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Working Party No. 3 on Co-operation and Enforcement

JURISDICTIONAL NEXUS IN MERGER CONTROL REGIMES

-- Note by Japan --

14-15 June 2016

This document reproduces a written contribution from Japan submitted for Item 5 of the 123rd meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 14-15 June 2016.

*More documents related to this discussion can be found at
www.oecd.org/daf/competition/jurisdictional-nexus-in-merger-control-regimes.htm*

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JAPAN

1. The overview of the business combination regulations and the obligation of notification under the Antimonopoly Act

1. The Antimonopoly Act (hereinafter referred to as “the AMA”) in Japan prohibits any business combination that may be substantially to restrain competition in a particular field of trade.

2. Under the AMA, any company planning a business combination which meets certain criteria is required to notify the Japan Fair Trade Commission (hereinafter referred to as the “JFTC”) in advance. The purpose of this prior notification is to ensure that the JFTC can effectively obtain information regarding the business combination which may violate the AMA.

3. The thresholds for the notification are determined according to the types of business combinations (“acquisitions of shares”, “mergers”, “joint incorporation-type splits”, “absorption-type splits”, “joint share transfers”, and “acquisitions of business”).

4. For example, in the case of acquisition of shares, a company acquiring shares of another company is obliged to notify the JFTC of its plan in advance when the company belonging to a group of combined companies (a company group consisting of its ultimate parent company and the subsidiaries of the ultimate parent company) with total domestic sales exceeding 20 billion yen plans to acquire voting rights of another company with total domestic sales exceeding 5 billion yen including those of its subsidiaries, and the ratio of these voting rights exceeds the thresholds of 20% or 50% of total voting rights as a result of the acquisition.

5. In the case of mergers, every company that intends to become a party to a merger shall notify the JFTC in advance of its merger plan if the total domestic sales amount of a group of combined companies of any one of the merging companies exceeds 20 billion yen, and the total domestic sales amount of a group of combined companies of any one of the other merging companies exceeds 5 billion yen¹.

2. Amendment to the AMA in 2009 (Review of Regulations on Business Combination)

6. The current business combination regulations were introduced by the 2009 Amendment of the AMA (enacted in 2010).

7. The Amendment included the change of the criteria as well as the thresholds for notification in light of ensuring international consistency, etc.

2.1 Review of Notification Criteria

8. With regard to jurisdictional nexus, under the AMA before the 2009 Amendment, a report to the JFTC was required in the case of acquiring shares for example when a company whose nonconsolidated total assets exceed 2 billion yen and whose combined total assets of the company, its direct subsidiaries and parent company in Japan exceed 10 billion yen acquired voting rights, in excess of a certain ratio, of a Japanese company whose nonconsolidated total assets exceed 1 billion yen or a

¹ For the details, please refer to the following
http://www.jftc.go.jp/en/policy_enforcement/mergers/index.files/ThresholdforNotification.pdf

foreign company whose domestic sales exceed 1 billion yen. Under such criteria, a foreign company acquiring shares could become subject to the reporting requirement even if the company does not have any presence in the Japanese market (i.e., it has neither assets nor sales in Japan). The 2009 Amendment to the AMA, however, made the notification requirement applicable only to the cases in which both the company acquiring shares and the company issuing the shares have domestic sales that exceed a certain amount.²³

9. Furthermore, “domestic sales” under the AMA before the 2009 Amendment, which was used as the notification criteria for cases in which the company issuing the shares is a foreign company, referred to only sales of sales offices in Japan of the foreign company and its direct subsidiaries. Therefore, sales of a foreign company where it directly sells products to a Japanese company or sales of sub-subsidiary of a foreign company where such sub-subsidiary serves as the foreign company’s sales base in Japan was not included in the “domestic sales” of the foreign company. The definition of the criteria was also changed by the 2009 Amendment so that “domestic sales” include such sales.

10. In addition to the criteria for acquisition of shares, the criteria for the notification of other types of business combinations were changed by the 2009 Amendment, from those based on the amount of total assets to those based on the combined total of domestic sales of both parties, in light of ensuring international consistency.

2.2 Introduction of the prior notification system and simplification of the notification thresholds

11. While the filing of a notification before the consummation of a business combination was already required for mergers, etc., the notification requirement for the acquisition of shares was to file a report after the consummation of the acquisition that resulted in the ratio of voting rights held by the acquirer exceeding the thresholds of 10%, 25% or 50%.⁴ The 2009 Amendment, however, made the prior notification mandatory also for the acquisition of shares if the ratio of voting rights to be held exceeds 20% or 50%.

3. Impact of the 2009 Amendment to the AMA

12. The 2009 Amendment led to a decreased number of notifications filed⁵, reduced the burden of the companies for the notification, and made it possible for the JFTC to allocate more resources to the review of business combination cases that have higher probability of violating the AMA.

13. As described above, the business combination regulations modified by the 2009 Amendment of the AMA ensures international consistency and secures the effectiveness of business combination regulations, while reducing the burden of companies, which is considered to show that the Amendment appropriately reflected the intent of the 2005 Recommendations of the Council.

² This does not necessarily mean that the AMA excludes business combinations that are not subject to the prior notification requirement from its scope of application; i.e., the JFTC has the authority to start investigations into any business combination that has not been filed to the JFTC by the prior notification.

³ In practice, the JFTC is open to informal consultations on planned mergers that are not subject to the notification obligation, which provides companies with means of avoiding the risk of action by the JFTC after the consummation of a merger.

⁴ There was a case in which the JFTC started an investigation into a possible violation of the AMA by ordering submission of a report because the prior notification system was not in place for the acquisition of shares. http://www.jftc.go.jp/en/pressreleases/yearly-2008/dec/individual_000067.html

⁵ The number of notifications was roughly 1000 cases per year before the enactment of the 2009 Amendment to the AMA in January 2010. The number decreased after its enactment to 265 cases for the period from April 2010 to March 2011 and has been around 300 cases annually since then.