



**2018 ICN Merger Workshop
BOS 7: Remedies in vertical mergers**

**Remedies in vertical mergers:
Recent development in Japan and practical
perspectives**

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1. Overview of merger review by the JFTC

1 . Overview of merger review by the JFTC

i) Legal framework / guidelines / practice

- JFTC's Merger Guidelines (last amendment in 2011)
 - Not very elaborated on competitive analysis of vertical mergers
 - “The remedies should, in principle, be structural measures”

- Developments afterwards
 - JFTC's more detailed analysis of vertical merger
 - Basically consistent with EU / US approaches
 - Major competition concerns in vertical mergers:
 - Input foreclosure
 - Customer foreclosure
 - Access to confidential info of competitors in upstream/downstream markets
 - Emergence of precedential vertical mergers with remedies / abandoned
 - Two prominent vertical mergers in 2012 and another two in 2017 (cleared with behavioural remedies)
 - One abandoned vertical merger in 2016 (*Lam Research / KLA-Tencor*)

1 . Overview of merger review by the JFTC

i) Legal framework / guidelines / practice

- Merger remedies under the Japanese Anti-Monopoly
 - ✓ Merger remedies as a non-statutory measure
 - ✓ JFTC's Policies Concerning Procedures of Review of Business Combination
 - “a notifying corporation can submit to the JFTC written opinions or any other materials... (including offers to take remedies in question...)”
 - ✓ JFTC's Merger Guidelines (last amendment in 2011)
 - “The remedies should, in principle, be structural measures”

- Legislation of “commitment procedure” in 2018
 - ✓ Following the conclusion of the Trans-Pacific Partnership (TPP) Agrmt
 - ✓ Formal introduction of commitment procedure
 - Applicable to both antitrust cases and merger cases (for remedies)
 - ✓ Expected to come into force by the end of 2018
 - ✓ Change in merger review practice?
 - Remedies under JFTC's current Policies still available

1. Overview of merger review by the JFTC

ii) Statistics in general

➤ Number of merger notifications and decisions from 2012 to 2017

	2012	2013	2014	2015	2016	2017
Cleared after Phase I	340	257	275	281	308	299
Cleared after Phase II	6	4	3	6	3	1
Cleared with remedies	3	1	2	1	3	3
Prohibitions	0	0	0	0	0	0
Abandoned by parties	3	3	11	8	8	6
Total number of notifications filed	349	264	289	295	319	306

(Source: JFTC)

NB: The number of cases “cleared with remedies” represents the number of mergers that were cleared with remedies, regardless of when the notification was filed with the JFTC, while other numbers are counted on the bases of the notifications filed within that year. Therefore, the sum of all columns for a year does not match “total number of notifications filed”.)

1. Overview of merger review by the JFTC

ii) Statistics in general

➤ Notifications and types of mergers in the last three years

	2015	2016	2017
Horizontal mergers	200 (68%)	197 (62%)	179 (58%)
Vertical mergers	91 (31%)	120 (38%)	121 (40%)
Conglomerate mergers	118 (40%)	167 (52%)	132 (43%)
Total no. of notifications	295 (100%)	319 (100%)	306 (100%)

(Source: JFTC)

NB: A merger falling within more than one category is counted twice / thrice.

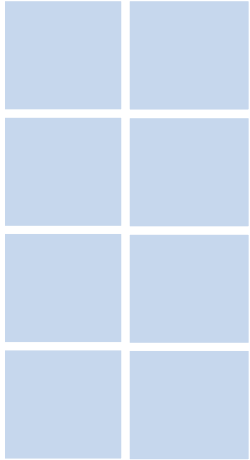
“Total number of notifications” is based on the actual number of notifications.)

→Recent increase of vertical mergers in Japan (?)

