

# Merger Remedies: Is Japan Unique?

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# Today's presentation

- 1) The importance of merger remedies in Japan
- 2) How often does the JFTC intervene? A comparison of **intervention rates** in Japan, the EU and the OECD
- 3) Legal framework and types of remedies

# The importance of merger remedies in Japan

# Japanese merger control stands or falls with its remedies

- No prohibitions for more than 70 years
- Remedies (問題解消措置) is the only tool used
- Heavy reliance on remedies is not unique, but exclusive reliance on remedies is unique for a mature jurisdiction such as Japan

# European Commission: prohibitions are rare, but they do happen

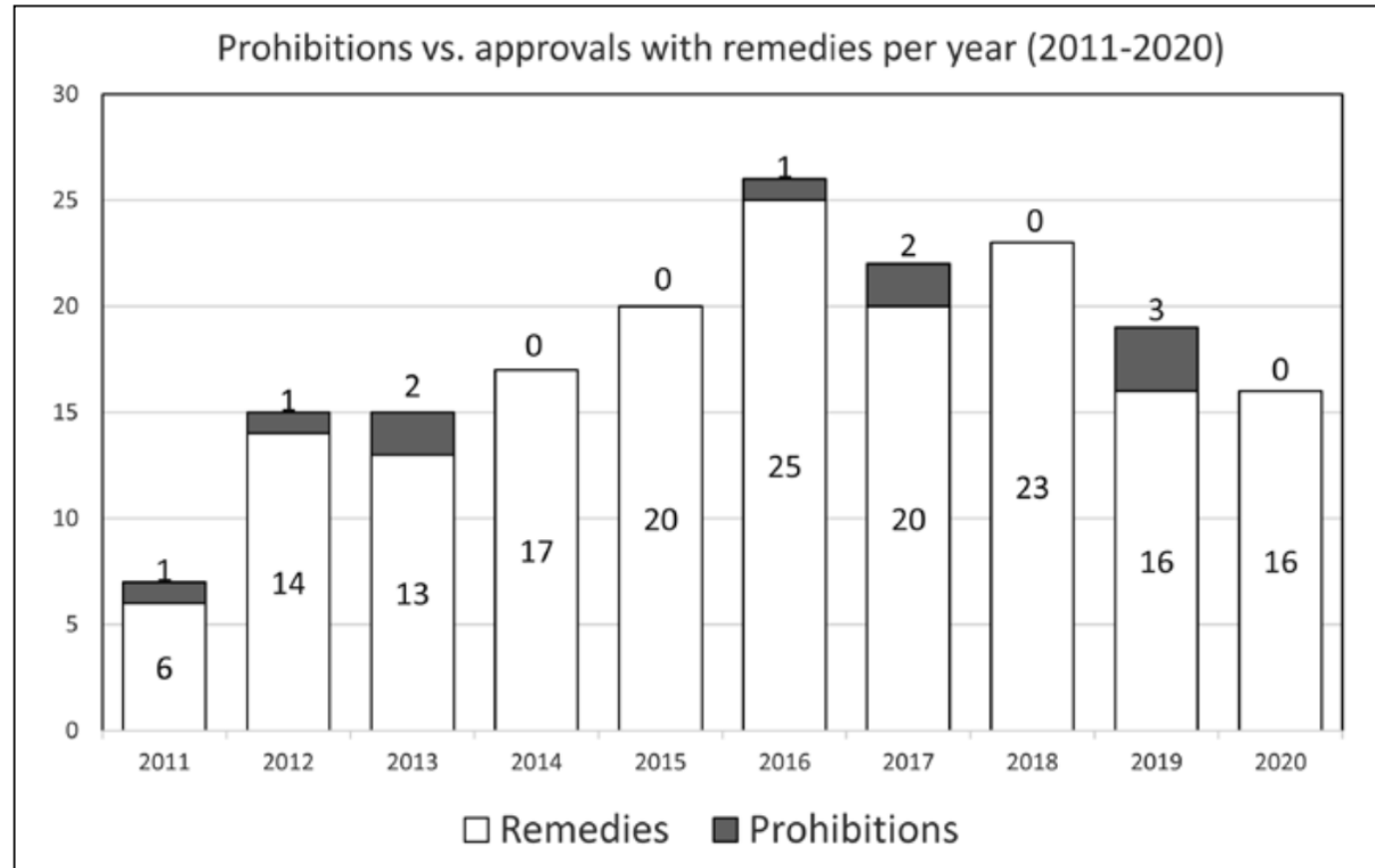
## V.) SECOND PHASE DECISIONS

September

	90	91	92	93	94	95	96	97	98	99	00	01	02	03	04	05	06	07	08	09	10	11	12	13	14	15	16	17	18	19	20	21	22	23	Total
Art 8.1 compatible (8.2 under Reg. 4064/89)	0	1	1	1	2	2	1	1	3	0	3	5	2	2	2	2	4	5	9	0	1	4	1	2	2	1	1	0	4	0	1	0	0	2	65
Art 8.2 compatible with commitments	0	3	3	2	2	3	3	7	4	7	12	9	5	6	4	3	6	4	5	3	2	1	6	2	5	7	6	2	6	6	3	4	2	5	148
Art 8.3 prohibition	0	1	0	0	1	2	3	1	2	1	2	5	0	0	1	0	0	1	0	0	0	1	1	2	0	0	1	2	0	3	0	0	2	1	33
Art 8.4 restore effective competition	0	0	0	0	0	0	0	2	0	0	0	0	2	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	0	1	0	0	5	

Source: European Commission, Statistics on Merger Cases (updated regularly), [https://competition-policy.ec.europa.eu/mergers/statistics\\_en](https://competition-policy.ec.europa.eu/mergers/statistics_en).

