INTERNATIONAL BAR ASSOCIATION

ANTITRUST COMMITTEE MERGERS WORKING GROUP

CONTRIBUTION TO THE PUBLIC CONSULTATION ON THE JFTC'S REVISED "GUIDELINES TO APPLICATION OF THE ANTIMONOPOLY ACT CONCERNING REVIEW OF BUSINESS COMBINATION" OF 17 JULY 2026

31 August 2026

Public consultation – Revised JFTC Business Combination Guidelines

Contribution prepared by the International Bar Association – Antitrust Section

Submitted on behalf of the IBA Antitrust Section.

Consultation deadline: 31 August 2026

I. INTRODUCTION

This submission is made to the Japan Fair Trade Commission (the '**JFTC**') on behalf of the Mergers Working Group ('**Working Group**') of the Antitrust Section of the International Bar Association ('**IBA**') in response to the public consultation initiated by the JFTC on the review of the proposed Revised Guidelines that will update the 2004 Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (the '**Consultation**').[1]

The IBA is the world's leading organization of international legal practitioners, bar associations and law societies. It takes an interest in the development of international law reform and seeks to help shape the future of the legal profession throughout the world. Bringing together practitioners and experts among the IBA's 80,000 individual lawyers from across the world and with a blend of jurisdictional backgrounds and professional experience spanning all continents, the IBA is in a unique position to provide an international and comparative analysis in the field of commercial law, including on competition law matters through its Antitrust Section.[2]

The Working Group welcomes the Consultation and provides constructive comments below, which draw on the vast experience of the IBA's members in merger control law and practice within jurisdictions across the globe.

II. SCOPE OF RESPONSE

The JFTC is an experienced and well-established competition authority with a sophisticated and well-developed approach to merger assessment. The JFTC has built an impressive track record of reviewing a large number of business combinations over the years, contributing significantly to the sound functioning of competitive markets in Japan and providing transparency and predictability for businesses seeking to implement transactions.

The Working Group commends the JFTC for undertaking a comprehensive review and updating its current Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (the '**Guidelines**') to reflect changes in the economic environment surrounding Japan and the global economy, as well as other factors and developments in jurisprudence and enforcement practice since the previous revision of these Guidelines in 2019. Transparency regarding the review of business combinations is key for companies seeking to implement a business combination and other market participants as well as legal and economic advisors. The Working Group commends the JFTC for updating its analytical tools through the Revised Guidelines to reflect the accumulated experience from its enforcement practice and evolving global economic

1 *See* https://www.jftc.go.jp/en/pressreleases/yearly-2026/July/260717.html. This submission does not necessarily reflect the views of the organisations with which individual members of the Working Group or officers of the Antitrust Section are engaged or employed.

2 Further information on the IBA is available at http://www.ibanet.org and information about the Antitrust Section is available at https://www.ibanet.org/LPD/Antitrust-Section/Default.aspx.

realities, ensuring that Japan's merger control framework remains robust, modern and aligned with international best practices.

The Working Group is grateful for the opportunity to participate in the Consultation. On this submission, the Working Group focuses and provides comments below on four key elements of the Revised Guidelines as follows: (i) counterfactual analysis; (ii) efficiencies and sustainability; (iii) evidentiary standards for harms and benefits; and (iv) behavioural remedies.

III. SPECIFIC COMMENTS

1. Counterfactual guardrails and probability threshold

The Working Group welcomes the clarification that a substantial restraint must arise "by means of" the business combination. This requires a comparison of competition with the business combination against competition without it, thereby establishing the required causal relationship.

The Working Group considers that the counterfactual framework introduced by the Revised Guidelines represents a significant and positive development. The pre-business combination situation will ordinarily supply the counterfactual. Where a different competitive situation is expected to arise independently of the business combination, however, that future situation becomes the relevant comparator. The amendments materially improve legal certainty, transparency, predictability, consistency, and reviewability.

That being said, the Working Group respectfully recommends that the JFTC clarifies the relationship between the counterfactual framework and the probability standard. Although "may be" does not require an inevitable substantial restraint, *Part III - The Effect May Be Substantially to Restrain Competition* requires it to be probable that the business combination will further conditions capable of producing that result. In this respect, the final Guidelines could explain whether a future situation "expected to be realized" must satisfy a distinct probability threshold. They could also clarify how likelihood and magnitude interact, including whether a high-magnitude but lower-probability scenario can satisfy the applicable standard despite any minimum probability requirement.

