

The 2011 Reform of Japan's Business Concentration Regulations

Christopher Vogl *

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I. INTRODUCTION

The Japanese business concentration regulations underwent comprehensive amendments in 2011. After the amendment of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade of 2009 (hereinafter the Anti-Monopoly Act),¹ this marks the second substantial adjustment of Japanese merger control provisions in only two years.² The reform was primarily part of the Japanese government's New Growth Strategy³ but should also be considered within the broader context of the judicial reform process and conflicting political and economic interests.⁴ The aggravation of difficulties in the eco-

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1 *Shiteki dokusen no kinshi oyobi kōsei torihiki no kakuho ni kansuru hōritsu*, Law No. 54/1947 as amended by Law No. 51/2009. English translation available at: http://www.jftc.go.jp/en/legislation_guidelines/ama/pdf/amended_ama09.pdf.

2 For a summary of recent reforms of the Anti-Monopoly Act, see A. NEGISHI/U. EISELE, *Recht der Wettbewerbsbeschränkungen*, in: Baum/Bälz (eds.), *Handbuch Japanisches Handels- und Wirtschaftsrecht* (Köln 2011) 755 et seq.

3 See below III.

4 For a historical introduction and an outline of the political disputes that have been shaping Japanese competition law, see H. IYORI/A. UESUGI/C. HEATH, *Das japanische Kartellrecht* (2nd ed., Köln 1994) 1-16; H. ODA, *Japanese Law* (3rd ed., London 2009) 328 et seq; M. WAKUI, *Antimonopoly Law: Competition Law and Policy in Japan* (Suffolk 2008) 7-39; S. SUGAHISA, *Wettbewerbspolitik in Japan*, in: *Zeitschrift für Betriebswirtschaft* 64 (1994) 153-166.

conomic environment in Japan following the financial turmoil of 2008 has placed additional pressure on Japanese companies to restructure and to find ways to maintain their competitiveness. A reduction of domestic competition through mergers is seen as one way to regain strength and face the challenges brought about by globalization and nearby emerging markets. The recent reform is also a reflection of these challenges and of ongoing disputes between the interests of large Japanese businesses and the Fair Trade Commission (*Kôsei Torihiki I'in-kai*, hereinafter JFTC).

This article will provide an overview of the particular amendments that have been made and the discussions leading to and resulting from the reform.

II. BEFORE THE REFORM

1. Key Legislation

The Japanese legal provisions relevant to merger notifications are divided into three levels.⁵ The core provisions are set out in Articles 9 to 16 of the Anti-Monopoly Act, which went into force in 1947. Based on these provisions, the JFTC established the Rules on Applications for Approval, Reporting, Notification, etc. Pursuant to the Provisions of Articles 9 to 16 of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (hereinafter the Notification Rules)⁶ in 1953. In addition, there are various Guidelines (*unyô-shishin*) and Policies (*hôshin*), the most central of which are the Guidelines to the Application of the Antimonopoly Act Concerning Review of Business Combination (hereinafter the Merger Guidelines).⁷

The official Japanese substantial merger review consists of two phases (Art. 10 (8) and (9) of the Anti-Monopoly Act). As in many other jurisdictions, Phase I is meant to examine the need for an in-depth investigation to be carried out in Phase II. The time frame for Phase I is 30 days from the date the JFTC receives the notification. Within that time frame, the JFTC decides whether to open in-depth investigations (Phase II), which start with a request to submit additional information. The time frame for Phase II is 90 days⁸ from the date the parties to the concentration submit all additional information requested.

5 For English versions of all relevant provisions, see http://www.jftc.go.jp/en/legislation_guidelines/index.html.

6 *Shiteki dokusen no kinshi oyobi kôsei torihiki no kakuho ni kansuru hôritsu dai 9 jô kara 16 jô made no kitei ni yoru ninka no shinsei, hôkoku oyobi todokede-tô ni kansuru kisoku*, JFTC Regulation No. 1/1953, as amended by Regulation 3/2011.

7 *Kigyô ketsugô shinsa ni kansuru dokusen kinshi-hô no unyô-shishin*, JFTC Guideline of 31 May 2004, as amended on 14 June 2011.

8 Art. 10 (9) of the Anti-Monopoly Act stipulates “the date on which one hundred-twenty days from the date of acceptance of the notification stipulated in the preceding paragraph have passed, or the date on which ninety days from the date of acceptance of all the Reports, etc. have passed, whichever is later” but in practice, only the 90-day time frame is relevant.