*Simon Vande Walle*



*Figure 1. Number of approvals with remedies vs. prohibitions per year (2011-2020).*

Source: Simon Vande Walle, *Remedies*, in EU COMPETITION LAW VOLUME II: MERGERS AND ACQUISITIONS 763, at 764, figure 1 (Christopher Jones & Lisa Weinert eds., Edward Elgar, 3d ed. 2021)

# United States: “prohibitions” are rare but they do happen

TABLE 1. TOTAL HSR OUTCOMES (2001 TO 2020)<sup>74</sup>

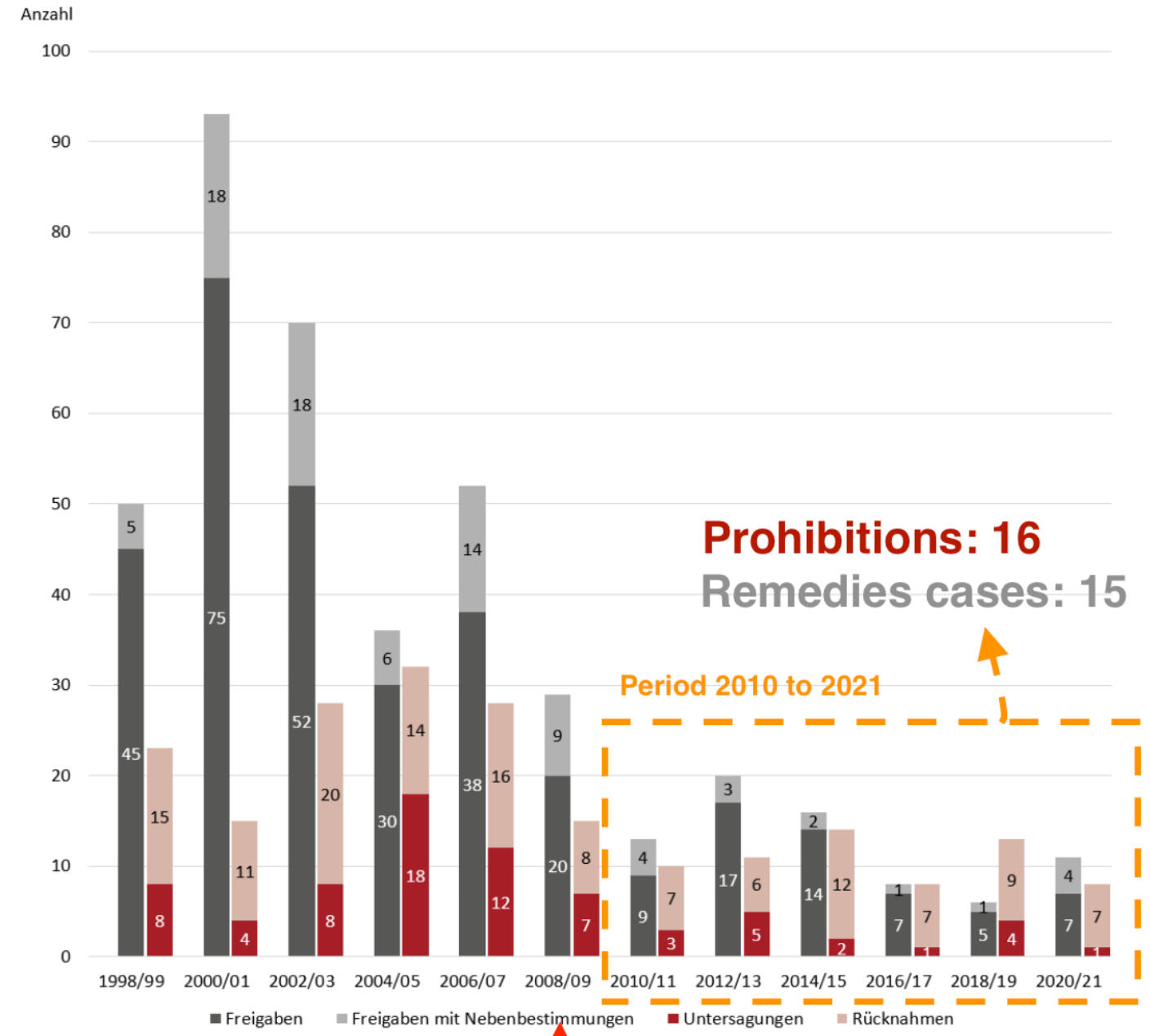
Outcomes	Total	Percentage
Total HSR filings	31,530	
<b>HSR Filing Outcomes</b>		
Agency clearances	4,850	15.3%
Total second requests	969	3.1%
<b>Second Request Outcomes</b>		
Cleared as is	274	28.3%
Abandoned/restructured pre-complaint	254	26.2%
Settled simultaneously with complaint	367	37.9%
Unresolved complaints (litigation)	74	7.6%
<b>Litigation Outcomes</b>		
Abandoned post-complaint	34	45.2%
Settled post-complaint	11	14.9%
Withdrawn by agency	3	4.1%
Litigated to a decision	26	37.9%
<b>Percentage of Wins/Losses</b>		
Government wins at trial	17	65.3%
Government losses at trial	9	34.7%