A future counterfactual should be assessed over a reasonably foreseeable, fact-specific period rather than a fixed duration. On the Revised Guidelines, Revised Note 11 appropriately makes the period dependent on industry characteristics and actual circumstances, extending that flexible approach to entry, related market and user pressure, efficiencies, financial condition, and market size. This clarification would preserve appropriately forward-looking analysis while preventing remote or speculative developments from displacing current competitive conditions. It may be useful that the JFTC indicate how a duration would differ depending on the industry characteristics.

2. Expanded efficiency analysis and potentially more permissive efficiency balancing

The collective recognition of supply chain resilience, green innovation, financing and procurement improvements, environmental capabilities, and innovation-led investment creates a materially broader efficiency framework than the prior Guidelines. The Working Group welcomes that broader framework and encourages the JFTC to preserve its user-focused approach to efficiencies.

The Working Group also commends the replacement of the categorical statement that business combinations creating a monopoly or quasi-monopoly are "hardly ever" justified by efficiencies with a proportional balancing standard. To enhance transparency and predictability, the Working Group respectfully recommends that the final Guidelines should explain how the JFTC will identify and assess the price and non-price harms against which efficiencies are weighed, including the likelihood and magnitude of quantitative and qualitative effects. It may also be clarified that a proportional balancing standard will, in principle, only be applied when the level of competition-restraining effect is significant.

The Working Group respectfully suggests that the final Guidelines preserve an illustrative, non-exhaustive classification and confirm that parties may substantiate additional efficiencies on their merits. The phrase "other such factors" supports an open-ended approach, but greater express clarity would improve predictability. The Working Group respectfully believes that the final Guidelines should expressly recognize qualitative and non-price benefits (including resilience, security of supply, innovation, and others) as well as benefits accruing to users throughout the value chain and, where appropriate, out-of-market benefits that address a market failure. Inherently qualitative benefits should not require precise quantification, provided that they are supported by workable and reliable evidence.

The merger-specificity test should require parties to demonstrate that the claimed efficiencies result from the notified transaction, but should not require them to disprove every theoretical less restrictive alternative. The Revised Guidelines retain the requirement that efficiencies be specific to the business combination and not achievable through less restrictive means. That requirement should be applied realistically: a transaction-specific benefit should be credited where no practicable alternative would achieve it with comparable probability, scale, magnitude, or timing. A genuinely intended transaction that is objectively capable of delivering the claimed benefit should not be rejected merely because a less-committal alternative can be hypothesized.

Comments on environmental aspects

The Working Group considers that the Revised Guidelines comes at an important time. Incumbents can be expected to acquire sustainable technology start-ups to become more resilient. Sustainable companies may pursue business combinations to achieve economies of scale, opportunities for commercialization and diffusion of new technologies, combination of complementary technologies and offerings to achieve economies of scope, or gain access to the necessary finance and resources for R&D.

The Working Group respectfully suggests that the final Guidelines specify more clearly when business combinations may result in environmental efficiencies. For example, environmental efficiencies may arise from (i) a combination of complementary assets that reduce the environmental pollution of production processes, (ii) improved access to sustainable inputs, or (iii) the creation of new or improved products that are more sustainable.[3] Illustrative guidance of this kind would improve predictability and assist parties in substantiating environmental efficiency claims.

The Revised Guidelines appropriately stipulate that (i) efficiencies should be specific to the business combination; (ii) improvements in efficiency materialize; and (iii) improvements in efficiency contribute to the interests of users. This is logical and welcome, but the Working Group respectfully makes the following suggestions.

