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**VIA EMAIL to kiketsukaisei2019@jftc.go.jp**

Person in Charge of Business Combination Guidelines (draft), etc.  
Mergers and Acquisitions Division, Economic Affairs Bureau, Secretariat,  
Japan Fair Trade Commission  
1-1-1, Kasumigaseki, Chiyoda-ku, Tokyo 100-8987 Japan

Attention: Kazuyuki Sugimoto, Chairman

Dear Chairman Sugimoto:

**Re: Opinions on draft of Business Combination Guidelines,  
etc.**

We write on behalf of the Merger Streamlining Group (“MSG” or the “Group”), whose membership consists of multinational firms with a common interest in promoting the efficient and effective review of international merger transactions.<sup>1</sup> The Group works with competition agencies and governments to help implement international best practices in merger control, with particular focuses on the *Recommended Practices for Merger Notification Procedures* (the “*Recommended Practices*”) of the International Competition Network (“ICN”) of which, as you know, the Japan Fair Trade Commission (“JFTC”) is a longstanding member and current Co-Chair of the Merger Working Group.<sup>2</sup>

The Group was founded in 2001. Its work to date has included two major surveys on implementation of the *Recommended Practices*, as well as more than 50 submissions to the European Commission, the U.S. Antitrust Modernization Commission, and competition agencies and governments in more than twenty other jurisdictions (e.g., the United Kingdom, Germany, France, Canada, Russia, Brazil, India, China, Korea, Spain, Italy, Argentina, Chile, Philippines, Portugal, Poland, and Ukraine) to promote reforms consistent with the *Recommended Practices*. The MSG has closely followed the evolution of merger control law in Japan, and its efforts have included prior submissions to the JFTC in March and August 2008 regarding proposed amendments to the Anti-Monopoly Act.

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<sup>1</sup> The current members of the Group include Accenture, BHP Billiton, Bosch, Chevron, Cisco Systems, Danaher, General Electric, Novartis, Oracle, Procter & Gamble, Siemens, and United Technologies.

<sup>2</sup> International Competition Network, *Recommended Practices for Merger Notification Procedures*, available online at <[https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG\\_NPRecPractices2018.pdf](https://www.internationalcompetitionnetwork.org/wp-content/uploads/2018/09/MWG_NPRecPractices2018.pdf)>.

The Group appreciates the opportunity to provide these comments regarding the proposed revision to the “Policies Concerning Procedures of Review of Business Combination” (the “Proposed Policies”). We have reviewed an English-language translation of the Proposed Policies which we understand was prepared by the JFTC. The Group applauds the JFTC for its interest in improving the merger control process in Japan and in particular for its willingness to consult with stakeholders on these important issues. We hope that this submission, which draws upon the MSG members’ very substantial experience with multinational merger transactions, will prove useful to you.

## **I. Proposed Transaction Value Threshold**

Under the Proposed Policies, the JFTC recommends that merger parties voluntarily notify a transaction to the JFTC when:

- the first party’s total domestic revenue in Japan exceeds the statutory requirement for mandatory notification, *i.e.*, 20 billion yen (approximately US\$184 million);
- the second party’s total domestic revenue in Japan does not exceed the statutory requirement for mandatory notification, *i.e.*, 5 billion yen (approximately US\$46 million) in the case of a share acquisition or a merger or 3 billion yen (approximately US\$36 million) in the case of an asset acquisition;
- the total value of the transaction exceeds 40 billion yen (approximately US\$369 million); and
- the transaction is expected to affect domestic consumers in Japan (the “Proposed Threshold”).

For the reasons given below, the Group believes that the Proposed Threshold would be inconsistent with the *Recommended Practices*, and may subject businesses to significant additional costs and burdens without achieving any material enforcement benefits.

## **II. Rationale for the Proposed Thresholds**

Based on the JFTC’s press release on October 4, 2019 accompanying the Proposed Policies,<sup>3</sup> the introduction of the Proposed Threshold appears to be primarily a response to the increased transaction activities in digital markets and a perceived enforcement gap relating to non-notifiable transactions in this area. As several other jurisdictions (such as Germany and Korea) considered adopting the transaction value-based notification thresholds in recent years, the *Facebook / WhatsApp* transaction was repeatedly highlighted as an example of

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<sup>3</sup> Available at < <https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191004.html>>.

this enforcement gap. We expect this may also have formed part of the JFTC's rationale for considering transaction value-based notification thresholds.

