

# Amendments to the Merger Filing Procedure in Japan

On 4 March 2011, the Japan Fair Trade Commission ("**JFTC**") announced its intention to amend its implementing regulations and guidelines on merger filings, including the abolishment of the prior consultation system. This change is expected to facilitate M&A transactions in Japan by simplifying and speeding up the merger control (antitrust) review process.

The JFTC has invited comments from the public on these amendments which must be sent to the JFTC by 4 April 2011. According to newspaper articles, the JFTC intends to implement the revised system in July 2011. This briefing describes the key features of these amendments.

## Background

A number of companies had expressed the view that amending the merger filing procedure was desirable as it usually takes much time, sometimes more than a year, to obtain clearance from the JFTC in the context of a prior consultation on M&A transactions.

In response to this issue, the Government urged the JFTC to amend the merger filing procedure to make it quicker and more transparent. Based on this new policy, the JFTC decided to abolish the prior consultation system and make a public disclose of transactions to achieve a higher level of transparency in the conduct of its review process.

## Abolishment of the Prior Consultation System

In practice, prior consultation is often used where there is a competition concern in M&A transactions. Under this process, companies can seek the formal opinion of the JFTC. Where the JFTC takes a decision in a particular case after examination at the prior consultation stage, it follows the same decision during the formal merger filing procedure on condition that the actual deal is identical to the one disclosed during prior consultation. As a result, companies can rely on the advance decision made by the JFTC.

The advantage of prior consultation is that companies can obtain a formal opinion from the JFTC on a confidential basis. If the opinion of the JFTC is negative, companies may decide not to proceed with the transaction before a public announcement needs to be made.

### Key Issues

#### Background

#### Abolishment of the Prior Consultation System

#### Public Announcement of the Transactions

#### Shorter Waiting Period

#### Other Amendments

#### Comments

If you would like to know more about the subjects covered in this publication or our services, please contact:

[Landry Guesdon](mailto:Landry.Guesdon@cliffordchance.com) +81 3 5561 6622

[Miho Mizuguchi](mailto:Miho.Mizuguchi@cliffordchance.com) +81 3 5561 6408

[Masafumi Shikakura](mailto:Masafumi.Shikakura@cliffordchance.com) +81 3 5561 6323

To email one of the above, please use [firstname.lastname@cliffordchance.com](mailto:firstname.lastname@cliffordchance.com)

Clifford Chance Law Office  
(Gaikokuho Kyodo Jigyo)  
Akasaka Tameike Tower, 7th Floor  
2-17-7 Akasaka, Minato-ku  
Tokyo 107-0052  
Japan  
[www.cliffordchance.com](http://www.cliffordchance.com)

On the other hand, the prior consultation process tends to be lengthy, sometimes more than a year, in spite of the official timeline set for the prior consultation process. The JFTC must respond within 20 days of receipt of a prior consultation application from the reporting company on whether the examination will go to Phase II or not. However, the JFTC often requires a lot of documents during the prior consultation process and will not accept an application unless all the requisite documents are submitted. In a number of cases, the timeline did not commence because of this reason and the prior consultation process took very long. It became difficult for reporting companies to foresee by when they could obtain clearance. Therefore, the wish of a number of companies and M&A industry players was to make the merger filing procedure quicker, more efficient and transparent.

Recently, a major transaction has been announced in which the parties had decided not to go for the prior consultation with the JFTC, thereby departing from market practice. Nippon Steel Corporation ("**NSC**") and Sumitomo Metal Industries, Ltd. ("**Sumitomo Metals**") announced on 3 February 2011 they were considering a full integration of their businesses. NSC is the largest and Sumitomo Metals is the third largest producer of domestic crude steel. Therefore, there was a clear competition concern in this transaction. According to the newspapers, NSC had been discussing other transactions with the JFTC for three years, but the prior consultation had continued for a long time due to the JFTC's unrelenting requests for information and documents. This time, NSC and Sumitomo Metals decided not to go for the prior consultation and to inform the JFTC of this transaction on the day following the public announcement.

As a result of these amendments, the JFTC will abolish the guidelines on prior consultation and make its decision as part of the formal merger filing process. The JFTC explains the rationale behind these amendments as follows:

- (i) neither the European Commission nor the US Federal Trade Commission state their final decision on competition issues at the prior consultation stage; and
- (ii) under the revised Anti-Monopoly Law of Japan (amended in 2009), the share acquisition filing process was changed from post-completion to pre-completion which made the JFTC's view in the prior consultation stage less relevant.