2. *Prior Consultation (jizen sôdan)*

In addition, there was a system called prior consultation (*jizen sôdan*). The JFTC offered guidance to parties planning a business concentration. The purpose of this was to make the official review process more efficient by identifying and solving legal problems in an informal atmosphere before an official notification was filed. In 2002, after facing criticism for a lack of transparency, the JFTC issued the Prior Consultation Response Policy (hereinafter the Consultation Policy).⁹ The policy split the prior consultation into three phases. The first phase had the purpose of gathering all relevant information (Sec. 3 (1) of the Consultation Policy). The JFTC would ask the parties involved to submit documents and provide answers to questions the JFTC deemed necessary to assess the compliance of the planned concentration with the Anti-Monopoly Act. The following two phases had the same purposes as the official review phases (Sec. 3 (3) and Sec. 4 of the Consultation Policy).¹⁰ The time frames for the three phases were 20 days for the first phase and 30 and 90 days, respectively, for the following two phases. These time frames ended with either clearance or a request by the JFTC to submit additional information. The next phase, however, did not start until the requested information had been submitted, so, depending on the time it took for the parties to gather all documents and to answer the questions, there was room for a substantial loss of time between consecutive phases. The result of the prior consultation determined the official review. If the parties filed an official notification according to the agreement they reached with the JFTC during prior consultation, which could include self-imposed remedies, they could be sure to obtain clearance soon after the notification.

This prior consultation was voluntary. In practice, about two to three percent of the concentrations underwent the process.¹¹ The rest directly filed official notifications, starting the official two-phase substantial review process. However, the fact that especially major business concentrations that required thorough investigation and attracted public attention underwent prior consultation led some to believe that it was de-facto mandatory.

9 *Kigyô ketsugô keikaku ni kansuru jizen sôdan ni taisuru tai-ô hôshin*, JFTC Policy of 11 December 2002, abolished 1 July 2011.

10 These two phases are usually referred to as Phases 1 and 2 (*dai 1 ji-shinsa, dai 2 ji-shinsa*) of the prior consultation by the JFTC. The 20-day phase of information collection is defined as an application to enter Phase 1 and has no official name. However, it is sometimes sarcastically referred to as Phase 0; see: Y. OCHI, *Jizen sôdan seido no haishi no igi to kongo no kigyô ketsugô shinsa no tenbô* [The Significance of the Abolition of the Prior Consultation System and the Future of the Substantial Merger Review], in: *Kôsei Torihiki* 729 (2011) 27.

11 The number of notifications that underwent prior consultation was 28 out of 1,008 in fiscal year 2008, 24 out of 985 in fiscal year 2009, and 13 out of 265 in fiscal year 2010; see: S. SUGAHISA, *Kigyô ketsugô kisei no jissai to kongo* [The Practical Application of Business Concentration Regulations So Far and from Now On] in: *NBL New Business Law* 960 (2011) 25.

3. *General Criticism*

The Japanese merger review was criticized for three main reasons: the long duration, a lack of predictability, and a lack of transparency.¹²

This criticism was mainly directed toward legal procedures, but was accompanied by growing concerns about the international competitiveness of Japanese companies. Having too many competing companies on the domestic market is seen as a source of this problem, and reducing their number through mergers is one of the countermeasures proposed by the business community.

III. CHRONOLOGY OF EVENTS

On 18 June 2010, the Japanese government promulgated the New Growth Strategy (*shin seichō senryaku*),¹³ which laid the foundation for the reform of the business concentration regulations. It called on the JFTC to assess the need for a revision of its rules and guidelines by the end of fiscal year 2011 while taking global market conditions into account. In reaction to this, the JFTC conducted a public hearing with experts, companies, and lawyers, and also compared its rules and guidelines to those of other competition authorities in the world.¹⁴ The Federation of Economic Organizations, *Keidan-ren*, and the Kansai Economic Federation submitted written opinions.¹⁵ In September 2010, however, the Japanese cabinet released a follow-up paper on the New Growth Strategy to tackle Currency Appreciation and Deflation.¹⁶ The paper, called “The Three-Step Economic Measures for the Realization of the New Growth Strategy,” urged the JFTC to take measures toward a revision of the Notification Rules and Merger Guidelines by the end of fiscal year 2010. On 4 March 2011, the JFTC proposed amended versions of the Notification Rules and the Merger Guidelines and proposed the abolition of its Prior

12 NIHON KEIZAI DANTAI RENGŌKAI, *Kigyō ketsugō ni kansuru dokuzen kinshi hōjō no shinsa tetsusuki, shinsa kijun no tekiseika wo motomeru* [We Demand More Suitability of the Notification Procedure and Investigation Criteria Pursuant to the Antimonopoly Act’s Provisions on Business Concentrations], <http://www.keidanren.or.jp/japanese/policy/2010/094.html>.

