nihon Keizaihō Gakkai Nenpō, Dai 41 (2020), p. 57-58.

83) Case 7 in the JFTC's Annual Overview of Major Business Combinations in FY 2022.

84) Case 3 in the JFTC's Annual Overview of Major Business Combinations in FY 2021 (*Shinkō kenzai kōgyō [Kobelco Engineered Construction Materials] / Nittetsu Kenzai [Nippon Steel Metal Products]*).

85) JFTC, Press Release: Results of Investigation into the Proposed Merger Between Nippon Steel Corporation and Sumitomo Metal Industries, Ltd. (14 December 2011). Apart from non-oriented electrical steel sheets, the JFTC also had concerns in relation to the market for high-pressure gas pipeline engineering services. It accepted behavioural remedies for that market as well.

ment of critical or opportunistic third parties.

But the informality of the JFTC's approach undoubtedly also has demerits and Japanese scholars have not hesitated to point these out. For starters, the lack of formal decisions in merger control leads to stunted development of the law.[86] It also makes it more difficult for third parties to be involved in the merger review process.[87] From the merging parties' perspective, that may be a positive thing, but it means the JFTC misses out on potential sources of information, and it leads to less involvement of civil society in the merger control process.

Perhaps most importantly, it also leads to difficulties in enforcing remedies. The JFTC typically requires the companies to report about their compliance with remedies on a regular basis (e.g. yearly),[88] and there is no indication that companies do not comply with this reporting duty. However, it is much less clear whether this reporting allows the JFTC to adequately monitor compliance and what leverage the JFTC has to push companies towards compliance.

Since the remedies are not incorporated in any formal JFTC order or decision, a violation of the remedies as such cannot be sanctioned. If a party fails to comply, the only option for the JFTC is to re-open the merger investigation and take action against the merger itself, by arguing that, with the remedies not being fully implemented, the merger may lead to a substantial restraint of competition. A hearing would then ensue and ultimately the JFTC could issue a cease-and-desist order. In short, the violation of the remedies as such is not an offense under the Antimonopoly Act. Only an anticompetitive merger is. This constitutes a very indirect way of enforcing merger remedies and it would seem to be a difficult path for the JFTC. As of yet, it has never been tested, as the JFTC has never pursued a violation of remedies.

VII. Conclusion

Remedies play an important role in merger control in many jurisdictions, but even more so in Japan, where the JFTC has exclusively used remedies, not prohibitions, to address anticompetitive mergers. The JFTC's remedies practice is governed by guidelines, without any statutory provisions or case law. This seems to confer significant discretion to the JFTC. But the JFTC has not used that discretion to force the merging parties to offer onerous, far-reaching remedies. On the contrary, the JFTC has often accepted behavioural remedies and, in case of structural remedies, the divestiture of a collection of assets rather than full businesses. In other words, for better or worse, the JFTC's stance has been more pragmatic than principled.

A possible explanation for this tendency is that the incentives for the JFTC are somewhat asymmetric. If the JFTC is demanding, it may have to go down the path of a cease-and-desist order prohibiting the merger or imposing its own remedies, something which the JFTC has not done in more than half a century. By contrast, if it is lenient and clears the merger with the remedies proposed by the parties, it faces almost no threat of an appeal by third parties. Hence, it is probably easier for the JFTC to be lenient than it is to be demanding.

86) *See e.g.*, FUMIO SENSUI, DOKUSENKINSHIHŌ, p. 149-150 (Yūhikaku, 2022) (pointing out that the tendency to terminate merger investigations in Phase I is fraught with problems in terms of rule-making); SHŪYA HAYASHI, KIGYŌ KETSUGŌ KISEI – DOKUSENKINSHIHŌ NI YORU KYŌSŌ HYŌKA NO RIRON, p. 697 (Shōjihōmu, 2011) (pointing out that. one of the problems of the informal merger control system is that there is no accumulation of precedent to illuminate the abstract standard of "substantial restraint of competition").

87) Megumi Tahira, *Kigyō ketsugō kisei ni okeru shinsa to tetsuzuki no arikata [How Does Merger Control Work in Japan?]*, NIHON KEIZAIHŌ GAKKAI NENPŌ, DAI 41, p. 58-59 (2020) (pointing out the need for a more systematic involvement of third parties in Japanese merger control).

88) The JFTC normally does not use monitoring trustees to assist with the monitoring of the remedies, except in cross-border cases where a monitoring trustee has been appointed by other competition authorities as well. Recent cases with a monitoring trustee include *Google / Fitbit*, *Qualcomm / NXP* and *Broadcom / Brocade*.

A distinctive feature of the remedies process in Japan is its informality. The JFTC does not issue formal decisions incorporating the remedies. No party has ever challenged the remedies accepted by the JFTC. The JFTC has also never pursued a violation of remedies. All of this illustrates the cooperative dynamics between companies and the JFTC. The JFTC's remedies practice therefore confirms the conventional wisdom that Japanese regulators and businesses strongly prefer informal processes with little judicial intervention over strict, rights-based enforcement subject to judicial review.

At the same time, Japan's remedies practice raises an intriguing question. In spite of the JFTC's non-confrontational approach to merger control, there is little sign that Japan has suffered from the ills of increased concentration and market power in the way that the United States and, increasingly, Europe have. It is an open question how that is possible. Is the JFTC's approach to merger control more effective in keeping markets competitive? Is there some unique characteristic in the Japanese economy – perhaps the communitarian spirit in large companies ("the company as a family") – that makes anticompetitive mergers less frequent? Or is there yet another factor at play?

(Simon VANDE WALLE)