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COMMENTS OF ITIF

Before the

Japan Fair Trade Commission

Tokyo, Japan

In the Matter of:	)	
Request for Public Comments on the Revised "Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination"	)	Public Comment

August 31, 2026

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INTRODUCTION AND SUMMARY

On July 17, the Japan Fair Trade Commission (JFTC) issued a request for public comments on its revised "Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination" (Draft Revised Guidelines).[1] As the JFTC explains in an accompanying summary document, the Draft Revised Guidelines involve three main revisions.[2] First, "[e]xpressly providing that improvements and maintenance of security of supply, enhancement of environmental performance (including reduction of greenhouse gas emissions), and the creation of new products through expanded investment and promotion of innovation are to be taken into consideration"; second, "[e]xpressly providing that long-term market conditions are to be taken into consideration with respect to import pressure, efficiency (including promotion of innovation), and other matters"; and third, "[a]dditional provisions reflecting recent cases and the approaches taken in guidelines (drafts) of other jurisdictions."[3]

The Information Technology and Innovation Foundation (ITIF), an independent, nonprofit, nonpartisan research and educational institute focusing on the intersection of technological innovation and public policy, greatly appreciates the opportunity to comment on the Draft Revised Guidelines from the standpoint of driving innovation in Japan. Consistent with its previous comments to the JFTC on the Mobile Software Competition Act (MSCA), ITIF believes the JFTC should calibrate its competition policies to maximize innovation and economic growth, including in the crucial area of business combinations, and applauds the agency for its comprehensive review of merger policy.[4]

ITIF's comment proceeds in five parts. First, ITIF sets forth its views on the new efficiencies defense in the Draft Revised Guidelines, cautioning that while the innovation defense will greatly improve enforcement by limiting false positives associated with chilling procompetitive transactions, the JFTC should avoid generally crediting the satisfaction of non-economic goals, such as reducing greenhouse gas emissions, except in limited cases where they reflect cost savings or a dimension of competition. Second, to ensure that merger enforcement in Japan is objective and predictable, ITIF cautions against generally evaluating a combination's

[1] Press Release, Request for Public Comments on the Revised "Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination" (Draft) JFTC (July 17, 2026), https://www.jftc.go.jp/file/260717_1/pdf.

[2] Summary, Revision of the Business Combination Guidelines, JFTC (July 17, 2026), https://www.jftc.go.jp'file/260717_2.pdf [hereinafter Summary].

[3] *Id.*

[4] *See, e.g.*, Joseph V. Coniglio, Comments to Japan's Fair Trade Commission Regarding Draft Guidelines for the Mobile Software Competition Economy Act, ITIF (June 13, 2025), https://itif.org/publications/2025/06/13/comments-to-jftc-regarding-draft-guidelines-for-the-mobile-software-competition-economy-act/.

long-term effects, which are typically uncertain—especially in dynamic markets. Third, ITIF identifies additional changes that the JFTC could make to its guidelines, as well as key areas where the JFTC was right to maintain its existing approach. Brief recommendations and a conclusion follow.

NEW EFFICIENCIES DEFENSES

The JFTC explains that one set of core changes reflected in the Draft Revised Guidelines involves both "[e]xpressly providing that security of supply and environmental performance (including greenhouse gas emissions) constitute means of competition for the acquisition of customers" and "[e]xpressly providing that where improvements in efficiency resulting from a business combination are expected to bring about improvements and maintenance of security of supply, enhancement of environmental performance (including reduction of greenhouse gas emissions), or the creation of new products through expanded investment and promotion of innovation, such improvements are to be taken into consideration as pro-competitive effects."[5]

As to the Draft Revised Guidelines' recognition that security of supply and environmental performance constitute means of competition for the acquisition of customers, ITIF agrees that while this may be true for business combinations in certain markets, it is not always the case as a general matter: Competition policy should be focused on promoting competition goals, not environmental, resilience, or other non-competition aims. For example, the reduction of greenhouse gas emissions through a merger would constitute an efficiency defense to the extent that the behavior producing that reduction results in cost savings that are passed on to consumers—not by virtue of environmental benefits alone. What's more, a merger between two alternative energy firms that creates scale to develop new and more competitive green technologies is a legitimate efficiency benefit for the JFTC to consider as it reflects a dimension of competition in the market.