13 The Japanese full text is available at: <http://www.kantei.go.jp/jp/sinseichousenryaku/>.
An English translation is available at:

<http://www.meti.go.jp/english/policy/economy/growth/report20100618.pdf>.

14 W. KOBAYASHI, *Kigyō ketsugō kisei (shinsa tetsusuki oyobi shinsa kijun) no minaoshi no gaiyō* [An Outline of the Reform of the Business Concentration Rules (Notification Procedure and Investigation Criteria)], in: *Shōji Hōmu* 1938 (2011) 4.

15 NIHON KEIZAI DANTAI RENGŌKAI, *supra* note 12; KANSAI KEIZAI RENGŌKAI, *Kigyō ketsugō shinsa tetsusuki no minaoshi ni kansuru iken* [Opinion on the revision of the notification procedure for business concentrations], <http://www.kankeiren.or.jp/material/pdf/2009/101115ikenshokigyoketugo.pdf>.

16 The original version can be found on the Cabinet’s website:
<http://www.kantei.go.jp/jp/keizaitaisaku2010/keizaitaisaku.pdf>.

An English translation is available at:
http://www.meti.go.jp/english/policy/economy/measures/three-step_20100910.pdf.

Consultation Response Policy. It asked for public comments on the proposals to be submitted by 11 April 2011. Twenty-three comments were submitted and after further amendments in reaction to these comments, the amended versions went into force on 1 July 2011. The final version included a partial amendment of the Notification Rules, a partial amendment of the Merger Guidelines, the abolition of the Prior Consultation Response Policy, and the creation of *Policies Concerning Procedures of Review of Business Combinations* (hereinafter the Merger Procedure Policies).¹⁷

IV. THE REFORM

1. *Outline of the Amendments*

The main goals of the reform, in response to the criticisms, were to improve the swiftness, transparency, and predictability of the merger review process while enhancing international harmonization.¹⁸ Although these sound like rather technical issues, the underlying hope on the part of the Japanese business world was to create a system that would lower the substantial requirements for approval by the JFTC, with a resulting increase in the number of Japanese mergers.

Amendments to both the procedure and the substantial review criteria were made.

2. *Procedural Changes*

The most striking changes concern procedural issues. The reform includes (a) the abolition of the Prior Consultation Response, (b) improvements to communication, (c) the establishment of a clearance notification, and (d) the loosening of requirements for a reduction of the waiting period.

a) *Abolition of the Prior Consultation Response Policy*

The most remarkable change to the Japanese merger control has been the abolition of the prior consultation system. The system was criticized for delaying mergers by placing an unmanageable burden on the parties, requiring them to submit copious amounts of information and answer literally thousands of questions, and for not allowing them to participate properly in the proceedings. Most of this criticism concerned the gathering of information that preceded Phase I of the prior consultation process (Phase 0)¹⁹. Critics claimed that the JFTC used this phase to actually carry out the entire substantial review.

17 *Kigyô ketsugô shinsa no tetsusuki ni kansuru tai-ô hôshin*, JFTC Policy of 14 June 2011.

18 JFTC, Partial Amendment, etc. of the Fair Trade Commission Rules Associated with Reviews of Business Combination Regulations (Investigation Procedures and Criteria), Press Release of 14 June 2011, <http://www.jftc.go.jp/en/pressreleases/archives/individual-000432.html>.

19 See above, footnote 10.

For that reason it reportedly took several months in some cases before even Phase I of the prior consultation could be reached. This was seen as an arbitrary circumvention of the statutory procedure.²⁰

This criticism, however, was disputed.²¹ The system was voluntary, so there was no legal obligation to wait. If a company felt dissatisfied with the way its case was being handled it could have filed an official notification at any time, forcing the JFTC to carry out the proceedings within the stipulated time frames of the Anti-Monopoly Act. But that would have meant that the parties had to forfeit all the advantages of not officially filing, such as the confidentiality that the JFTC maintained regarding the information disclosed by the parties. When considering the long time the prior consultation system took in some instances, one should keep in mind that the system was being used as an alternative to the official review rather than an addition. Thereby, it reduced the time that was needed afterward for the official review proceedings.²² The same could be said about the burden of providing large amounts of information. This did not happen on a regular basis, but only when concentrations raised serious concerns regarding their effects on competition.²³

