

Unclassified

DAF/COMP/WP3/WD(2016)63

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

14-Nov-2016

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Cancels & replaces the same document of 09 November 2016

Working Party No. 3 on Co-operation and Enforcement

AGENCY DECISION-MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A CONDITIONAL CLEARANCE

-- Note by Japan --

28-29 November 2016

This document reproduces a written contribution from Japan submitted for Item 4 of the 124th meeting of the OECD Working Party No. 3 on Co-operation and Enforcement on 28-29 November 2016.

More documents related to this discussion can be found at www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm

Please contact Ms. Despina Pachnou if you have any questions regarding this document [phone number: +33 1 45 24 95 25 -- E-mail address: despina.pachnou@oecd.org].

JT03405241

Complete document available on OLIS in its original format

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

DAF/COMP/WP3/WD(2016)63
Unclassified

English - Or. English

-- JAPAN --

1. Remedies in the Review of Business Combinations in Japan

1. The Japan Fair Trade Commission (hereinafter referred to as the “JFTC”) can issue cease and desist orders (a kind of administrative measures) under the Antimonopoly Act (hereinafter referred to as the “AMA”) when a business combination would substantially restrain competition in a particular field of trade. As to the business combination review, the JFTC, however, has never issued cease and desist order for nearly half a century in the past.

2. This is because, the Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (hereinafter referred to as the “Business Combination Guidelines”) provide that “Even though the effect of a business combination may be substantially to restrain competition in a particular field of trade, such restraint may be remedied by certain appropriate measures taken by the company group. (Such measures are hereinafter referred to as ‘remedy(ies)’.)”

3. On the other hand, when the JFTC determines that the remedies proposed by the companies concerned (hereinafter referred to as “parties”) are not appropriate to resolve the restraint, the parties will reconsider the remedies, or abandon such planned business combination and withdraw their notification.

1.1 General consideration regarding Remedies

4. The Business Combination Guidelines provide that the “remedies should, in principle, be structural measures such as the transfer of business and should basically be those that restore competition lost as a result of the combination in order to prevent the company group from controlling the price and other factors to a certain extent.” Exceptionally, the guidelines also provide that “in a market featuring a rapidly changing market structure through technological innovations, there may be cases where it is appropriate to take certain types of behavioral measures.”

5. When a business combination would substantially restrain competition in a particular field of trade, the parties usually consider the remedies and propose them to the JFTC. If it can be assessed that the remedies can resolve the problem pointed out by the JFTC, the JFTC will determine that the planned business combination with the remedies would not substantially restrain competition. When making such determination, the JFTC will generally conduct a market test to confirm the effectiveness of those remedies from users, etc.

1.2 Ensuring the implementation of Remedies, etc.

6. With respect to the timing when remedies should be taken, the Business Combination Guidelines provide that the “remedies should be completed before the implementation of the combination in principle.” The guidelines also provide that “Even if the remedies are to be taken without fail after the implementation of the combination, then an appropriate and definite deadline for the remedies should be imposed. Moreover, to transfer all or part of the businesses as remedies, for example, it is desirable to select the transferee of the business in advance of the combination. Otherwise, the parties may be required to obtain permission in advance from the JFTC with respect to the transferee.”

7. In this respect, the JFTC confirms that the remedies will be implemented or have been implemented by having the parties concerned describe the remedies and the deadline for the implementation of remedies in the prior written notification of the planned business combination. In addition, the implementation of the remedies is ensured through the following things: (i) if matters in the plan regarding the business combination, those which are considered important in light of the provisions of Article 10 (1) of the AMA, etc. are not carried out by the deadline stipulated in said plan, the JFTC may issue cease and desist orders (Article 10 (9) of the AMA, etc.), (ii) if there has been a description which is contrary to the fact in the notification, 1) the JFTC may issue cease and desist orders (Article 10(9) of the AMA, etc.), and 2) criminal penalties may be imposed against the false description (Article 91-2 of the AMA).

8. Practically, there are some mechanisms to reduce the risk of not being implemented the remedies. The JFTC has taken the following measures: (i) a report drawn up by the independent audit team related to the status of compliance with the remedies. (“Monitoring Trustee”) (M&A between ASML Holdings N. V. and Cymer Inc. (Major Business Combination Cases in Fiscal Year 2012, Case 4)¹); (ii) undertaking of a prompt bidding procedure of the stores of the parties located in the area under appropriate, reasonable methods and conditions, in case a transfer agreement is not concluded or in case a transfer agreement is concluded but the transfer is not carried out thereafter (Acquisition of shares of BEST DENKI Co., Ltd. by YAMADA DENKI Co., Ltd. (Major Business Combination Cases in Fiscal Year 2012, Case 9)); (iii) the disposal of the business by a third party (“divestiture trustee”), in case the parties did not reach an agreement to conclude contracts concerning the disposal of the business with buyers within a certain period of time. (Integration of Zimmer and Biomet) (Major Business Combination Cases in Fiscal Year 2014, Case 7)); and (iv) the decision of the buyer of the business prior to the implementation of the business combination (Integration of NXP Semiconductors N.V. and Freescale Semiconductors, Ltd. (Major Business Combination Cases in Fiscal Year 2015, Case 5))².

1.3 Changes in the Conditions after the Business Combination

9. The Business Combination Guidelines provide that “Based on a request from the company group, when the necessity of continuing the remedies is assessed in light of changes in the competitive conditions after the business combination, if it is determined that the effect of the business combination would not substantially restrain competition, the company group is sometimes permitted to change or terminate the remedies.”

