

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Suspensory Effects of Merger Notifications and Gun Jumping - Note by Japan****27 November 2018**

This document reproduces a written contribution from Japan submitted for Item 5 of the 130th OECD Competition committee meeting on 27-28 November 2018.

More documents related to this discussion can be found at

[www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm](http://www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm)

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## *Japan*

### 1. Introduction

1. In Japan, share acquisitions, mergers, company splits, joint share transfers and acquisitions of business (hereinafter referred to as “M&A transactions”) are under the obligation of prior notification. Under this prior notification system, Japan Fair Trade Commission (JFTC) has recently been receiving over 300 notifications per year including from foreign companies.

2. JFTC has never taken any legal measures against so-called gun jumping as a violation of Japanese competition law (the Antimonopoly Act; AMA). This would be the fruit of JFTC’s more than 70 years’ history of advocacy activities of merger control regime for companies and lawyers, such as holding seminars and lecture meetings across the country. At the same time, however, JFTC has observed a competition issue concerning gun jumping described below (section 4).

3. This contribution paper is organised as follows: first, it illustrates the outline of Japanese merger notification system including penalties in case of violation in section 2, and section 3 describes the treatment of gun jumping under merger control regime in Japan. Then, an actual case which JFTC has dealt with is introduced in section 4. Lastly, section 5 briefly summarises the paper.

### 2. Merger notification system under the AMA

4. M&A transactions are subject to a prior notification system under the AMA, only if certain thresholds regarding domestic sales amount and the ratio of the number of voting rights are exceeded<sup>1</sup>.

5. Also, the AMA provides for standstill obligation; there is a waiting period of 30 calendar days after JFTC accepts the notification, during which the parties cannot implement the transaction.

6. Nevertheless, the waiting period can be shortened in response to a written request by notifying company. JFTC clarifies the requirements for shortening the waiting period in the Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination: it is evident that the effect may not be substantially to restrain competition in any particular field of trade, and the notifying company requests in writing to shorten the waiting period.

7. If JFTC finds, as a result of the review during the waiting period, that the transaction will not substantially restrain competition, it provides the notifying company with a notice in a certain form that it will not issue a cease and desist order. Then the parties can implement the transaction when the 30-day (or shortened waiting period if applicable) passes after JFTC accepts the notification.

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<sup>1</sup> Article 10 (2) for share acquisitions, Article 15 (2) for mergers, Article 15-2 (2) for joint incorporation-type company splits, Article 15-2 (3) for absorption-type company splits, Article 15-3 (2) for joint share transfers and Article 16 for business transfers.

8. Failure to file a prior notification or breach of standstill obligation are subject to criminal penalty; criminal fine of not more than two million JPY shall be imposed on parties in accordance with the AMA.

### 3. Regulation of gun jumping under the AMA

#### 3.1. Outline

9. There is no clear definition of gun jumping or guidance for legitimate/illegitimate pre-merger communication or integration between merging parties in the AMA or its guidelines.

10. The term gun jumping is generally used to describe two types of scenarios: [1] substantive gun jumping and [2] procedural gun jumping. [1] is exchange of important information in terms of competition, such as prices, between merging companies before JFTC clears the merger, which would result in a violation of substantive provisions of competition law. [2] is a violation of procedural merger control provisions such as failure to file a prior notification or breach of standstill obligation.

11. The treatment of these two types of behaviors under Japanese merger control regime are described below:

#### 3.2. Substantive gun jumping

12. Japanese merger control regime do not directly prohibit pre-merger information exchange described above 3.1. Accordingly, this type of conduct is generally regulated by substantive provisions of the AMA, i.e. Article 3 (unreasonable restraint of trade), in the same way as other types of collusive conducts.

#### 3.3. Procedural gun jumping

13. As described in section 2, criminal fines of not more than two million JPY shall be imposed on a notifying company when it fails to notify or violate the standstill obligation.

14. Those violations of procedural provisions can be usually uncovered by JFTC's close examination of newspaper articles or press releases by merging parties.

15. An investigation of suspected violations of procedural provisions requires JFTC substantial analysis on a case-by-case basis (an actual case example is shown in section 4), except for cases of clear-cut violations. JFTC gives careful consideration to each case by requesting merging companies for an explanation in light of the purpose of its prior notification system.

#### **4. Issue concerning a violation of procedural provisions (Acquisition of shares of Toshiba Medical Systems Corporation by Canon Inc.)<sup>2</sup>**

16. JFTC observed a “potential” violation of procedural provisions in one case in 2016, the acquisition of shares of Toshiba Medical Systems Corporation (hereinafter referred to as “Toshiba Medical”) by Canon Inc. (hereinafter referred to as “Canon”). In this case, the parties concerned set an acquisition plan and implemented a part of the plan before notifying JFTC.

17. To be more precisely, prior to notifying JFTC, Canon acquired stock acquisition rights, for the purpose of obtaining common stock of Toshiba Medical, at a price paid to Toshiba Corporation (a parent company of Toshiba Medical, hereinafter referred to as “Toshiba”) that was substantially equivalent to the value of the underlying common shares. Also, Canon established a third party company to hold the voting shares of Toshiba Medical until Canon exercises the stock acquisition rights. After that, Canon notified the acquisition of Toshiba Medical to JFTC.

18. This series of actions that was implemented before notification constituted a part of the plan premised on Canon ultimately acquiring the voting shares of Toshiba Medical upon JFTC’s approval and was likely to form a certain level of integration between Canon and Toshiba Medical through the third party.

19. As this series of actions was inconsistent with the purpose of the prior notification system and could be in violation of Article 10(2) of the AMA, JFTC cautioned Canon not to repeat such actions in the future, and also urged Toshiba not to get involved in such schemes.

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<sup>2</sup> See <https://www.jftc.go.jp/en/pressreleases/yearly-2016/June/160630.html> (released on June 30th, 2016). JFTC cleared the case itself after finding that it would not have the effect of substantially restraining competition in any particular field of trade.