The main reason for not officially filing was the fear of facing disadvantages during the official proceeding. This was mentioned as an implied obligation to undergo the prior consultation process.²⁴ On a different note, however, one could argue that the JFTC provided a non-statutory system that was more appealing to companies than the original legal provisions. Often, parties preferred to clear contentious matters in advance and have a smooth investigation afterward instead of taking the risk of facing problems after officially filing. Some, in fact, predict that the abolition of the prior consultation will make it more difficult for companies to obtain clearance and will result in an

20 K. KAWAI, *Kôtori'i no kigyô ketsugô shinsa no kadai* [Issues in Japanese Substantial Merger Review], in: *Kôsei Torihiki* 711 (2010) 40 et seq; K. KAWAI, *Kigyô ketsugô shinsa tetsusuki no kaikaku (jitsumu-ka no kenchi kara)* [The Reform of the Merger Review Procedure (From a Practitioner's Perspective)], in: *Jurisuto* 1423 (2011) 52 et seq. 56.

21 OCHI, *supra* note 10, 26.

22 JFTC, *Kôsei Torihiki I'in-kai ni okeru heisei 20 nen-do no seisaku hyôka ni tsuite* [Evaluation of the JFTC Policies in FY2008] of 25 August 2008, attachment 1 (*jisseki hyôka-sho*) 5, <http://www.jftc.go.jp/pressrelease/08.august/08082502-02-betten01.pdf>; KAWAI, *supra* note 20 (*Jurisuto*), 56

23 OCHI, *supra* note 10, 29; also, some allegations were rejected by the JFTC; see: SUGAHISA, *supra* note 11, 26: "The amount of required documents depends on the particular case, but things like one or two truckloads did not happen so far and are not easy to imagine in the future either."

24 There were great discussions as to the wording that the JFTC used to state that not going through a prior consultation would have no negative effects on the investigation: JFTC, Partial Amendment, etc. of the Fair Trade Commission Rules Associated with Reviews of Business Combination Regulations (Investigation Procedures and Criteria), Press Release of 14 June 2011, attachment 4, 9 (only in Japanese), <http://www.jftc.go.jp/pressrelease/11.june/11061404.pdf>; Y. ABE, *Keizai-kai kara mita kigyô ketugô kisei no minaoshi* [The Reform of the Merger Control Regulation from a Business Perspective], in: *Kôsei Torihiki* 729 (2011), 22.

increase in unsolvable disputes and costly court proceedings.²⁵ Ultimately, this concern reached the business world itself and, in its written opinion, *Keidan-ren* suggested the introduction of a different consultation system rather than the complete abolition of any prior consultation.²⁶

In the end, the Prior Consultation Response Policy was abolished, but the JFTC declared that it would continue to consult the parties in an informal manner on issues such as the best way to fill out the notification forms and provide information (Sec. 2 of the Merger Procedure Policies), a system called Consultation Prior To Notification (*todokede-mae sôdan*). However, the JFTC will no longer comment on any substantive issues or the outcome of the substantial merger review, which is expected to shorten the required time significantly and also to reduce the incentives for parties to make use of the new consultation system.²⁷ In addition, the JFTC emphasized the voluntary nature of the consultation, pledging that there were no disadvantages for parties which chose to forgo it.

b) Improvements to Communication

The lack of opportunities to participate was mainly due to the way the prior consultation system worked. The JFTC was not obliged to duly justify its decisions and requests. During prior consultation, it was not unusual to cite “serious reservations among companies on the downstream market” as the only reason for an order or decision.²⁸ Of course, this confidential handling hampered the parties’ ability to challenge their competitors’ claims. However, it worked both ways. While the parties to the concentration had limited access to the opinions and allegations submitted by competitors, they themselves could be sure that few business secrets were disclosed.

This is about to change to a certain degree. There will be increased opportunities for both the parties and their competitors to actively take part in the investigation process. The basis for this will be a new kind of communication policy under which the JFTC will provide comprehensive explanations regarding its decisions and its intended actions (Art. 7-2 of the Notification Rules in conjunction with Sec. 4 of the Merger Procedure Policies). The parties will be given the opportunity to comment on these explanations and express their opinions. In addition, they may submit statements and suggestions on issues which they deem important at any time during the course of the proceedings. If the JFTC requests additional information, it will explain the necessity of its request.

25 OCHI, *supra* note 10, 31.

26 NIHON KEIZAI DANTAI RENGOKAI, *supra* note 12, Section 3 (1).

27 ABE, *supra* note 24, 22: “Not making binding statements regarding the substantial review decreases the predictability and casts doubts as to whether the new consultation has any significance at all.”

28 KAWAI, *supra* note 20 (Kôsei Torihiki), 42.

Furthermore, the JFTC will make public announcements on ongoing investigations, allowing every third party to submit statements on the planned merger within 30 days from the date of the announcement (Sec. 6 (2) of the Merger Procedure Policies).