Source: Logan Billman & Steven C. Salop, *Merger Enforcement Statistics: 2001-2020*, 85 ANTITRUST LAW JOURNAL 1, p. 12 (Table 1) (2023)

Germany: prohibitions and remedies cases are more balanced

Source: Monopolkommission, Wettbewerb 2022, XXIV. Hauptgutachten [Competition 2022, XXIV - Main Report], p. 116, Abbildung II.2 [Figure II.2], [https://www.monopolkommission.de/images/HG24/HGXXIV\\_Gesamt.pdf](https://www.monopolkommission.de/images/HG24/HGXXIV_Gesamt.pdf).

Abbildung II.2: Anzahl der Hauptprüfverfahren und der dortigen Entscheidungen sowie Rücknahmen



Quelle: eigene Darstellung nach Angaben des Bundeskartellamtes

Prohibitions



# Frequent use of remedies by competition authorities criticized

## **Fix It or Forget It: A “No-Remedies” Policy for Merger Enforcement**

*By John Kwoka & Spencer Weber Waller*

The inherent limitations of remedies as a method of resolving competitive concerns with mergers have become more evident. The expansive use of remedies in actual practice has likely exceeded the capabilities of agencies and courts; and empirical evidence has increasingly cast doubt on their effectiveness. Accordingly, we propose a “no-remedies” policy under which the antitrust agency would not accept any conduct remedies and only limited divestitures. The agencies would only consider those structural changes that have been undertaken (or at least committed to) prior to the parties’ filing their merger proposal and would not enter into negotiation with the parties during the review period. This “Fix It or Forget It” (“FIFI”) policy would encourage merging parties to initiate the necessary competitive fixes and permit the agency to evaluate precisely what the parties file in their proposal. We believe this policy would strengthen merger enforcement by restoring the traditional roles of the agencies and the courts.

BY JOHN KWOKA & SPENCER WEBER WALLER<sup>1</sup>



Source: John Kwoka & Spencer Weber Waller, *Fix It or Forget It: A “No-Remedies” Policy for Merger Enforcement*, CPI ANTITRUST CHRONICLE, p. 3 (August 2021).

- Some changes in enforcement policy in the U.S.
- But global preference for remedies unlikely to change

# Prohibitions are important

- To obtain effective remedies: only credible threat of prohibition will make parties willing to offer solid remedies
- To deter future anti-competitive mergers (see, e.g., Pedro Pita Barros, Joseph A. Clougherty & Jo Seldeslachts, *Remedy for Now but Prohibit for Tomorrow: The Deterrence Effects of Merger Policy Tools*, 52(3) THE JOURNAL OF LAW & ECONOMICS 607 (2009)).

# How to explain the JFTC's lack of prohibitions?

The Chair then asked **Japan** why the Japan Fair Trade Commission (JFTC) has not issued any cease and desist orders against proposed transactions in the last 50 years. The JFTC explained that one of the reasons is that, before 2011, the JFTC had a system of informal consultation with companies, before any formal notification of a transaction. During this consultation phase, the JFTC conducted an almost full review of the transaction, and shared its main conclusions with the parties. Thus, when the parties anticipated that the JFTC would reject proposed remedies, **they abandoned the transaction**. After 2011, the JFTC changed the process. While it still accepts prior consultations mainly for procedural matters, such as how to make entries in the notification forms, full review only takes place after the parties submit a notification. Since 2011, there have been cases where **transactions were abandoned** after their notification; in fact, out of 295 cases notified to the JFTC in 2015, 8 were abandoned during Phase 1 review. The JFTC prefers structural remedies. However, when behavioural measures are appropriate, the JFTC accepts behavioural remedies if they counter the competition concerns.

Source; OECD, Agency decision-making in merger cases: Prohibition and conditional clearances, Summary of discussions (29 November 2016), p. 8.

[https://one.oecd.org/document/DAF/COMP/WP3/M\(2016\)2/ANN4/FINAL/en/pdf](https://one.oecd.org/document/DAF/COMP/WP3/M(2016)2/ANN4/FINAL/en/pdf)

# OECD Roundtable on agency decision-making in merger cases: from a prohibition decision to a conditional clearance (November 2016)



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## Agency decision-making in merger cases: Prohibition and conditional clearances



When analysing mergers which risk generating anti-competitive effects, competition agencies often consider the trade-off between prohibiting the transaction and granting a conditional clearance. While it is clear that agencies should establish that a transaction generates anti-competitive effects to either prohibit it or impose conditions to its clearance, the point beyond which sufficient harm is assumed to be established, and a prohibition decision or the imposition of remedies are justified, is not always clear.

In November 2016, the OECD held a roundtable to explore competition authorities' approaches to prohibiting mergers or accepting remedies to achieve a conditional clearance. The discussion provided insights into the factors that competition authorities consider when making their decision.

