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Non-price Effects of Mergers - Note by Japan

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More documents related to this discussion can be found at www.oecd.org/daf/competition/non-price-effects-of-mergers.htm.

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Japan

1. Introduction

1.1. Merger regulation by the Antimonopoly Act

1. The Antimonopoly Act (AMA) prohibits[1] share acquisition, merger, joint incorporation-type split, absorption-type split, joint share transfer, and acquisition of business (hereinafter referred to as "merger") which would substantially restrain competition in any relevant market.

2. Tokyo High Court stated that "Substantially to restrain competition means to bring about a state in which competition itself has significantly decreased and a situation has been created in which a specific business operator or a group of business operators can control the market by determining price, quality, volume, and various other terms to some extent at its or their own volition (Tokyo High Court, Judgement of December 7th, 1953)."

3. That is to say, "competition" includes not only "price" competition but also competition on "quality, volume, and various other terms". It is therefore obvious that Japan Fair Trade Commission (JFTC) has considered non-price effects of merger in its merger review.

4. With the view of securing transparency and predictability of merger reviews based on the AMA, JFTC made public "Guidelines to Application of the Antimonopoly Act concerning Review of Business Combination (MRG; Merger Review Guidelines)" in 2004[2].

1.2. Examples of non-price effects considered in specific cases

5. JFTC has several merger cases where it took non-price effects into account in accordance with the MRG; for example, JFTC defined a relevant market for free services based on non-price factors in one case. In another case, JFTC pointed out competition concerns based on its non-price effects.

1.2.1. Consideration of non-price effects at market definition

6. The MRG stipulates that in principle, a relevant market is defined by the combination of product/service market and geographic market based on the demand-side substitutability; whether certain products/services are interchangeable or substitute by users. Demand-side substitutability is examined by the SSNIP test. Further, when necessary, supply-side substitutability is also considered.

[1] See Article 10(1) (share acquisition), Article 15 (merger), Article 15-2 (joint incorporation-type split and absorption-type split), Article 15-3 (joint share transfer), and Article 16 (acquisition of business).

[2] Japan Fair Trade Commission, "Guidelines to Application of the Antimonopoly Act concerning Review of Business Combination (2011)", available at http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines. files/110713.2.pdf (The MRG has been revised several times so far. The latest changes are made in 2011.)

7. The degree of demand-side substitutability, in other words, the range of products/services which are recognised as substitutes by users, very often matches the degree of similarity of utility for users. This similarity of utility for users is assessed by factors such as i) the intended use of a product or service[3], ii) changes in its price and quantity, iii) users' perception about its use and function or users' usage behaviour[4].

8. When competition occurs on non-price aspects, JFTC considers above mentioned factors i) and iii) to define a market as it is impossible to take into account changes in price, which are mentioned above as factor ii).

9. In *"Yahoo/Ikyu"* case described in section 2.1, JFTC defined the "online travel reservation services" market, where parties competed on non-price factors based on the characteristics of the services.

1.2.2. Consideration of non-price effects in the assessment of substantial restraint of competition

10. JFTC also examines substantial restraint of competition based on non-price effects such as the impact on innovation, which are not concretely described in the MRG in some cases.

11. In *"Lam/KLA"* case described in section 2.2, JFTC concluded that the merger would substantially restrain competition based on the fact that it could cause sharing of confidential information between merging parties, which could finally create an adverse impact on R&D competition, as well as possible input foreclosure.

2. Non-price effects in recent merger cases[5]

2.1. *Yahoo/Ikyu* (2015)[6]

2.1.1. Outline of the case

12. Yahoo Japan Corporation (Yahoo) which operates online travel reservation services planned to acquire all shares of Ikyu Corporation (Ikyu) which operates the same services.

[3] JFTC considers whether Product X is, or has the potential to be, employed for the same usage as Product Y.

[4] For example, JFTC considers whether users see they are actually employing Product X for the same usage of Product Y even if the specific characteristics of Product X and Product Y are different.

[5] This section introduces JFTC's decisions considering the facts of each case such as market situation. JFTC conducts merger review on a case-by-case basis.

[6] Japan Fair Trade Commission, "Major Business Combination Cases in Fiscal Year 2015", available at http://www.jftc.go.jp/en/policy_enforcement/mergers/index.files/MajorBusinessCombinationCasesFY2015.pdf

2.1.2. Definition of "online travel reservation services" market

13. An online travel reservation service which an online travel agency (OTA) provides on the internet comprises two services. First, OTAs provide travel mediation services to hotel businesses (including inn business, air transport services, etc. The same shall apply hereinafter.). OTAs compete with each other in this market in terms of the number of users and the volume of sales on their websites. Second, OTAs provide a service which enable consumers to obtain information on accommodation, transportation, and other travel services, and make reservation. OTAs compete with each other in the latter market in terms of the number of hotels or flights, and by offering consumers with points in their loyalty programme.