While extending merger efficiencies to include non-competition benefits broadly should be viewed as a bridge too far, ITIF wholeheartedly commends the JFTC for expressly including an efficiency defense for "the creation of new products through expanded investment and promotion of innovation."[6] As economist Joseph Schumpeter explained long ago, increased concentration often enhances firms' incentives and abilities to innovate, including by ensuring that they can profitably recoup investments. Indeed, as economists have subsequently demonstrated, the relationship between market concentration and innovation often takes the form of an inverted-U, whereby mergers that increase concentration but fall short of creating a monopoly may often have innovation benefits that far outweigh any harm from reduced price competition.[7]

LONG-TERM MARKET CONDITIONS

The JFTC makes clear that the Draft Revised Guidelines include language "[e]xpressly providing that where import pressure is expected to work at a future point in time due to anticipated changes in market structure,

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[5] Summary at 2; *see also* JAPANESE FAIR TRADE COMMISSION, GUIDELINES TO APPLICATION OF THE ANTIMONOPOLY ACT CONCERNING REVIEW OF BUSINESS COMBINATION at 42-44 (Tentative Translation) (July 17, 2026), https://www.jftc.go.jp/file/260717_1.pdf [hereinafter Draft Revised Guidelines].

[6] Summary at 2.

[7] *See, e.g.*, Philippe Aghion at al., *Competition and Innovation: An Inverted-U Relationship*, 120 Q. J. ECON. 701 (2005); Michiyuki Yagi & Shunsuke Managi, *Competition and Innovation: An inverted-U relationship using Japanese industry* data, Discussion Papers 13062, Research Institute of Economy, Trade and Industry (RIETI) (2013).

long-term market conditions are to be taken into consideration."[8] More broadly, the Draft Revised Guidelines state that "long-term market conditions are similarly to be taken into consideration with respect to entry, competitive pressure from related markets, competitive pressure from users, efficiency (including promotion of innovation), financial conditions of the company group, and the size of a particular field of trade (including the approach that a business combination may be cleared where it is difficult to maintain competition among multiple business operators due to the shrinking market and other factors)."[9]

ITIF agrees that innovation and competition globally should be fully incorporated into the JFTC's competitive analysis of business combinations—across market definition, theories of harm, entry, efficiencies, and other defenses—but cautions against attempts to generally assess a combination's effects in the long term as opposed to the more standard short-term two- to three-year window. As explained in comments to the European Commission (EC) on its own Draft Merger Guidelines, a general focus on short-term effects helps avoid problems arising from the "limitations associated with speculating about a merger's effects too far into the future," which can be particularly acute when enforcers are "already weighing asymmetric parameters of competition" such as price and innovation.[10] And, importantly, a focus on short-term effects does not at all exclude consideration of a merger's effects in light of broader global or technological factors, such as intense competition from China and the revolution in artificial intelligence, provided that those factors bear on a transaction's short-term effects.

ADDITIONAL PROVISIONS

The JFTC states that the Draft Revised Guidelines contain "[a]dditional provisions reflecting recent cases and the casebook on economic security, covering cases where import pressure, competitive pressure from related markets, and competitive pressure from users work, as well as cases involving remedies."[11] These additional provisions also include helpful sections on the value of diversion ratios in analyzing unilateral effects, the role of countervailing bargaining power in limiting firms' ability to exercise market power post-merger, the failing firm defense, as well as substantial new language regarding relief the JFTC may impose highlighting how behavioral remedies, like preventing discriminatory treatment or limiting information sharing, can often sufficiently address competition concerns in a way that obviates the need for structural relief.[12]

To be sure, there are other changes that the JFTC may wish to consider to improve its merger regime. For example, while the Draft Revised Guidelines rightly recognize that vertical and conglomerate mergers have "less impact on competition than horizontal ones and, with certain exceptions, their effect may not be substantially to restraint competition in general," they nonetheless maintain the view that conglomerate mergers should remain a target of merger enforcement.[13] But the potential competitive harms from

[8] Summary at 2.

[9] *Id.*

[10] *See, e.g.*, Joseph V. Coniglio, *Comments to European Commission Regarding Review of the Mergers Regulation*, ITIF at 5-6 (June 26, 2026), https://itif.org/publications/2026/06/26/comments-european-commission-regarding-review-mergers-regulation/ [hereinafter Comment on EC Draft Merger Guidelines].