[Read the detailed summary of the discussion](#) • [Voir le compte rendu détaillé de la discussion](#)

[» Full list of Competition Policy Roundtables](#)

# How to explain the JFTC's lack of prohibitions?

- Parties can (and do) abandon deals in other jurisdictions as well, based on feedback from the authority (in pre-notification, Phase I or Phase II)
- Still, those jurisdictions occasionally prohibit deals. Why the difference?
  - Do parties in Japan see no point in getting a cease-and-desist order because an appeal will be lost in any event? But this would imply that judicial review does not function and, in any event, parties may wish a JFTC decision for reasons other than an appeal (cf. Siemens / Alstom in the EU: no appeal, but parties did not abandon their merger)
  - Are clear cases abandoned but borderline cases not, in the expectation that the JFTC will show flexibility with regard to remedies? Asymmetric incentives for the JFTC: virtually no threat of an appeal by third parties if clearance with remedies, but high hurdle to issue a cease-and-desist order.

Japan's low intervention rate

# Intervention rate

- Percentage of merger cases in which a competition authority intervened
- Intervention = remedies or prohibition
- Calculated as:
$$\frac{\textit{total number of interventions}}{\textit{total number of mergers reviewed (notified)}}$$
- Frequently used in international discussions
  - Example: OECD Competition Trends (database launched in 2018)

# Calculating the JFTC's intervention rate in the period 2015 - 2021

Year (Japanese fiscal year)	Number of notifications	Cases cleared with remedies
2022 (Reiwa 4)	306	1
2021 (Reiwa 3)	337	3
2020 (Reiwa 2)	266	6
2019 (Reiwa 1)	310	4
2018 (Heisei 30)	321	8
2017 (Heisei 29)	306	6
2016 (Heisei 28)	319	3
2015 (Heisei 27)	295	1
2014 (Heisei 26)	289	2
2013 (Heisei 25)	264	1
2012 (Heisei 24)	349	3

=2154

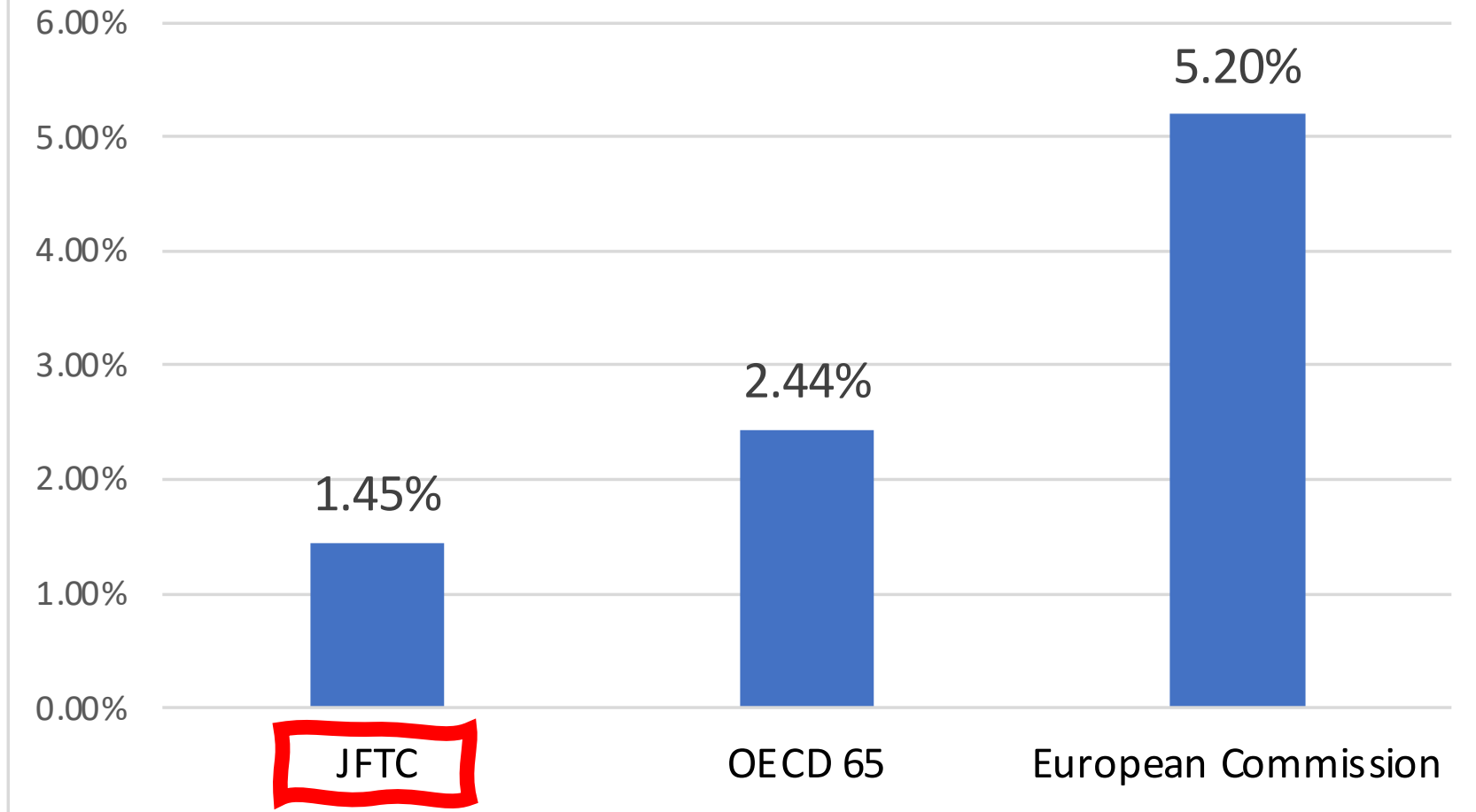
=31

$$\frac{31}{2154} = 1.44\%$$



## Intervention rate

(percentage of mergers in which authorities intervened out of total mergers reviewed; 2015-2021)