14. JFTC compared online travel reservation services operated by merging parties with those services provided by brick-and-mortar agencies, i.e. offline travel reservation, in examining the degree of substitutability for the customers. JFTC found that these two are different for both customers including consumers and hotel business operators in the necessity of internet environment. Therefore, JFTC concluded there was no demand-side substitutability between these two services.

15. As well, supply-side substitutability is deemed to be limited because online travel reservation services need to establish a system for reservation websites and develop a maintenance and management system for it while brick-and-mortar travel agencies need to develop branch facilities and relevant personnel system.

16. In summary, JFTC defined the "online travel reservation services" market based on demand-side substitutability and supply-side substitutability of the concerned services, in order to examine whether the proposed merger would substantially restrain competition.

2.1.3. Method of calculating market share of merging parties in multi-sided markets

17. A question here is: what is an appropriate way to calculate the market share of the merging parties in a free market or double-sided market?

18. In this *Yahoo/Ikyu* case, the relevant market includes OTA's free service to consumers as mentioned in 2.1.2, but JFTC calculated the market share on the basis of transaction volume of the merging parties for the following reasons: first, the income of OTAs from hotel businesses operators comprises commission derived from transaction between hotel business operators and consumers through the websites of the OTAs. Second, OTAs are competing with each other for hotel business operators in terms of the number of the consumers and the volume of transaction through their own websites. Lastly, OTAs are competing with each other for consumers in terms of the number of hotel business operators which OTAs do business with, and by offering their customers with points in their loyalty programme through their own websites. Therefore, it is reasonable that the market share is based on the transaction volume of merging parties in the two different services for OTAs and consumers. By so calculating the market share, JFTC found that the proposed merger fell within the safe-harbour criteria for a horizontal merger and concluded that the merger would not substantially restrain competition.

2.2. *Lam/KLA* (2016)[7]

2.2.1. Outline of the case

19. Lam Research Corporation (Lam), which manufactures and sells a part of semiconductor equipment for executing manufacturing process (manufacturing-equipment) and KLA-Tencor Corporation (KLA), which manufactured and sold a part of semiconductor equipment for inspection of execution of manufacturing process (inspection-equipment) planned to integrate their businesses.

2.2.2. Assessment of the substantial restrain of competition

20. Certain types of inspection-equipment which KLA manufactured and sold were considered to be especially important for R&D activities of manufacturing-equipment manufacturers. JFTC found that there were concerns that the merging parties would conduct input foreclosure of the inspection-equipment.

21. In addition to that, JFTC found that the proposed merger would cause transfer of confidential information of Integrated Circuit (IC)[8] manufacturers and manufacturing-equipment manufacturers from KLA to Lam. It would impede joint R&D activities between KLA and IC manufacturers or manufacturing-equipment manufacturers. Based on these findings, JFTC concluded the proposed merger would substantially restrain competition in the manufacturing-equipment market.

22. To be more precisely, JFTC considered that the merging parties would have unfair advantage in the manufacturing equipment market if KLA transfers confidential information of an IC manufacturer concerning IC manufacturing or confidential information of a manufacturing-equipment manufacturer concerning its R&D activities to Lam and therefore it was used for Lam's development of manufacturing equipment. Moreover, it was considered that if IC manufacturers and manufacturing-equipment manufacturers other than Lam were concerned about the possible conduct mentioned above, they would be less motivated to continue joint R&D activities which have been conducted through partnership between KLA and IC manufacturers or manufacturing-equipment manufacturers. JFTC scrutinised the case based on the impact on R&D competition as well as the impact on price competition by the input foreclosure.

23. The merging parties proposed remedies to anticompetitive concerns as mentioned above. However, JFTC reached the conclusion that the proposed remedies would not be enough to eliminate the impact of the proposed merger on competition. When the merging parties were informed of the conclusion, they dropped the plan for the conduct of this case. Therefore, JFTC discontinued the review on the conduct of this case.

[7] Japan Fair Trade Commission, "Major Business Combination Cases in Fiscal Year 2016", available at http://www.jftc.go.jp/en/policy_enforcement/mergers/index.files/MajorBusinessCombinationCasesFY2016.pdf

[8] IC offers processing functions such as date storage, numeric calculation, logical operation, etc. based on the properties of semiconductors.

3. Conclusion

24. As described above, JFTC conducts merger reviews focusing on non-price effects as necessary. For example, JFTC has considered the characteristics of the services in a free market or multi-sided market and defined a relevant market based on demand-side substitutability and supply-side substitutability of the concerned services. JFTC has also considered the impact of a proposed merger on R&D competition as well as that on price competition in a case where a concerned product is necessary for R&D activities for another product.