These changes have been generally welcomed as favorable steps toward more transparency, but some concerns remain as to the disclosure of business secrets in public announcements.²⁹

c) Establishment of a Clearance Notification

The previous system included prior notification in cases where the JFTC intended to issue a cease and desist order but no notification of clearance. Where the JFTC came to the conclusion that the concentration did not raise any concerns regarding its effects on competition, it just waited until the end of the waiting period during which the parties were prohibited from implementing the transaction. After that, the parties were free to proceed, but there was no formal decision.

Under the new system, the JFTC will issue a notification if it intends to clear a concentration. These notifications can be issued during both Phase I and Phase II. The initial proposal was to inform the parties that “a prior notification regarding a cease and desist order will not be issued,” but the wording was changed after it faced criticism by *Keidanren* for being confusing and not to-the-point.³⁰ From now on, wherever the JFTC finds that a concentration is not in violation of the Anti-Monopoly Act, it will issue a notification to the effect that a cease and desist order will not be issued (Sec. 5 (2) and Sec. 6 (3) of the Merger Procedure Policies).

d) Loosening of Requirements for a Reduction of the Waiting Period

The introduction of a clearance notification increases transparency, but it does not shorten the waiting period. Even where a clearance notification is issued, parties are still prohibited from implementing the transaction before the lapse of 30 days from the day of filing a notification, or, in the case of Phase II proceedings, 90 days from the day of submitting all requested information. Shortening the waiting period was possible even before the reform, but only if the JFTC deemed it necessary to do so. Now, the JFTC will shorten the waiting period and issue a notification to the effect that a cease and desist order will not be issued if so requested by the parties without any further requisites (Sec. 5 (2) Merger Procedure Policies). This is expected to become common practice from now on.

²⁹ ABE, *supra* note 24, 23.

³⁰ JFTC, *supra* note 24, 21.

3. Substantial Review

Section 10 of the Anti-Monopoly Act states that “no company shall acquire or hold shares of any other companies where the effect of such acquisition or holding of shares may be substantially to restrain competition [...]”. The JFTC applies a variety of tests and criteria to determine whether such a restraint on competition will result from the concentration. The reform affects (a) the geographic market definition, (b) competitive pressure from imports and related markets, (c) consideration of imminent failure, and (d) consideration of decrease in demand.

a) Geographic Market Definition

The JFTC was criticized for focusing too much on the national market and ignoring recent trends such as globalization and increasing cross-border competition.³¹ The JFTC rejected this allegation, pointing out that the Guidelines provided for the possibility of an international market definition³² and that it had even applied a worldwide market definition in recent cases.³³ But to improve predictability for parties, the JFTC clarified their handling of cross-border market definitions in Chapter 2 Sec. 3 (2) of the Merger Guidelines. The method of determining the relevant market will be the same as for domestic markets. The main criterion is demand-side substitution.³⁴ Where Japanese consumers are able to choose between domestic and international competitors to an extent that prevents domestic companies from raising prices, the relevant market will be defined according to the geographic scope of substitutability. *Keidan-ren* criticized this for not bringing about a substantial change in the JFTC’s approach to the geographic market definition.³⁵ They argued that a company with a high domestic market share does not necessarily have high international competitiveness.³⁶ The JFTC should at least clarify that not only worldwide and East Asian market definitions are possible, but also parts thereof.³⁷ *Keidan-ren*’s argument seems to be that the relevant geographic market

31 SANGYÔ-KÔZÔ SHINGI-KAI, *Sangyô kyôshô-ryoku bukai (dai 5 kai) – giji-yôshi* [5th Meeting of the Industrial Competitiveness Study Group: Summary], available at: <http://www.meti.go.jp/committee/summary/0004660/index05.html>; NIHON KEIZAI DANTAI RENGÔKAI, *supra* note 12; KANSAI KEIZAI RENGÔKAI, *supra* note 15.

32 KOBAYASHI, *supra* note 14, 10.

33 SONY / NEC, *Hei-sei 17 nen-do ni okeru shuyô na kigyô ketsugô jirei* [Major Business Concentrations in Fiscal Year 2005], 7 June 2006, 42; SUMCO / KOMATSU, *Hei-sei 18 nen-do ni okeru shuyô na kigyô ketsugô jirei* [Major Business Concentrations in Fiscal Year 2006], 19 June 2007, 29; NEC ELECTRONICS / RENESAS, *Hei-sei 21 nen-do ni okeru shuyô na kigyô ketsugô jirei* [Major Business Concentrations in Fiscal Year 2009], 2 June 2010, 32 et seq.; BHP BILLITON / RIO TINTO, *Hei-sei 22 nen-do ni okeru shuyô na kigyô ketsugô jirei* [Major Business Concentrations in Fiscal Year 2010], 21 June 2011, 3.