However, this does not mean that companies may not ask questions to the JFTC. Companies will still be able to ask questions about the need for filling the notification form and how to proceed. As a consequence of these amendments, companies will have better visibility on the duration of the merger filing procedure.

### **Public Announcement of the Transactions**

Under the current formal filing process, transactions are not made public by the JFTC. If the JFTC commences its Phase II examination as part of the prior consultation process, it will make the details of the transaction public on its website subject to a prior public announcement by the parties. If the parties have not made a prior public announcement, the JFTC discontinues the prior consultation process.

As a consequence of the amendments, the JFTC will disclose a transaction only when the case goes to Phase II of the formal filing process. The JFTC will also disclose transactions for "educational" purposes when the case is considered to be useful to other companies, for instance where the parties suggest remedies to avoid competition issues.

### Shorter Waiting Period

In principle, a transaction subject to a merger filing cannot be completed until 30 calendar days have elapsed after filing. Under the current regulation, this waiting period may be shortened if :

- (i) it is evident that the deal will not cause any substantial restrictions on competition; and
- (ii) there is a proper reason for shortening the waiting period (e.g. a company faces a serious risk to its business such as bankruptcy if the deal cannot be done before the 30 days waiting period is over).

After the amendments, condition (ii) above will be dropped. In other words, if the JFTC determines that there is no competition issue, it will notify the decision to the parties in writing, and shorten the waiting period immediately.

### Other Amendments

Other key amendments are as follows:

- Communication between the JFTC and reporting companies will be improved. If the JFTC requires additional information or documents from reporting companies, it will make a request in writing to the reporting companies detailing the reason for the request. If requested, the JFTC will explain to them the competition issues it is concerned with. Furthermore, the amended guidelines will state clearly that the parties may submit their opinions in writing to the JFTC.
- The JFTC will notify the results of its review to the reporting companies. Currently, the JFTC sends written notification to the parties only when there is a competition issue. However, the JFTC will now send the written notification to the parties even if there is no competition issue.
- The current guidelines state that the market outside Japan may be relevant in certain cases. The amendments will include an example in which the whole world may be considered as the relevant market. If the main suppliers sell a product at substantially similar prices all over the world and customers can choose the supplier for that product from all over the world, the whole world can be considered as the relevant market.
- The amendments clarify that the JFTC may take import pressure (i.e. potential new entrants) into account even if products are not being effectively imported in the relevant market.
- The JFTC will also take into account the positive effect that the products in adjacent markets will have on competition for the relevant products in the relevant market.
- The guidelines state that if one of the parties has a very poor business performance, it will only have limited effects on competition concerns. The amendments prescribe that posting a significant loss continuously is one example of a poor business performance.

## Comments

In Japan, in the presence of competition concerns in M&A transactions, prior consultation has been the norm. There has been no formal order/measure by the JFTC regarding mergers and acquisitions for almost 40 years. This means that before entering into a transaction, companies discuss it with the JFTC and obtain its views at the prior consultation stage. If the JFTC raises any competition issues, the parties suggest suitable remedies in line with the JFTC's view, or simply give up.

After the amendment, the examination process will become quicker, and more transactions would be made public by the JFTC. However, this has certain merits and demerits (e.g. confidentiality).

Merger filings are sometimes required for large cross-border transactions not directly affecting competition in Japan. Even then, companies have to wait for 30 days due to the waiting period and this affects the schedule of the whole transaction. The possibility to shorten the waiting period will be welcome news.

These amendments will significantly change competition rules in Japan. It is anticipated that a lot of comments will be submitted to the JFTC.

---

This Client Briefing does not necessarily deal with every important topic or cover every aspect of the topics with which it deals. It is not designed to provide legal or other advice. Clifford Chance assumes no responsibility for any situation arising from any act based on this Client Briefing. All rights reserved.

[www.cliffordchance.com](http://www.cliffordchance.com)

Abu Dhabi ■ Amsterdam ■ Bangkok ■ Barcelona ■ Beijing ■ Brussels ■ Bucharest ■ Budapest ■ Dubai ■ Düsseldorf ■ Frankfurt ■ Hong Kong ■ Kyiv ■ London ■ Luxembourg ■ Madrid ■ Milan ■ Moscow ■ Munich ■ New York ■ Paris ■ Prague ■ Riyadh\* ■ Rome ■ São Paulo ■ Shanghai ■ Singapore ■ Tokyo ■ Warsaw ■ Washington, D.C.

\* Clifford Chance also has a co-operation agreement with Al-Jadaan & Partners Law Firm in Riyadh

Clifford Chance has recently announced its intention to further expand its business with the opening of offices in Perth, Sydney and Istanbul in Spring 2011, and in Qatar (subject to licence approval).