# Comparing intervention rates is tricky

- Rate depends not only on number of interventions (numerator), but also on number of mergers reviewed (denominator)
- Jurisdictions with low notification thresholds will capture many mergers → high number of mergers reviewed → tend to have low intervention rates
  - For example: Germany, United States: intervention rate far below 1%

But in the case of Japan, this does not explain the low intervention rate

- Roughly 300 notifications per year (since 2009 amendment)
- Same range as EU (300-400) or France (roughly 250)

# Intervention rate in France also significantly higher than in Japan

## ● DÉCISIONS D'AUTORISATION SOUS RÉSERVE D'ENGAGEMENTS

Year	2009 *	2010	2011	2012	2013	2014	2015	2016	2017	2018
Clearance decision	88	192	214	184	201	200	192	230	233	235
Decisions subject to commitments	3	7	7	10	7	10	6	6	8	4
As %	3.4%	3.6%	3.3%	5.4%	3.5%	5%	3.1%	2.6%	3.4%	1.7%
<i>Of which decisions subject to behavioural remedies</i>	2	2	2	3	2	3	3	3	3	3
<i>Share of behavioural remedies in relation to total commitments accepted</i>	67%	29%	29%	30%	29%	30%	50%	50%	38%	75%

\* As jurisdiction of merger control was transferred to the *Autorité* on 2 March 2009, only the decisions issued after this date have been analysed.

Source: *Autorité de la concurrence, LES ENGAGEMENTS COMPORTEMENTAUX*, p. 293 (in the English version)  
(Direction de l'information légale et administrative, 2019)

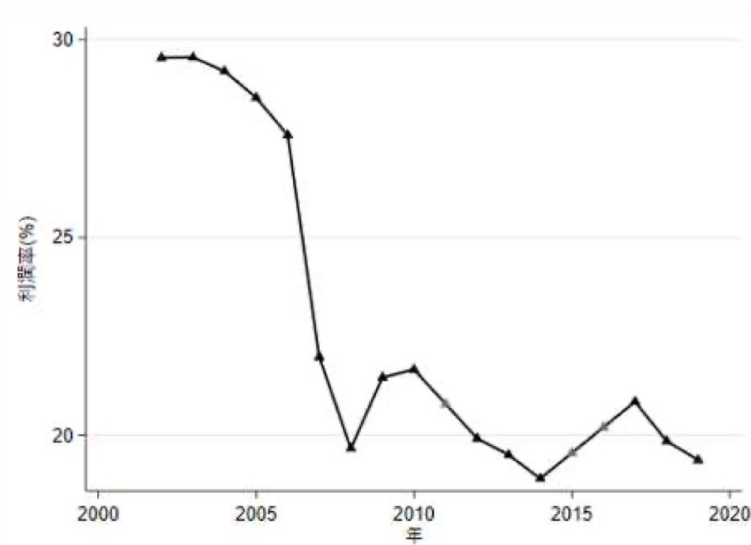
[www.autoritedelaconcurrence.fr/fr/publications/engagements-comportementaux](http://www.autoritedelaconcurrence.fr/fr/publications/engagements-comportementaux)

# How to explain Japan's uniquely low intervention rate?

- JFTC is less strict?
  - Merger guidelines follow international norms, but applied in a more lenient way?
- JFTC is faced with fewer problematic mergers?
  - Is there a uniquely Japanese factor explaining this?
    - Concentration in Japanese market not yet as high as in U.S., EU → more room left for mergers?
    - Markups of firms have stagnated, profit ratios have fallen: less market power?
      - Shrinking population, decline in demand as possible reason
    - Japanese companies' aversion to mergers with strategic competitors?

# Japan: profit ratios in the manufacturing industry have fallen in last 15 years

図 7: 日本全体における利潤率の推移



注釈: 利潤率は、第 2.3 節の (1) で定義した値である。図の各年度における値は、全事業者を対象として、各事業者の利潤率を事業者の出荷額合計で加重平均した値である。使用するデータ期間は、2002 年～2019 年である。データ制約 (第 2.5 節参照) より、期間中の 2011 年、2015 年、2016 年は除き、センサス年 (2011 年、2015 年) と 2016 年は前後の年の数値の平均値で補完している。