34 The foundation of the JFTC’s market definition is the SSNIP test, but other tests and considerations are also likely to apply according to the Merger Guidelines (Chapter 2 Sec. 1).

35 ABE, *supra* note 24, 25.

36 JFTC, *supra* note 24, 21.

37 ABE, *supra* note 24, 25.

should be defined based on the geographic scope of the business activity of a company rather than demand-side substitutability.³⁸ The JFTC dismissed this claim and continues to define the relevant geographic market mainly by applying the SSNIP test.^{38a}

b) Competitive Pressure from Imports and Related Markets

Even before the reform, both import pressure and competitive pressure from related markets had been recognized as viable criteria to determine the competitive effects of a concentration, due to their potential to cause downward price pressure on the investigated market and thereby reduce the negative effects of the concentration. However, there were uncertainties as to the sorts of pressures that were covered and the way in which the JFTC determined their effects.

The Merger Guidelines now state that the JFTC runs tests regardless of whether there are actual imports, which means that potential competition rather than actual competition will be the focus of the investigation (Chapter 4 Sec. 2 (2) of the Merger Guidelines). The JFTC will take into account institutional barriers, transaction costs, and problems in distribution, substitutability, and the capacity of supply to determine the likelihood of sufficient import pressure. Interestingly, import refers to product supply from outside the geographic range of the defined market and may also include domestic products (Note 6 of Chapter 4 Sec. 2 (2) of the Merger Guidelines).

The same applies to competitive pressure from related markets. Actual pressure is not required, but rather a high probability of such pressure emerging in the near future if the parties to the concentration raise prices. Markets are considered “related” if they provide so-called “competing goods”³⁹ or if they are geographically adjacent while providing the same goods.

c) Consideration of Imminent Failure

One highly controversial issue in the debates was how the JFTC should take into account the imminent failure of a party to the transaction. The revised Merger Guidelines state that “the effect on competition of a concentration is usually thought to be small if a

38 Such arguments illustrate the great ideological differences that characterize the Japanese debate about competition policies. While the prevailing view in the West is that competition is essential to economic growth, Japanese domestic competition is sometimes seen as a hindrance to economic success. For a historical explanation, see ODA, *supra* note 4, 327 et seq; IYORI/UESUGI/HEATH, *supra* note 4, 8 et seq; for the discussion in Japan regarding the purpose of the Anti-Monopoly Act, see NEGISHI/EISELE, *supra* note 2, 747 footnote 4; T. KANAI/N. KAWAHAMA/F. SENSUI (eds.), *Dokusen kinshi-hô* [Anti-Monopoly Law] (3rd ed., Tokyo 2010) 32 et seq; for an explanation of the term excessive competition (*katô kyôdsô*), see WAKUI, *supra* note 4, 17; M. BRONFENBRENNER, Excessive Competition in Japanese Business, in: Monumenta Nipponica Vol. 21 (1966) 114 et seq.

38a SSNIP stands for ‘Small but Significant and Non-transitory Increase in Price’.

39 Competing goods are defined as “products that provide similar utility to users” (Chapter 4 Sec. 2 (4) of the Merger Guidelines).

party to the concentration has recorded continuous and significant ordinary losses, has excess debt, or is unable to obtain finance for working capital and it is obvious that the party would be highly likely to go bankrupt and exit the market in the near future without the business combination” (Chapter 4 Sec. 2 (8) of the Merger Guidelines). While the introduction of such a provision was generally welcomed, *Keidan-ren* criticized the wording for being too restrictive.⁴⁰ Especially the phrase “highly likely to [...] exit the market in the near future” was controversial. *Keidan-ren* argued that by the time a party was about to exit the market, it was already too late to take appropriate measures and find a suitable agreement. But the JFTC kept the wording, citing the need for international harmonization given similar provisions in European and US merger law.⁴¹ The application of this provision in practice remains to be seen, but given the emphasis on the need for international harmonization,⁴² the preliminary assumption would be that the JFTC will look closely into European and American case law when the first Japanese cases arise.

d) Consideration of Decrease in Demand

Japan has been experiencing decreasing demand in various markets for many years.⁴³ In fact, the problem of shrinking domestic markets has become one of the main challenges for Japanese companies. This development is also reflected in three newly introduced paragraphs in the Merger Guidelines. The JFTC stopped short of creating a new provision for this specific issue, but rather included it as a criterion influencing the assessment of the overall competitive situation (Chapter 4 Sec. 2 (1) E.), competitive pressure from related markets (Chapter 4 Sec. 2 (4)), and competitive pressure from users (Chapter 4 Sec. 2 (5)). In general, a decrease in demand is part of the overall market development and market trends that other competition authorities also use as criteria for their investigations. However, since this has been the most prominent trend in the Japanese market for many years, the JFTC decided to state it more explicitly.