We note that there was nothing uniquely significant to Japan (or Korea and Germany) about this transaction. Both Facebook and WhatsApp are based in California, USA. This was a transaction between two US companies which was subject to review in the United States and the European Union. We also note that the transaction was approved following phase I reviews, no remedies were required in any of the reviewing jurisdictions, and none would have been expected in Japan (or Korea and Germany) had it been reviewed there. Additional notifications would simply have added costs for the parties and consumed enforcement resources for the JFTC, with no corresponding enforcement benefit.

There is no indication that the Proposed Threshold would have addressed any perceived enforcement gap in digital markets. There is no indication that, had Proposed Threshold already been in place, the JFTC would have received notification of any otherwise non-notifiable transactions in respect of which JFTC would have sought remedies or taken enforcement actions.

The French Competition Authority considered the possibility of introducing transaction value thresholds in October 2017 to address the perceived shortcomings in its merger control regime, but ultimately decided against introducing such thresholds in June 2018 after finding that it would constitute a disproportionate response to a limited number of potentially problematic transactions.<sup>4</sup> Even in Germany, there is no indication that the transaction value threshold it introduced in 2017 has had any meaningful enforcement benefit, as all of transactions notified due the transaction value threshold in the first 18 month period have been cleared by the German Federal Cartel Office ("FCO") in Phase I.<sup>5</sup>

The JFTC currently receives more than 300 notifications per year. Most domestic and international transactions conducted by any sizeable Japanese company (*i.e.*, a company that exceeds the acquiring party threshold of 20 billion yen in domestic revenue in Japan) with a large transaction value are likely to require notification in Japan. It is difficult to predict how many additional transactions will be subject to notification under the Proposed Threshold, particularly given the broad scope of the local nexus requirement discussed in the next section. However, the Group is concerned that the Proposed Threshold is likely to significantly increase the number of transactions subjected to a Japanese notification, without any clear benefits (*i.e.*, addressing any identifiable enforcement gaps) and at considerable time and cost to merging parties and the JFTC.

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<sup>4</sup> French Competition Authority, Press Release "07 June 2018: Modernization and simplification of merger control," available at <[http://www.autoritedelaconurrence.fr/user/standard.php?lang=en&id\\_rub=684&id\\_article=3182](http://www.autoritedelaconurrence.fr/user/standard.php?lang=en&id_rub=684&id_article=3182)>.

<sup>5</sup> German Federal Cartel Office, "Activity Report 2017/2018 (in German)", available at <[https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20T%C3%A4tigkeitsbericht%202017\\_2018.pdf?\\_\\_blob=publicationFile&v=6](https://www.bundeskartellamt.de/SharedDocs/Publikation/DE/Taetigkeitsberichte/Bundeskartellamt%20-%20T%C3%A4tigkeitsbericht%202017_2018.pdf?__blob=publicationFile&v=6)>.

Now that merger control has proliferated around the world, there is less rationale than ever before for a single jurisdiction such as Japan to sweep large numbers of transactions with minimal or no nexus into its local review regime. Jurisdictions with significant actual nexus can and should be relied upon to address the competition concerns that arise in transactions that affect supra-national markets.

### **III. Local Nexus**

The ICN *Recommended Practices* state that a jurisdiction's notification regime "should seek to screen out transactions that are unlikely to result in appreciable competitive effects within its territory."<sup>6</sup> The "local nexus" threshold should be sufficiently high so that transactions which are unlikely to have a potentially material effect on the domestic economy do not require notification.<sup>7</sup>

The Proposed Threshold includes a local nexus that the transaction "is expected to affect domestic consumers" in Japan and this can be established in one of three ways: (a) the business base or research and development base of the acquired company is located in Japan; (b) the acquired company conducts sales activities targeting domestic consumers, such as opening a Japanese website or using a Japanese pamphlet, (c) the total domestic sales of the acquired company in Japan exceed 100 million yen (approximately US\$920,000). The Group is of the view that the Proposed Threshold does not provide meaningful nexus to Japan.