1 . Overview of merger review by the JFTC

iii) Vertical mergers with remedies in Japan

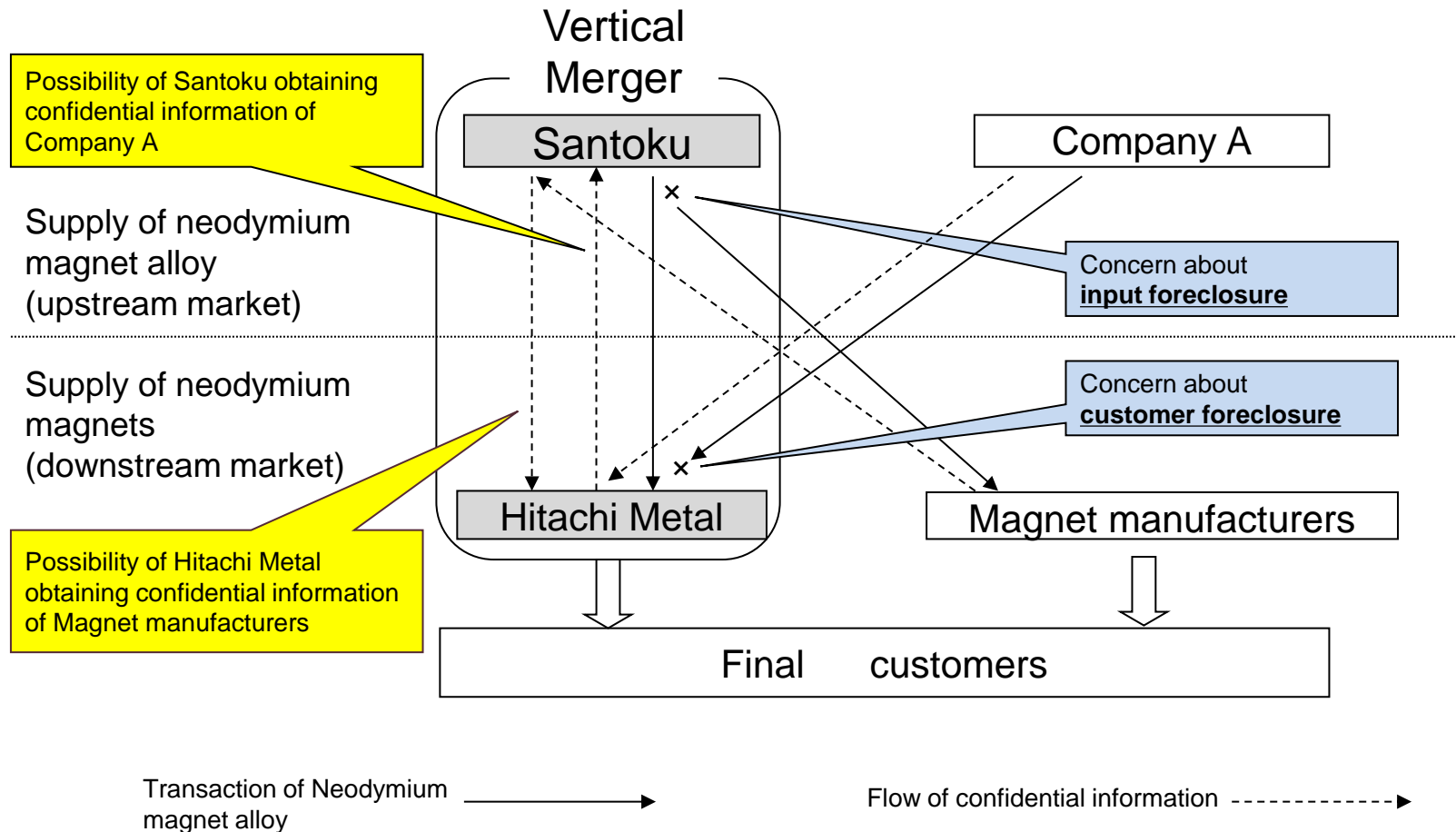
- Prominent, precedential vertical mergers with remedies in Japan
- C&H Co., Ltd. / Daiken Corporation in 2012
 - Concern about input foreclosure
 - Cleared with behavioural remedies
- ASML Holdings N. V. / Cymer Inc. in 2012
 - Concern about input / customer foreclosure and sharing of information
 - Cleared with behavioural remedies
(cf. non-conditional clearance by US FTC)
- Broadcom Limited / Brocade Communications Systems in 2017
 - Concern about sharing of information
 - Cleared with behavioural remedies
- Santoku / Hitachi Metal in 2017 (next section)



2. Recent case study: Hitachi Metal's acquisition of Santoku

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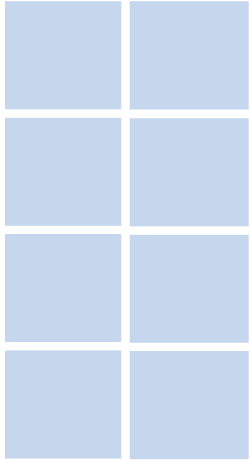
Hitachi Metal's acquisition of Santoku (overview)



2. Recent case study:

Hitachi Metal's acquisition of Santoku

- Remedies package before the consummation of the acquisition
 - ✓ Santoku's continuation of supply of neodymium magnet alloy
 - To address concern about input foreclosure
 - For five years / prices and volume consistent with historical practice
 - ✓ Hitachi Metal's continuation of purchase of neodymium magnet alloy
 - To address concern about customer foreclosure
 - For one year / prices and volume consistent with historical practice
 - ✓ Information firewalls between Santoku / Hitachi Metal
 - To address concern about sharing of confidential information on rivals
 - Information firewalls + confidentiality pledge from employees
 - ✓ Regular reporting on compliance with remedies



3 . Practical issues on the use of behavioural remedies

3. Practical issues on behavioural remedies:

i) Sufficiency

- Input foreclosure and customer foreclosure
 - ✓ Continuation of supply
 - ✓ Continuation of purchase
 - ✓ How conditions of such continuation of supply/purchase should be?
 - pricing (historical practice / price increase)
 - duration
 - provisions on “non-discrimination”
 - treatment of aftermarkets / supports / related services
 - ✓ Maintenance of the but-for world and allowing for benefits from vertical integration (efficiencies / innovation)?

- Information firewalls

- Cf. Abandoned case in 2016
Lam Research / KLA-Tencor – insufficient remedies package

3. Practical issues on behavioural remedies:

ii) Compliance/monitoring

- Self-report
- Monitoring trustee (cf. appointed in ASML Holdings / Cymer Inc. in 2012)
 - ✓ How can outside monitoring trustee effectively monitor the parties' compliance with behavioural remedies?
 - ✓ What should such monitoring trustee monitor as its mandate/role?
- Breach of remedies?
 - Merger remedies as a non-statutory measure (currently available)
 - Remedies adopted under the “commitment procedure”
 - ✓ In either case, no direct sanction against breach of remedies or commitments in Japan
 - ✓ Need for stringent mechanism for monitoring in Japan?



Thank you very much!

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