Source: Toshiko Igarashi & Jun Honda, 日本の製造業における市場集中度と競争環境

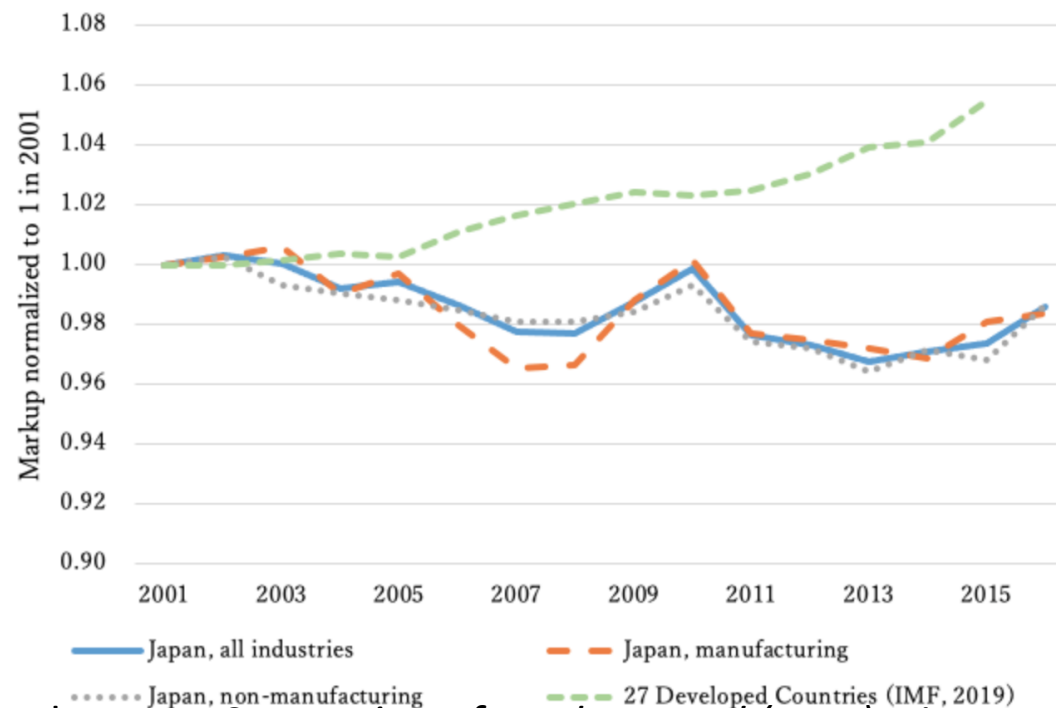
*Nihon no seizōgyō ni okeru shijōshūchūdo to kyōsōkankyō [Concentration and Competition in Japanese Manufacturing Industries]* (CPRC Discussion Papers, November 2022), p. 14, figure 7 (Nihon zentai ni okeru rijunritsu no suii [Change of profits ratios in Japan]),

[https://www.jftc.go.jp/cprc/reports/discussionpapers/r4/index\\_files/CPDP-91-J.pdf](https://www.jftc.go.jp/cprc/reports/discussionpapers/r4/index_files/CPDP-91-J.pdf)

# Japan: markups have stagnated

(since 2001)