40 ABE, *supra* note 24, 25.

41 For the United States, see: U.S. Department of Justice and the Federal Trade Commission, Horizontal Merger Guidelines of 19 August 2010, Section 11; for the European Union, see: Guidelines on the Assessment of Horizontal Mergers under the Council Regulation on the Control of Concentrations between Undertakings (2004/C 31/03), Section 90.

42 JFTC, *supra* note 24, 25; KOBAYASHI, *supra* note 14, 11.

43 KOBAYASHI, *supra* note 14, 11 et seq.

V. GENERAL EXPECTATIONS AND RECEPTION

1. *Trend toward EU Law*

The general reform and the direction it took have often been compared to the EU Merger Regulation.⁴⁴ It has been said that the reform marks a shift toward European legal thinking. Although it is true that closer alignment to EU law was proposed throughout the reform process, it seems to be too early to make such a prediction. Whether there will be a shift toward EU law will depend on the JFTC's interpretation of the new provisions. And the JFTC has already rejected proposals to adopt certain EU concepts such as "change of control."⁴⁵

2. *Reception*

Industry stakeholders and the legal community generally welcomed the reform.⁴⁶ Although a large portion of their demands were not satisfied, they perceived the amendments as a step in the right direction. Nevertheless, harsh criticism and demands for further amendments persisted. It is unlikely that the discussion about competition policies will be settled in the near future.

The consumer group *Shōdan-ren* disapproved of the reform both in terms of procedure and content.⁴⁷ They were opposed to the fact that a cabinet decision led to a substantial reform within only one year and called for the responsible persons to take more time to further examine the issues. They also disapproved of the overall purpose of increasing the international competitiveness of Japanese companies without paying attention to domestic consumers. They demanded further discussions and closer considerations of consumer interests but remained widely unheard. It is surprising that although the Japanese Anti-Monopoly Act is said to be comparatively focused on the interests of consumers,⁴⁸ their stakeholders were hardly visible during the entire reform process.

44 OCHI, *supra* note 10, 27; K. TAKEDA, *Tekkō kaisha-kan no kigyō ketsugō to EU kyōsō-hō* [Business Concentrations in the Steel Industry and EU Competition Law] in: *Kōsei Torihiki* 729 (2011), 38-47.

45 JFTC, *supra* note 24, 17.

46 C. IKEDA, *Kigyō ketsugō shinsa (tetsusuki oyobi shinsa kijun) no minaoshi* [Reform of the Business Concentration Review (Procedure and Substantial Review Criteria)] in: *Kōsei Torihiki* 729 (2011) 19; ABE, *supra* note 24, 25.

47 ZENKOKU SHŌHISHA DANTAI RENRAKU-KAI, *Kigyō ketsugō kisei no minaoshi-an ni taisuru iken* [Opinion on the Proposed Reform of the Business Concentration Regulations], press release of 4 April 2011, http://www.shodanren.gr.jp/database/pdf/229_01.pdf

48 K. EGUCHI, *Das japanische Kartellrecht und dessen neuere Entwicklung*, in: *ZJapanR/ J.Japan.L* 13 (2002) 143.

VI. CONCLUSION

The Japanese substantial merger review has undergone changes that will have a significant impact on future merger investigations. However, these amendments mainly concern procedural matters. The amendments made to the substantial review criteria are mostly clarifications of what had been JFTC practice for years. They are expected to improve the swiftness, transparency, and predictability of merger review proceedings and serve as a reference for parties and lawyers, but are unlikely to fundamentally affect the outcome.

From a legal perspective and in the context of the Japanese Judicial Reform, the reform is a successful step toward further strengthening legal certainty and concepts such as the rule of law. It is too early to tell whether the reform will also lead to an increase in legal disputes between enterprises and the JFTC. But with the abolition of the Prior Consultation Response Policy and Japanese businesses determined to restructure, the chances have never been higher.⁴⁹

In terms of competition law theory, the articles and arguments that went along with the reform manifest the need for a more fundamental debate regarding competition policy. Regrettably, the discussions are almost exclusively dominated by legal scholars and legal arguments. Therefore, they concern the practice rather than the philosophical and economic theories that form the foundation of competition law and determine its contents. Japan's economists, who communicated their opinions on competition matters very vividly 40 years ago,⁵⁰ seem to have lost interest in being part of the debate.⁵¹ At the same time, certain arguments show that the concept of competition itself has not yet found full appreciation in Japan.⁵² In this respect, more debates regarding economic theory would be desirable to develop an inherently Japanese stance on competition policy.