Notably, these indicia of the local nexus for the Proposed Threshold appear to be less meaningful than the "substantial domestic operations" requirement in the transaction value threshold introduced in Germany. Germany's transaction value threshold applies only if the acquired business has "substantial domestic operations" in Germany. The German FCO explained in its guidance document that the requisite activities in Germany must have a "market orientation" (e.g., basic research is not sufficient) and must be "substantial" (i.e., "marginal activity on a domestic market is not sufficient").<sup>8</sup>

The Proposed Threshold appears to contemplate that local nexus to Japan can be established even if the activities in Japan neither have a market orientation nor are substantial in scope. Indeed, if all that is required to establish local nexus is that the acquired company has a website or pamphlets in Japanese, the JFTC should expect to receive an enormous number of notifications, the majority of which are likely to have minimal competitive effect in Japan.

### **IV. German Experience with Transaction Value Threshold**

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<sup>6</sup> *Recommended Practice* I.B, Comment 1.

<sup>7</sup> *Recommended Practice* I.B, Comment 1 and *Recommended Practice* I.C, Comment 2.

<sup>8</sup> German Federal Cartel Office, "Guidance on Transaction Value Thresholds for Mandatory Pre-Merger Notification", available at <  
[https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden\\_Transaktionsschwelle.pdf?\\_\\_blob=publicationFile&v=2](https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2)>.

As noted before, Germany enacted transaction value threshold in 2017 to its merger control regime:

- In the last business year, the combined aggregate worldwide turnover of all undertakings concerned was more than € 500 m.
- In the last business year, the domestic turnover of one undertaking concerned was more than €25 m. Neither the target undertaking nor any other undertaking concerned achieved a domestic turnover of more than €5 m.
- The value of the consideration for the acquisition exceeds €400 m.
- The target undertaking has substantial operations in Germany.

In the first 18 months since its implementation, the German FCO received 18 merger notifications as a result of the new transaction value threshold. Seven of these notification were subsequently withdrawn by the parties after the FCO determined that the transaction value-based notification requirements were not actually fulfilled, primarily due to lack of significant domestic activities in Germany by the target company. In the remaining 11 cases, the FCO cleared the transactions within the Phase I investigation, even though in some of those cases there was no final conclusion that the notification requirements were actually fulfilled. In one further transaction, *Microsoft / Github* in 2018, the parties believed that it was required to notify in Germany due to the transaction value threshold but requested a referral to the European Commission because it was also notifiable in several other European jurisdictions. The European Commission cleared the *Microsoft / Github* in Phase I investigation as well.

Germany's experience provides two important lessons:

- There does not appear to be any discernible enforcement gap that are being address by the transaction value threshold, the FCO has not taken any enforcement action on any transaction notified due to the transaction value threshold;
- More than a third of the transactions notified due the transaction value threshold did not actually fulfill the requirement of local nexus to Germany. Notwithstanding extensive guidance the FCO provided about the local nexus requirement, there remains significant confusion on the part of merging parties on this issue.

## **V. Concluding Observations**

Unlike other jurisdictions that have considered transaction value threshold, the JFTC does not propose to introduce the Proposed Threshold as an additional requirement for mandatory notification. Instead, under the Proposed Policies, the JFTC recommends merger

parties to voluntarily notify their otherwise non-notifiable transactions if they have a transaction value exceeding 40 billion yen and are expected to affect Japanese consumers.

The voluntary nature of the Proposed Threshold mitigates the Group's concerns. However, in the absence of discernible enforcement benefits, the Group is of the view that the additional burden on both merger parties and JFTC that will result from the Proposed Threshold is not justified.

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Thank you very much for considering the Group's views. We would welcome the opportunity to respond to any questions or discuss this submission with you or your colleagues further, at your convenience.

Yours very truly,

A. Neil Campbell

Casey W. Halladay

Copy to: Members of the Merger Streamlining Group