**Figure 1** Aggregated markups (sales share weighted) in Japan and developed countries

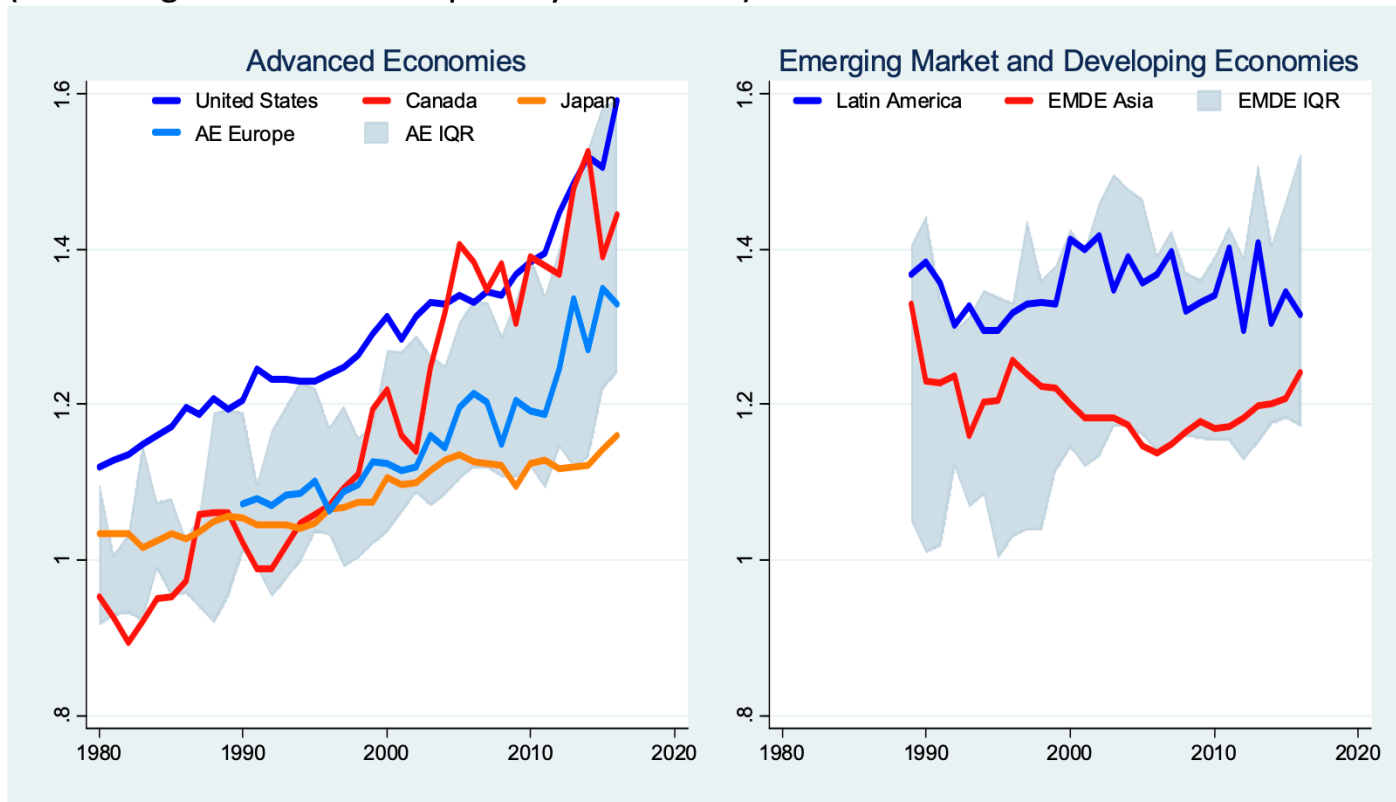


Source: Hiroshi Ohashi & Tsuyoshi Nakamura, *Stagnation of markups and (non-)existence of superstar firms in Japan* (VoxEU columns, 20 October 2020), <https://cepr.org/voxeu/columns/stagnation-markups-and-non-existence-superstar-firms-japan> (figure 1)

# Japan: moderate increase in markups but a steep increase for the United States, Canada and Europe

(since 1980)

Figure 6. Evolution of Estimated Markups Across Economies  
(Sales-weighted mean for all publicly listed firms)



Note: Figure reports markup estimates for 33 advanced economies (AEs) and 41 emerging market and developing economies (EMDEs). For country groups (AE Europe, Latin America, and EMDE Asia) figure reports median of included countries. IQR denotes inter-quartile range.

Source: Federico J. Díez, Daniel Leigh & Suchanan Tambunlertchai, *Global Market Power and its Macroeconomic Implications*, p. 25, figure 6 (IMF Working Papers Vol. 2018, issue 137, June 2018), <https://doi.org/10.5089/9781484361672.001>



# Legal Framework and Types of Remedies

- No “hard law” (no statutory provisions, no case law)
- Legal vacuum filled by JFTC guidelines and regulations (規則)
  
- Seems to grant great power and discretion to JFTC
- But JFTC has shown remarkable restraint
  - Guidelines follow international practices
  - Application of the guidelines is pragmatic / lenient

# The JFTC's pragmatic approach: behavioural remedies vs. structural remedies

- JFTC's remedies policy: structural remedies in principle
- But JFTC guidelines give JFTC flexibility
- In practice: JFTC frequently accepts behavioural remedies
  - Past twenty-one cases: 13 behavioural – 8 structural

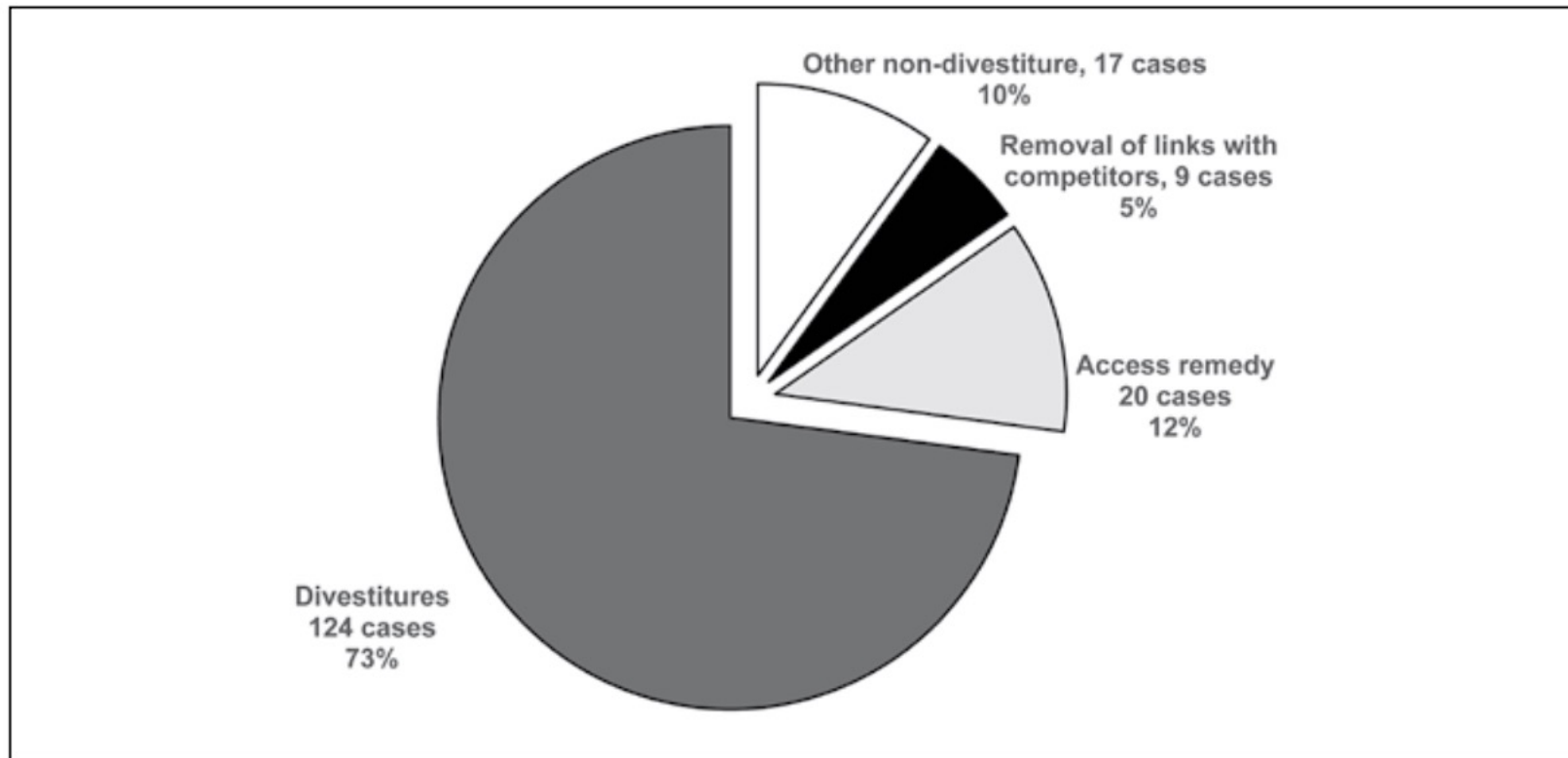
# 34 (structural) vs. 62 (behavioural)