1. <u>Merger-specificity</u>: The Revised Guidelines explain that benefits should not be achievable by other means that are less restrictive on competition. A requirement to demonstrate that environmental efficiencies could not be achieved through less restrictive alternatives is often difficult to meet in practice. In many cases, the types of gains invoked (*e.g.* greener inputs, decarbonisation initiatives, or supply-chain optimisation) may be replicable through cooperation agreements, licensing or industry-wide initiatives, even if these are less effective or slower. This creates a very high evidentiary hurdle that is very difficult to meet in practice, as parties must not only show that the merger enhances sustainability, but also convincingly rule out realistic alternative mechanisms, which are frequently present in precisely the types of sectors where sustainability efficiencies arise. It is true that mergers are structural and completely eliminate incentives on the parties to compete with each other. That means the competitive impact may be more permanent. But it also means that the parties are more committed than in the case of mere agreements, which in turn leads to a greater likelihood that efficiencies are actually achieved. Accordingly, if a merger is genuinely intended to – and objectively can – achieve proportional sustainability efficiencies, the Working Group respectfully believes that the JFTC should not block a merger solely because a lesser commitment was in theory possible.

2. <u>Evidence of efficiencies</u>: the Working Group welcomes the fact that the JFTC will have regard to studies by external specialists. This approach could be especially useful in relation to environmental benefits such as estimated reductions in emissions (at a national level). To ensure that the JFTC receives robust evidence in support of claimed environmental benefits, the Working Group suggests that the final Guidelines encourage parties to refer to quantified targets, defined timelines and, where appropriate, monitoring mechanisms, particularly where efficiencies are central to the competitive assessment. Conversely, the Working Group understands the final Guidelines could clarify that generic or aspirational sustainability commitments – such as broad pledges to reduce emissions without quantified

[3] *See* also by way of comparative reference, paragraph 299 of the Draft EU Merger Guidelines. Available at: https://competition-policy.ec.europa.eu/document/download/46dde10f-85c1-4590-a3f4-2b71f85685ef_en?filename=Merger%20Guidelines%20-%20final%20for%20public%20consultation.pdf.

targets, defined timelines or monitoring mechanisms – would not satisfy the requisite evidentiary threshold.

3. Users are required to benefit from improvements in efficiency: The Revised Guidelines explain that improvements in efficiency must benefit users and elaborate that this may include quality improvements and reduced greenhouse gas emissions. The Working Group commends the Guidelines for clarifying that benefits can be qualitative as well as quantitative. That being said, the Working Group encourages the final Guidelines to take a broad interpretation in two aspects:

   a. First, the Working Group suggests a broad interpretation of consumers' valuation of quality. Consumers may derive benefits from product characteristics that affect the use value of the product ('use value benefits'),[4] as well as from product characteristics that are unrelated to the use but are valued by consumers for other reasons, such as a concern for the environment, a concern for disruptions of future consumption (*i.e.,* resilience) or a concern for the impact of their individual consumption on others ('non-use value benefits'). The Working Group respectfully suggests that the final Guidelines explain the concepts of 'use value' and 'non-use value'.

   b. Secondly, the Working Group further recommends that the JFTC consider all relevant environmental benefits accruing to Japanese consumers (not only those direct consumers arising within a narrowly defined market or indirect cnsumers in a downstream market). Disregarding broader out-of-market efficiencies would underestimate efficiencies, especially for business combinations that promote innovation, the green transition or resilience effects that almost by definition tend to materialize fully beyond the affected markets. Therefore, the Working Group recommends that the final Guidelines explain that quantifiable, wider out-of-market environmental benefits accruing to Japanese consumers may also be taken into consideration as relevant efficiencies.

3. Symmetry of time horizons and evidentiary standards for harms and benefits

The Working Group welcomes the JFTC's adoption of an expressly industry-specific 'certain period' for the time horizon of competitive assessment (in lieu of the former general two-year formulation). Although approximately two years remains a guideline, the Revised Guidelines appropriately recognize that later import expansion may constitute competitive pressure where supported by anticipated changes in market structure, industry characteristics, and other circumstances of the relevant industry.

