

Cross-border merger control in Japan

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1. Introduction

With globalization, there are an increasing number of cases where the merger between two firms based in a foreign country may affect competition in other countries. However, competition agencies face problems when examining mergers in foreign countries. Some of them are legal, and others are related to practical matters such as information gathering, monitoring, and so on.

Today, I would like to talk about these problems, and how we, the JFTC, have actually handled these problems when investigating cross-border merger cases. Then, I will conclude with a few observations.

2. The JFTC's experiences of investigating cross-border mergers

In recent years, we have investigated several merger cases where merging parties were foreign companies and

the transaction, if completed, might have harmed competition in Japan.

Among them, today I would like to talk about two recent cases.

The first case is the Agilent-Varian Case.

Agilent and Varian are both U.S. based analytical instruments manufacturers. They both sell their products in Japan through their respective Japanese subsidiaries. Agilent planned to acquire Varian, and notified the JFTC under the mandatory notification requirement system in place in Japan.

The JFTC started an investigation upon receiving their notification and requested additional detailed information in accordance with Article 10, Paragraph 9 of the Antimonopoly Act. The FTC of the U.S. and the EC started investigations as well, and we exchanged information with the FTC.

The JFTC has bilateral agreements with these counterparts in the U.S and the EC. The formal and

informal relationships through these arrangements were important in working closely with our foreign counterparts.

The FTC and the EC told the merging party that there was a high possibility that competition would be harmed in several product markets by this transaction. In response to this, the companies proposed a remedy. We examined this remedy proposal carefully, and determined that the remedy would be sufficient to maintain competition in the Japanese markets as well. The FTC and the EC also allowed this acquisition to proceed on the condition that this remedy would be put into place.

The second case is the BHP-RT case.

These are two mining companies based in Australia and England. Japanese steel companies depend heavily on them for the supply of iron ore and coal. These two companies tried to merge before, but the merger was investigated by several competition agencies throughout the world, and the plan was abandoned. Then, they tried

to create a joint venture for production in Western Australia where a large part of their mines are located. On January 20th, 2010, they came to us for prior consultation. Thus, we started an investigation. In this process, we exchanged information with competition agencies in Australia, the EC, Germany, and Korea that were also conducting investigations. On September 27th, 2010, we notified the parties that there was a possibility that competition would be harmed by the proposed joint venture. Some other agencies, such as the KFTC of Korea and the Bundeskartellamt of Germany, followed. The two companies made public that they had abandoned the plan to create a joint venture, and we terminated our investigation.

3. Lessons and implications

From these cases we have learned the following points.

First, it is important to have a proper legal environment in our own country to deal with cross-border mergers.

The existing merger regulations are largely to regulate

domestic mergers and they often do not anticipate the need to deal with the mergers of foreign firms.

Therefore, it is important to review your own competition law and procedures to make sure that they are sufficient for dealing with cross-border mergers. We have amended the Antimonopoly Act several times so that we can investigate cross-border mergers effectively.

Second, cooperation with other agencies is extremely important for effective cross-border merger control by agencies. Bilateral agreements and multilateral forums, such as the OECD and the ICN, facilitate cooperation. At the same time, mutual trust between agencies is important, to know someone at the other agency helps in a major way. Trust can be built through face-to-face meetings between staff. Bilateral and multilateral agreements and meetings provide opportunities for people to get together and to get to know each other and create so-called “pick up the phone” relationships.

Third, cooperation between agencies is important for industry, too. With increasing globalization, the merger of two firms in one country can affect competition in many other foreign countries, as the examples I have given illustrate. As a result, firms have to notify many agencies in many countries. Then many agencies start an investigation, which is inevitable, but very costly for the companies planning a merger. While merger control is an important part of competition agencies' job to protect consumers, we should be careful not to impose unnecessary burdens on business transactions as mergers can often bring efficiency.

Today, more than 100 competition agencies exist in the world. It would take a long time to obtain approval from many agencies.

Translation fees, legal fees, and other costs can be very high. In the case of a merger between Panasonic and Sanyo, two large Japanese electric and electronics firms, it is said that they filed notifications to eleven countries. Four agencies told them to take some kind of remedies.

This process took a long time and cost them more than 10 billion yen.

Inter-agency collaboration can reduce this burden, as the Agilent-Varian case I mentioned exemplifies. I think more should be done on this front. Some kind of international collaboration to reduce the burden and promote efficiency is badly needed. In this regard, we are far behind the Intellectual Property Rights community, which has the Paris Convention and the World Intellectual Property Organization.

I am aware that this is difficult, as many proposals have been made and many meetings have been held in the past with little success. It is a major challenge for the competition policy community to find an effective mechanism to reduce the business costs and the uncertainty associated with merger review, while protecting consumers in countries that are affected by mergers.

Thank you for your attention.