表 3

事業譲渡等	コストベース引取権の設定	設備等の提供	特許権等の実施許諾	技術指導・提供	情報遮断措置	差別取扱禁止	市場支配力不行使	合計
34件	12件	8件	8件	6件	31件	21件	5件	84件
34件	62件							84件
52件					50件			84件

Source: Yoshihiro Sakano, 企業結合における問題解消措置のあり方に関する検討 (2021) (doctoral thesis, Kobe University), p. 60, Hyō 3 [Table 3], <https://da.lib.kobe-u.ac.jp/da/kernel/D1007662/D1007662.pdf>. The numbers add up to more than 84 cases because some cases had both a divestiture remedy and non-divestiture remedy.

# EU: divestitures constitute large majority of remedies cases



*Figure 3. Types of remedies (2011-2020): type, number of cases, percentage of total.*

# France: behavioural remedies frequently used

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# Other example of JFTC's pragmatic attitude: structural remedies in name but not in effect

- 3-to-2 merger between Nippon Steel and Kobe Steel's road-related businesses (神鋼建材工業(株)による日鉄建材(株)の鋼製防護柵及び防音壁事業の吸収分割)
- Remedy: divestiture of a stake (持分) in equipment (設備譲渡)

## 2 設備譲渡

問題解消措置は事業譲渡等の構造的な措置が原則とされているため、事業全体や設備の全部を譲渡することが望ましいが、統合会社の尼崎製造所では3商品以外の商品も製造しており、また、仮に設備を譲渡すると統合会社の工場内にダイクレの製造設備が点在することになるため、設備の管理等の面で設備全体又は設備の一部を切り出して譲渡することは困難といえる。そのため、第三者に対して製造設備の持分を譲渡するという方法は、新たな競争事業者を参入させて統合会社に対し有効な牽制力を働かせる構造的な措置として、採り得る方法である。

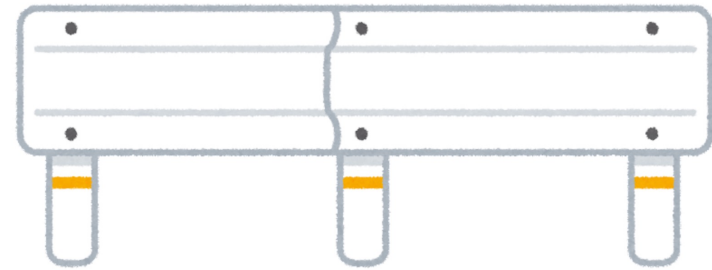
また、ダイクレは持分の取得に際して設備に係る固定費を負担することになるため、ダイクレにとっては、統合会社に生産を委託する量を増やせば増やすほど単位当たりの固定費の負担を減らすことができ、利益の増加につながることから、積極的な販売活動を行おうとするインセンティブが働くと考えられる。

さらに、尼崎製造所の製造量の45%は、当事会社のうち市場シェアの低い方の会社の直近事業年度の販売数量に相当する数量であり、前記第5の2における操業生産受託の上限数量と同等となることから、製造設備の45%の持分を譲渡することにより当事会社のうち市場シェアの低い方の会社と同等程度の製造ができる競争事業者になり得ると評価できることから、持分の比率についても適切な水準であると考えられる。

以上のことから、かかる設備譲渡は適切であると認められる。

# Merger between Nippon Steel and Kobe Steel's road-related businesses (神鋼建材工業(株)による日鉄建材(株)の鋼製防護柵及び防音壁事業の吸収分割)

- → does not create an independent player that can compete (for instance, no innovation possible)
- Volume to which remedy taker is entitled is capped → remedy taker cannot be an effective constraint → merged entity has much more market power than when facing a normal competitor
- Cf. mobile mergers in the EU:
  - capacity at a fixed cost
  - no variable cost
  - strong incentive to gain new customers?  
In theory yes, in practice...
- Lesson: very difficult to replicate the incentives of a true structural remedy-taker





# Conclusions

# Conclusions

- Strong reliance on remedies (as opposed to prohibitions) is not unique, but exclusive use of remedies (*zero* prohibitions) is unique for a mature jurisdiction such as Japan
- Complete informality of remedies process (no hard law, no binding decisions, no court interventions) seems unique
- Puzzle: in spite of the JFTC's non-confrontational approach to merger control, markets in Japan are more competitive than in the EU and the U.S. What factors are at play?