

## Overview

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It was not until fairly recently that the Japan Fair Trade Commission (JFTC) began emphasising economic analysis in its antitrust enforcement. Until the early 2000s, the Commission's approach to merger assessment primarily relied on the idea, under the Structure-Conduct-Performance paradigm, that the degree of competition in a market is determined by market concentration. Moreover, the JFTC's approach to investigations focused heavily on the documents submitted by the merging parties and on hearings with the applicants' customers and their competitors. This approach became insufficient for determining whether big mergers substantially restrained competition in concentrated markets within Japan's economy.

The early 2000s marked the starting point of the JFTC's efforts to modernise its antitrust enforcement style by relying on a more economic approach. The Commission started to recruit qualified fixed-term and mid-career economists to its merger division. In 2004, the regulator thoroughly revised its merger guidelines to be consistent with the merger guidelines of the United States and the European Commission, which reflected recent developments in microeconomics and industrial organisation. The JFTC established its Competition Policy Research Center (CPRC) at nearly the same time. While the role of the CPRC has been to carry out competition policy research, JFTC members have also learned how to better investigate actual cases by working with the CPRC's legal academics and economics professors.

Naturally, the most popular area of enforcement to which the JFTC has applied economic analysis during the past 13 years has been merger assessment. This is consistent with its substantial revision of merger guidelines in 2004. The Commission has used qualified economists in its merger division since the early 2000s, introducing economic analysis to its merger assessment and responding to the submission of reports prepared by economic consulting firms.

Part of the economic analyses conducted in merger cases in Japan has been published and made available to the public in 'Major Business Combination Cases', which the JFTC has released each fiscal year since 1993 (official documents are only available in Japanese).

Economic analyses by the JFTC or by the merging parties have been shown in the official reports on *Unicharm-Shiseido* (sanitary pad, 2005), *Ajinomoto-Yamaki* (seasoning, 2006), *Nissin-Myojo* (instant noodle, 2006), *BHP Billiton-Rio Tinto* (iron ore and coking coal, 2010), *Daiken-C&H* (building material, 2012), *Yamada-Best* (electronics retail store, 2012), *Oji-Chuetsu* (paper, 2014), *Cosmo-Showa Shell-Sumitomo-TonenGeneral* (refined petroleum product and LP gas, 2015), *Zimmer-Biomet* (artificial hip stem, 2015), *Kadokawa-Dwango* (portal site, 2015), *Osaka Steel-Tokyo Kohtetsu* (shaped steel, 2015), *FamilyMart-Uny* (convenience store, 2015), *Idemitsu-Shell and JX-Tonen General* (oil wholesaler, 2016), and *NSSMC-Nisshin* (steel sheets, 2016).

Now that the Commission no longer shies away from economic analysis, merging parties have to prepare quantitative explanation in advance for careful scrutiny by JFTC economists. The JFTC has more frequently used and discussed economic analyses in merger cases. It is clear that the JFTC is determined to look for economic evidence to judge the competitive impact of international, large-scale, or complicated mergers in particular, when they require Phase II investigation. They have even started to request that the merging parties show any economic evidence to support the remedy sufficiency.

In *Cosmo et al* (2015), the JFTC carried out difference-in-difference regression to find no anti-competitive impacts on gas price from the previous gas merger between JX Nikko Nisseki and Mitsui Marubeni in 2011.

In the *FamilyMart-Uny* case (2015), the JFTC conducted survey research, in cooperation with the merging parties, at chosen convenience stores, and estimated the Gross Upward Pricing Pressures Index scores to determine the competitive impact of adjacent non-merging convenience stores and general supermarkets.

The Commission cleared the two merger plans mentioned above partly because of the results of econometric analyses.

In *Zimmer-Biomet* (2014), the JFTC showed anti-competitive concern by finding empirically that the price was positively related to the Herfindahl-Hirschman

Index (HHI). Because of the merger in question, the HHI of a certain product market would increase and the market price was also expected to increase. The merging parties agreed to divest one of the merging parties in that product line in order to obtain the JFTC's clearance.

In the *Idemitsu-Shell and JX-Tonen General* case (2016), the JFTC employed a merger simulation framework proposed by O'Brien and Salop (2000) ('Competitive Effects of Partial Ownership: Financial Interest and Corporate Control', *Antitrust Law Journal*, Vol. 67, pages 559-614) to analyse the impact of mergers among the partial owners of LP gas wholesalers. While the two mergers do not decrease the number of LP gas wholesalers, they could facilitate the price information sharing among the LP gas wholesalers because separate investing companies come to own the same LP gas wholesalers. The merger simulation result suggested the merger could increase the price of a certain LP gas wholesaler by 2-6%. In responding to this result, the merging parties proposed a remedy plan wherein some merging parties gave up the ownership of a certain LP gas wholesaler to lower the incentive to raise the price, and interlocked directorates to lower the possibility of information sharing of the pricing decisions. The Commission approved the merger because the revised merger simulation reflecting those remedies yielded almost zero price increase.

