

Overview

Hiroaki Ishigaki

NERA Economic Consulting

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 (SCP) paradigm, that the degree of competition in a market was determined by market concentration. Moreover, the JFTC's investigation approach heavily focused 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 fixed-term and mid-career qualified economists to its merger division. In 2004, the regulator thoroughly revised its merger guidelines so that they were 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 10 years has been merger assessment. This is consistent with its substantial revision of merger guidelines in 2004. The Commission has hired 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), *Yamada-Best* (electronic retail store, 2012), *Oji-Chuetsu* (paper, 2014), *Cosmo-Showa Shell-Sumitomo-TonenGeneral* (gas, 2015), *Zimmer-Biomet* (artificial hip stem, 2015), *Kadokawa-Dwango* (portal site, 2015), *Osaka Steel-Tokyo Kohtetsu* (shaped steel, 2015), and *FamilyMart-Uny* (convenience store, 2015).

Now that the Commission no longer shies away from economic analysis, merging parties have to prepare far enough in advance for careful scrutiny by JFTC economists. In *Cosmo et al* (2015), the JFTC carried out difference-in-difference regression to find no anticompetitive 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 selected convenience stores, and estimated the Gross Upward Pricing Pressures Index (GUPPI) 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.

However, the JFTC showed anticompetitive concern for the merger plan of *Zimmer-Biomet* (2014) 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.

The JFTC has more frequently used and discussed economic analyses in merger cases. Aside from mergers, the number of antitrust cases that have been reviewed in light of economic analysis is not publicly known. Nevertheless, economic consulting firms in Japan have been retained in recent years for antitrust cases. For example, economic consultants at NERA have analysed the impact of bid rigging/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 have 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 have been involved in monopolisation cases where damages were empirically estimated.

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

According to a recent article in Policy and Regulatory Report (25 July 2016), the JFTC plans to double the number of economists at the agency. The Commission has not made an official announcement of this plan, but the move clearly shows that it is eager to use economic analysis more actively in non-merger antitrust enforcement. Like their counterparts in the EU and the US, these JFTC economists would work on

cartel, monopolisation and abuse of superior bargaining position cases.

It is 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 (MOFCOM), which have been actively working on such cases.

Two recent JFTC actions indicate that the rumors could be true. 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 find whether the company forced sellers to offer more favorable conditions to Amazon than provided to other e-commerce competitors. 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.



Hiroaki Ishigaki
NERA Economic Consulting

Dr Hiroaki Ishigaki is vice president 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.

He 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, he 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.

NERA

ECONOMIC CONSULTING

1166 Avenue of the Americas
29th Floor
New York, NY 10036
USA
Tel: +1 212 345 3000
Fax: +1 212 345 4650

Hiroaki Ishigaki
hiroaki.ishigaki@nera.com

www.nera.com

NERA Economic Consulting is a global firm of experts dedicated to applying economic, finance and quantitative principles to complex business and legal challenges. For more than half a century, NERA's economists have been creating strategies, studies, reports, expert testimony and policy recommendations for government authorities and the world's leading law firms and corporations. We bring academic rigour, objectivity and real-world industry experience to bear on issues arising from competition, regulation, public policy, strategy, finance and litigation.

NERA's clients value our ability to apply and communicate state-of-the-art approaches clearly and convincingly, our commitment to deliver unbiased findings and our reputation for quality and independence. Our clients rely on the integrity and skills of our unparalleled team of economists and other experts backed by the resources and reliability of one of the world's largest economic consultancies.

NERA is home to one of the world's leading competition practices. Our economists understand the high stakes involved in our assignments and take extraordinary measures to ensure our work is thoughtful, reliable and robust. NERA economists employ economic theory and quantitative methods, grounded in a thorough understanding of the market, to provide a full range of theoretical and empirical economic analysis and testimony in matters involving mergers and acquisitions, antitrust litigation and competition policy.