[11] Summary at 3.

[12] Draft Revised Guidelines at 30, 41-42, 44, 67-69.

[13] *Id.* at 23.

conglomerate mergers involving practices such as tying and bundling can readily be addressed using Japan's competition laws restricting exclusionary conduct—unlike, for example, an increased risk of tacit collusion from horizontal mergers or exploitative pricing of a necessary input to a rival with a vertical merger.

At the same time, ITIF praises the JFTC for not lowering its structural Herfindahl-Hirschman Index (HHI) thresholds, which make clear that a transaction will not generally be considered anticompetitive if, for example, the "HHI after the business combination is more than 2,500 while the increment of HHI is not more than 150."[14] In this regard, Japan's merger enforcement regime is substantially superior to the 2023 Merger Guidelines that remain in effect in the United States, which create structural presumptions of harm for transactions that result in either a post-merger HHI greater than 1,800 or a market share above 30 percent if the increase in HHI is greater than 100.[15]

RECOMMENDATIONS

For these reasons, ITIF respectfully offers the following recommendations for the JFTC to consider in connection with its revision of the Business Combination Guidelines:

- **Keep non-competition goals out of merger policy:** ITIF applauds the JFTC for expressly including an innovation efficiency defense to promote procompetitive mergers. However, non-competition goals such as reducing greenhouse gas emissions should not be treated as merger efficiencies unless they reflect cost savings passed on to consumers or a dimension of competition in the particular market at issue.
- **Focus on a combination's short-term effects:** Generally considering a merger's long-term effects on competition risks facilitating speculative enforcement and reducing business certainty about when the JFTC will find a particular transaction to be unlawful. Such an approach will also likely prove extremely difficult to implement in practice, especially as the JFTC rightly attempts to weigh a merger's effects on price, innovation, and other dimensions of competition.
- **The JFTC should not waste resources investigating conglomerate mergers**: In the rare cases where a conglomerate merger results in increased anticompetitive bundling or tying, the JFTC is already well able to police this conduct outside of its merger enforcement regime. The JFTC should instead focus its merger enforcement on horizontal mergers that directly reduce competition through coordinated or unilateral effects and, in limited cases, vertical mergers that result in anticompetitive foreclosure.

CONCLUSION

ITIF lauds the JFTC for working to ensure that its competition policy in the critical area of business combinations is fine-tuned to best maximize competition and innovation in Japan. Indeed, although further improvement is possible in several areas of the Draft Revised Guidelines, in view of the significant failings of the 2023 Merger Guidelines in the United States and key deficiencies in the EC's Draft Merger Guidelines, the JFTC has an excellent opportunity to set the global gold standard for competition policy in merger

[14] *Id.* at 26.

[15] U.S. DEP'T OF JUSTICE AND FED. TRADE COMM'N, MERGER GUIDELINES at 6 (Issued Dec. 18, 2023).

enforcement by issuing guidelines that best foster innovation by fully encouraging the dynamic efficiency benefits that business combinations can bring.[16]

Very truly yours,

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Information Technology and Innovation Foundation

[16] Regarding the EC's Draft Merger Guidelines, ITIF has explained that "[w]hile ITIF broadly commends the Commission for taking steps to ensure that its competition policy is more attune to the role mergers play toward enhancing efficiency and driving innovation, it remains concerned that the Commission retains substantial discretion to bring enforcement actions that deviate from this framework, especially in digital and technology markets." *See* EC Draft Merger Guidelines. And, regarding, the 2023 Merger Guidelines in the United States, ITIF has made clear that these guidelines "constitute a transparent attempt to reinstate a failed merger policy that harmed innovation, competition, and consumers" and put forward "HHI thresholds with no real basis in either case law or sound economics" such that "[p]rocompetitive transactions will be chilled as a result." *See* Joseph V. Coniglio, *DOJ and FTC's Endorsement of 2023 Merger Guidelines Is a Huge Unforced Error, Says ITIF*, ITIF (Feb. 18, 2025), https://itif.org/publications/2025/02/18/doj-and-ftc-endorsement-of-2023-merger-guidelines-huge-unforced-error-says-itif/.