In *NSSMC-Nisshin* (2016), the Commission carried out a critical elasticity analysis on the stainless sheet market to judge that the geographical relevant market is Japan, not East Asia, and that the competitive pressure from outside of Japan is still limited. They approved the merger plan on the condition that the merging parties provide the sales support to one of their significant competitors in the area of stainless sheet market.

Aside from mergers, the number of antitrust cases that have been reviewed in light of economic analysis is not publicly known. Nevertheless, the secretary general admitted in a regular session with reporters on 14 June 2017 that the JFTC had economists in the investigation bureau in charge of cartel and bid-rigging in addition to those in the merger division, and that the Commission formed an informal economist group who can work cross-departmentally on economic problems of various antitrust cases. Moreover, economic consulting firms in Japan have been retained in recent years for antitrust cases. For example, economic consultants at NERA analysed the impact of bid-rigging and cartels on prices, and estimated damages in investigations

by the US Department of Justice and the European Commission in private litigation and in settlement negotiations. They also worked on superior bargaining position cases against the JFTC to provide economic analysis, showing that some of the alleged conduct actually benefitted the counterparties. Moreover, they were involved in monopolisation cases where damages were empirically estimated.

Economic analysis has been gradually and widely used within antitrust practice in Japan. The importance of economic analysis has also been steadily recognised in other fields, such as securities litigation and intellectual property dispute. For example, event studies have been submitted to the courts in financial misstatement cases such as *Livedoor* (2009), *Seibu* (2011) and *Olympus* (2015).

It has been rumoured that the JFTC is eager to take on a case against big high-tech companies on matters of monopolisation or abuse of superior bargaining power following the lead of the European Commission, the Korea Federal Trade Commission and the Ministry of Commerce of the People's Republic of China, which have been actively working on such cases. On 2 August 2016, the JFTC issued guidelines on trade practices related to smartphone sales that could violate the antimonopoly law. The guidelines are targeted at overall smartphone sales, but many issues cited in the guidelines are related to Apple's sales strategy, according to a Nikkei Asian Review article. It was reported on 8 August 2016 that the JFTC had investigated Amazon Japan to determine whether the company forced sellers to offer more favourable conditions to Amazon than provided to other e-commerce competitors. Responding to the JFTC's investigation, Amazon Japan gave up the price parity and selection parity clauses in the seller contracts. On 6 June 2017, a study group at JFTC addressed the potential competition issues of big-data in relation to mergers, abuse of market power, refusal to deal and so on. This report clearly intends to target the companies who can access an enormous amount of private information. It has not been publically available whether and how the internal economist group were involved in the investigation of those high-tech companies' cases, but it is quite likely that the growing team of economists at the JFTC will play a key role in supporting the regulator's arguments when it decides to fight with high-tech companies since those cases typically requires careful economic arguments to find anticompetitive aspect of the companies' business decisions.



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Dr Hiroaki Ishigaki is managing director and head of NERA's Tokyo office and the company's operations in Japan. He is an expert in providing economic advice in antitrust, intellectual property, securities and finance, and energy. He has frequently presented his analyses to regulatory agencies and courts.

In his antitrust practice, Dr Ishigaki has analysed the competitive impacts of many merger cases in a wide range of industries, including: mining, beverages, paper products, chemicals, pharmaceuticals, metals, petroleum, refineries, containers, computer products, semiconductor devices, machinery, automobiles, wholesale, retail, securities exchanges, banking and auctions, among others. He has addressed liability and damages issues involving bid rigging, cartels, predatory pricing, monopolisation, abuse of a dominant position and other antitrust violations.

Dr Ishigaki has also evaluated damages in various intellectual property infringement disputes and reasonable compensation in employee invention litigations. He has experience in helping licence agreement of intellectual property rights. In his securities and finance practice, Dr Ishigaki has analysed the liability claim and damages in securities litigations regarding various fraudulent financial reporting, as well as minority squeezed-out and derivative transaction disputes.

Prior to joining NERA, Dr Ishigaki served as an economist in the mergers and acquisitions division of the Japan Fair Trade Commission, where he advised on and conducted economic analyses of many merger cases in a wide range of industries.

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