The Working Group also welcomes the revised treatment of import pressure. Where import volumes are significant and imported products remain competitive, the existence of tariffs should

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4 *See* also by way of comparative reference, for example, paragraph 321 of the Draft EU Merger Guidelines. Available at: https://competition-policy.ec.europa.eu/document/download/46dde10f-85c1-4590-a3f4-2b71f85685ef_en?filename=Merger%20Guidelines%20-%20final%20for%20public%20consultation.pdf.

not, by itself, indicate weak import pressure (though it would be helpful that the JFTC provide further guidance on the situations in which institutional regulations are considered to be entry barriers). The recognition that declining overseas demand may increase foreign suppliers' excess capacity and thereby strengthen import pressure is similarly appropriate. More broadly, extending the flexible, fact-specific time horizon to entry, competitive pressure from related markets and users, efficiencies, the financial condition of the company group, and the size of the relevant field of trade represents a significant improvement toward a more economically nuanced analysis.

The Working Group welcomes the Revised Guidelines' recognition that business combinations may both diminish research and development incentives and generate procompetitive efficiencies through increased investment, innovation, improved quality, and new products. Consistent with that balanced approach, the Working Group respectfully suggests that the final Guidelines expressly require symmetrical evidentiary standards and analytical time horizons for competitive harms and business combination-specific benefits. Where harm is projected over an extended period in industries with long investment or innovation cycles, dynamic benefits (including innovation, investment, and long-cycle efficiencies) should be assessed over a comparable horizon. Efficiencies expected to materialize in approximately three years should be presumed timely, while later efficiencies should remain eligible for consideration in industries characterized by longer cycles.

The Working Group further invites the JFTC to clarify that methodological differences in assessing harms and benefits should not result in structurally asymmetric evidentiary burdens. Although potential harm may sometimes be tested with rivals and customers more readily than confidential efficiencies, that practical difference should not subject claimed benefits to a systematically higher standard of proof. Positive and negative innovation effects should be assessed together under equivalent evidentiary standards. Moreover, long-term projections of dynamic harm that fall outside a reasonable margin of error should not, standing alone, provide a sufficient basis for intervention.

4. Behavioral-remedies policy

The Working Group welcomes the Revised Guidelines' approach to behavioral remedies. The express recognition that behavioral measures may be appropriate where declining demand makes identification of a divestiture counterparty difficult, or for a defined period until market structure is expected to change in a procompetitive direction, reflects sound economic reasoning. The Working Group notes with approval that the Revised Guidelines appropriately retain structural measures as the general rule while further elaborating the toolkit available for remedies, including long-term cost-based purchasing rights, measures promoting imports, competitor expansion or entry, and combinations of remedies.

The Working Group respectfully submits that the Revised Guidelines would benefit from objective criteria and procedural safeguards governing time-limited behavioral remedies predicated on declining demand or an anticipated procompetitive market change. Specifically, the

Working Group invites the JFTC to clarify: (a) the evidentiary standard and types of evidence required to establish that a future procompetitive market change is reasonably foreseeable; and (b) the principles governing the remedy's review, modification, termination, proportionality, and reassessment as competitive conditions evolve. Such guidance would promote predictability and ensure that remedies remain appropriately tailored to the competition concern they address.

The Working Group welcomes the added procedural clarity concerning remedies involving a specific purchaser or other counterparty. To support predictable administration, the Working Group respectfully requests practical guidance on the standards and timing for JFTC approval, including where the counterparty is selected after the review, qualifications required for a counterparty, and recommended procedures for divestiture (and appointment of a divestiture trustee). The Revised Guidelines should also clarify the safeguards applicable before implementation and the independent monitor's principal responsibilities (including an indicative mandate) and reporting arrangements. Any further implementation requirements should remain proportionate and case-specific.

The Working Group also welcomes the recognition that nondiscrimination commitments and information barriers may address vertical and conglomerate concerns. The Working Group respectfully suggests the final Guidelines to address practical guidance on objective terms and conditions, monitoring, reporting, complaint handling, and enforcement, as appropriate to the circumstances of each case. The final Guidelines should also recognize that formal remedies, especially divestiture, may be unnecessary where effective governance arrangements, firewalls, and ringfencing already address the identified concern. Detailed implementation mechanisms should be assessed case by case rather than treated as uniform requirements.

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The Working Group is grateful to the JFTC to participate in this consultation and provide comments on the proposed Revised Guidelines. The Working Group hopes that the comments set out in this submission will be of assistance to the JFTC. The Working Group would be happy to discuss the remarks with the JFTC if this were considered useful.