2. Cases in which the JFTC approved the business combination based on the remedies

10. In recent years, there are some cases the JFTC concluded that business combination would not substantially restrain competition in a particular field of trade based on the implementation of the remedies proposed by the parties. For instance, “Integration of Zimmer and Biomet” (Major Business Combination Cases in Fiscal Year 2014, Case 7) (for details of the case, see attachment) corresponds to such case.

1 The JFTC has published "Major Business Combination Cases" every fiscal year (<http://www.jftc.go.jp/en/pressreleases/categories/mergers/index.html>).

2 When a certain type of behavioral measures is taken as remedies, the JFTC usually monitor whether the parties deviate the remedies by having those parties submit reports on their related business activities for a certain period to the JFTC after the implementation of the planned business combination.

ANNEX

INTEGRATION OF ZIMMER AND BIOMET

(Major Business Combination Cases In Fiscal Year 2014, Case 7)

1. Outline of the case

11. Regarding the transaction of Zimmer, Inc. (Head office based in the USA; the corporate group to which the company belongs is hereinafter referred to as “Zimmer”) and Biomet, Inc. (Head Office based in the USA; the corporate group to which the company belongs is hereinafter referred to as “Biomet”, and hereinafter Zimmer and Biomet are collectively referred to as “the Parties”) (hereinafter referred to as “the Transaction³”), the JFTC received a written notification of the plan from the Parties based on the regulations of the AMA, and has reviewed the case. As a result, on the premise that the remedy proposed by the Parties would be taken, the JFTC concluded that the Transaction would not substantially restrain competition in any particular fields of trades.

12. The JFTC kept exchanging information and cooperating with the United States Federal Trade Commission (USFTC), the European Commission (EC) which also investigated the same transaction.

2 Outline of the results

13. The Parties were competing each other in the markets including manufacturing of medical devices. Among medical devices markets, the JFTC examined some artificial joints, because the Parties have a large market share in these markets. On the premise that the remedy proposed to the JFTC by the Parties would be taken, the JFTC concluded that the Transaction would not substantially restrain competition in any fields of trades including “UKA (one type of artificial knee joints)” and “artificial elbow joints” which the Parties would have large market share.

14. Furthermore, the JFTC conducted an economic analysis on this case, and took the result of the economic analysis into account in making its judgment.

3. Assessment under the Antimonopoly Act (UKA market and artificial elbow joints market)

15. After the Transaction, the market share of the Parties would become approximately 90% in the UKA market, and 60-70% in the artificial elbow joints market, which would create a significant gap from those of competing enterprises. Additionally, competition previously conducted between the Parties would be lost. Meanwhile, each competitive pressure (entry pressure, competitive pressure from users, competitive pressure from adjacent markets) in the UKA market and the artificial elbow joints market is limited. Therefore, the JFTC concluded that the Transaction would substantially restrain competition in the UKA market and artificial elbow joints market.

3 The Transaction is (1) for a subsidiary company of Zimmer, Inc. and a parent company of Biomet, Inc. to merge, with the parent company of Biomet, Inc. being the surviving company, and (2) for Zimmer, Inc. to acquire all the stocks of the company after the merger.

4. Proposal of remedy by the Parties

4.1 *The Parties submitted the proposal of Remedy on UKA and artificial elbow joints (hereinafter referred to as “the Remedy”) to the JFTC mainly as follows:*

- i) Tangible assets (e.g., inventory, design history, experimental and clinical data) and intellectual property rights (e.g., patents, trademarks, know-how) pertaining to the Parties’ leading brands corresponding to approximately 50% of the market share in the UKA and approximately 20% of the market share in the artificial elbow joints in FY2012 are to be divested;
- ii) Buyers are to be enterprises which have adequate experience and capability in the orthopedics and artificial joints business and be independent of and financially unrelated to the Parties, that need to be selected in light of the criteria such as possessing the funds, specialty and incentive to maintain and develop the business subject to the divestitures, the possible buyers are to be notified to and obtain a clearance from the JFTC after concluding contracts with the buyers;
- iii) If the Parties don’t reach to conclude contracts with buyers within a certain period of time, an independent third party (divestiture trustee) carries out disposal of the business listed in (4.1)(i) above after obtaining an approval from the JFTC; and,
- iv) The time limit to execute the divestitures is to be within three months from the day of the clearance from the JFTC regarding possible buyers.

4.2 *Assessment of the Remedy*

- i) On the premise that the Remedy described in (4.1) above would be taken, the Parties’ combined market share and rank in the UKA market after the Transaction would be approximately 40% and the second place; and the Parties’ combined market share and rank in the artificial elbow joints market after the Transaction would be approximately 40% and the first or second place. However, in both of the UKA market and artificial elbow joints market, the Parties’ market share after the Transaction would be lower than the market share of the Parties before the Transaction.
- ii) Regarding buyers, it is considered that buyers who satisfy the requirements described in (4.1)(ii) above would become independent competitors influential in the UKA and artificial elbow joints markets. Whether the actual buyers satisfy the said requirements will be assessed by the JFTC after receiving reports from the Parties.
- iii) The time limit to take the Remedy is appropriately and clearly specified.

5. Conclusion

16. On the premise that the Remedy would be taken, the JFTC concluded that the Transaction would not substantially restrain competition in the UKA and artificial elbow joints markets.