Overview

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It was not until 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 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 JFTC started to recruit qualified fixed-term and mid-career 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 area of enforcement to which the JFTC has applied most economic analysis during the past 14 years has been merger assessment. This is consistent with its substantial revision of merger guidelines in 2004. The JFTC 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), *NSSMC-Nisshin* (steel sheets, 2016) and *Daishi Bank-Hokuetsu Bank* (regional bank, 2017).

Now that the JFTC no longer shies away from economic analysis, merging parties are encouraged to prepare quantitative explanations in advance for 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 when, in particular, they require the second phase investigation. The JFTC has even started to request 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 prices 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 at select convenience stores in cooperation with the merging parties and estimated the Gross Upward Pricing Pressures Index scores to determine the competitive impact of adjacent non-merging convenience stores and general supermarkets. The JFTC cleared the two merger plans mentioned above partly because of the results of this econometric analyses.

In *Zimmer-Biomet* (2014), the JFTC found empirically that a 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 *Idemitsu-Shell and JX-Tonen General* case (2016), the JFTC employed a merger simulation framework proposed by O'Brien and Salop (2000) (DP O'Brien and SC Salop (2000), 'Competitive Effects of Partial Ownership: Financial Interest and Corporate Control', *Antitrust Law Journal*, Volume 67, pp 559–614) to analyse the impact of a merger among the partial owners of liquid petroleum (LP) gas wholesalers. While the two mergers do not decrease the number of LP gas wholesalers, they could facilitate price information sharing among the LP gas wholesalers because separate investing companies would 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 per cent. In responding to this result, the merging parties proposed a remedy plan where 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 JFTC approved the merger because the revised merger simulation reflecting these remedies yielded almost zero price increase.

In *NSSMC-Nisshin* (2016), the JFTC 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 stainless sheet market.

In *Daishi Bank-Hokuetsu Bank* (2017), the JFTC conducted a large-scale survey research of regional business borrowers on the relevant market and the degree of the competition among the merging banks and the non-merging financial institutions (including commercial banks, regional banks, cooperative banks, credit unions, government-affiliated financial institutions and agricultural cooperatives). The relevant market for large companies was decided wider than that for small- and medium-sized companies (large companies: prefectural level; small- and medium-sized companies: sub-prefectural level). The JFTC found from the survey research that large companies and small- and medium-sized companies could switch to respective alternative financial institutions including some non-merging regional banks, and some cooperative banks if the merging regional banks were to increase the borrowing rate. The JFTC also carried out a statistical analysis to compare the borrowing rates to evaluate the competitive pressure from government-affiliated financial institutions toward the merging regional banks. The JFTC cleared the merging plan without remedy even if the combined market share of the merging banks could reach over 50 per cent.

Aside from mergers, the number of antitrust cases that have been reviewed in light of economic analysis is not publicly known. This said, the Secretary-General of the JFTC acknowledged in a regular session with reporters on 14 June 2017 that the commission had economists in the investigation bureau in charge of cartel and bid-rigging, in addition to those in the merger division, and that the JFTC had 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, the European Commission, in private litigation and in settlement negotiations. They also worked on superior bargaining position cases against the JFTC to provide economic analyses showing that some of the alleged conduct actually benefited the counterparties. Moreover, they were 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 steadily recognised in other fields, such as commercial disputes, intellectual property disputes, securities litigation and international arbitration. For example, event studies have been submitted to the courts in financial misstatement cases such as *Livedoor* (2009), *Seibu* (2011) and *Olympus* (2015). Damage estimation may require but-for econometric sales estimation, and quantitative analysis of survey research.

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 China, which have been actively working on such cases. The growing team of economists at the JFTC are likely to play a key role in supporting the regulator's arguments when it

decides to fight with high-tech companies, since those cases typically require careful economic arguments to find anticompetitive aspects of a company's business decisions. Examples of the JFTC's interest in high-tech companies include the following.

- 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.
- On 8 August 2016 it was reported 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, the JFTC published the 'Report of Study Group on Data and Competition Policy' based on a study group discussion over big data and competition policy. The report admitted that data collection and its use is often pro-competitive but suggested regulating mergers that monopolise data, digital platforms that unfairly collect customer data and companies that exclude essential data from the competitors.
- On 15 March 2018, the JFTC raided Amazon Japan on suspicions that it is abusing its bargaining position in market place. The case is ongoing.
- On 11 July 2018, the JFTC closed an investigation into Apple's practices by ensuring that Apple changes the sales contracts with Japan's major mobile service providers, by which Apple requires mobile service providers to offer iPhone subsidies to lower the initial cost of purchasing an iPhone.

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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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