Without a comprehensive debate on competition law theory, discussions about geographic market definitions and other details are likely to continue to obscure the underlying fundamental differences,⁵³ while calls for the next reform are already being heard.⁵⁴

49 For the significance of this for the development of Japanese law, see: H. BAUM / M. BÄLZ, *Rechtsentwicklungen, Rechtsmentalität, Rechtsumsetzung*, in: Baum/Bälz (eds.), *Handbuch Japanisches Handels- und Wirtschaftsrecht* (Köln 2011) 13-21, with further references.

50 SUGAHISA, *supra* note 4, 160.

51 H. OHASHI, *Gurôbaru-ka ni okeru kigyô ketsugô to kyôshô seisaku no ari-kata* [Business Concentrations in Times of Globalization and the Status of Competition Policy] in: *Jurisuto* 1423 (2011) 60. As for a similar critic directed toward economists at the JFTC and the legislative branch, see: S. HAYASHI, *Kigyô ketsugô kisei – Dokusen kinshi-hô ni yoru kyôshô hyôka no riron* [Business Concentration Regulations: The Anti-Monopoly Act's Competition Theory] (Tokyo 2011) 782.

52 See above, footnote 38.

53 For the discussion on market definition methods and the political motives influencing it, see: T. SHIRAIISHI, *Kigyô ketsugô kisei to shijô-kakutei* [Business Concentration Regulations and the Market Definition] in: *Jurisuto* 1423 (2011) 46-51 [49].

54 ABE, *supra* note 24, 25; KAWAI, *supra* note 20 (*Jurisuto*), 59.

SUMMARY

The Japanese substantial merger review underwent significant changes in 2011. The amendments made to the procedure include the abolition of the Prior Consultation Response, improvements to communication, the establishment of a clearance notification, and the loosening of requirements for a reduction of the waiting period. As regards the substantial review criteria, the revisions affect the geographic market definition, competitive pressure from imports and related markets, consideration of imminent failure, and consideration of decrease in demand. It is expected that this reform will make the Japanese merger review more time-efficient and increase predictability for parties and their lawyers.

The reform process was accompanied by fundamental disputes regarding the role of competition and the best strategies to enhance growth and international competitiveness of Japanese companies. These controversies between business federations, the Ministry of Economic Affairs (METI), and the JFTC have been shaping Japanese competition policies for many decades and will continue to present an important topic for anyone interested in Japanese competition law.

ZUSAMMENFASSUNG

Das japanische Fusionskontrollverfahren wurde 2011 einer grundlegenden Reform unterzogen. Die verfahrensrechtlichen Veränderungen betreffen die Abschaffung der Vorabberatungen, neue Kommunikationsmöglichkeiten, die Einführung einer Freigabebenachrichtigung und erleichterte Voraussetzungen für die Verkürzung der Wartefrist. Bezüglich der materiellen Untersuchungskriterien fügte die japanische Fair Trade Commission in ihren Regularien und Leitfäden einige Konkretisierungen ein. Diese betreffen die räumliche Marktabgrenzung, Wettbewerbsdruck von benachbarten Märkten und die Berücksichtigung einer bevorstehenden Insolvenz eines Unternehmens und rückläufiger Nachfrage. Bei diesen Konkretisierungen handelt es sich jedoch lediglich um Klarstellungen der bisherigen Praxis. Es wird erwartet, dass das japanische Fusionskontrollverfahren in Zukunft weniger Zeit in Anspruch nehmen und für Unternehmen und ihre Anwälte besser vorhersehbar wird.

Die Reform wurde begleitet von grundlegenden Meinungsverschiedenheiten über den Stellenwert von Wettbewerb und die richtigen Strategien zur Förderung von Wachstum und internationaler Konkurrenzfähigkeit japanischer Unternehmen. Diese Diskussionen, die sich hauptsächlich zwischen den Vertretern von Industrie und Wirtschaft und dem Wirtschaftsministerium auf der einen und der japanischen Fair Trade Commission auf der anderen Seite abspielen, prägen die japanische Wettbewerbspolitik seit vielen Jahrzehnten und werden auch in Zukunft entscheidenden Einfluss auf das japanische Wettbewerbsrecht haben.