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Global Forum on Competition

ROUNDTABLE ON CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

Contribution from Japan

-- Session I --

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CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Japan --

1. Focus of the regulations against business combinations in Japan

1. The Antimonopoly Act (hereinafter referred to as the “AMA”) prohibits business combinations such as shareholdings, interlocking officers, mergers, splits, joint share transfers, acceptance of assignment of business, etc., if the effects of such business combinations may be substantially to restrain competition in any particular field of trade.

1.1 Notification system and its thresholds

2. The AMA prescribes a prior notification system against business combinations such as share acquisitions and mergers, etc. Accordingly, the AMA sets the thresholds for notification such as follows: share acquisitions should be notified when the total amount of domestic sales of the share acquiring company as coupled with the domestic sales of companies, etc., other than the said company in a combined group of companies to which the acquiring company belongs exceeds 20 billion JPY in case of the total amount of domestic sales of a share issuing company and its subsidiaries exceeds 5 billion JPY. (See ICN Merger Template¹ 4-A for details).

3. No filing fee is charged for the notification.

1.2 Substantive test

4. As the “substantive test” for merger review, any business combinations such as mergers, shareholdings, or other transactions are prohibited if “the effect may be substantially to restrain competition in a particular field of trade.” [Article 10, 13, 14, 15, 15-2, 15-3 and 16 of the AMA]

5. The Japan Fair Trade Commission (JFTC) has published the “Guidelines to Application of the Antimonopoly Act concerning Review of Business Combination²” (hereinafter referred to as the “Merger Guidelines”). The Merger Guidelines prescribe, upon determination of any particular field of trade, as follows: “determined, in principle, in terms of substitutability for users” and “when necessary, substitutability for suppliers is also considered.” In addition, when it comes to the interpretation of the geographical range of the scope of a particular field of trade, the Merger Guidelines also prescribe as follows: “If users inside and outside a territory usually purchase a certain product irrespective of whether the geographic location of suppliers is inside or outside the territory...In this situation, the geographic range (of the scope of a particular field of trade) is defined as crossing national borders³.”

¹ http://www.jftc.go.jp/e-page/internationalrelations/icn-materials/ICN_Merger_Template_Japan_2010.pdf

² <http://www.jftc.go.jp/e-page/legislation/ama/RevisedMergerGuidelines.pdf>

³ An example of the case where a geographic range of a particular field of trade was defined as crossing national borders is “Establishment of joint venture for iron ore production by BHP Billiton and Rio Tinto.” (A summary of this case is explained in our contribution).

6. When it comes to the interpretation of “the effect may be substantially to restrain competition,” the Merger Guidelines prescribe as follows: “if the market structure is altered in a non-competitive way by the business combination, and if conditions are likely to emerge that would allow the company a certain latitude to manipulate price, quality, volume, and other conditions by acting unilaterally or coordinately with other companies.”

2. Review of notification system for business combination to ensure international consistency

7. Before the amendments to the AMA in 2009 (effective in January 2010), unlike merger regulations in major foreign countries, share acquisitions were only notified ex-post in Japan. This had impeded international cooperation, due to the differences in timing for notification between Japan and other countries, although cooperation in merger investigations and, as a result, coordination on potential competitive concerns among several competition authorities should bring merits for both competition authorities and the companies subject to the review on business combination, with the developments of globalization of the economy and the increase of the cases where several competition authorities investigate the same business combination simultaneously. Also, there existed the risk that the JFTC would impose some sort of cease and desist orders against the parties after other competition authorities had completed the examination of the business combination. For these reasons, a prior notification system similar to those for other business combinations such as mergers, etc., was introduced regarding share acquisitions through the amendments to the AMA in 2009.

8. In addition, since the notification thresholds for foreign companies were different from those applied to domestic companies in the system before the amendment of the AMA in 2009, there were some cases where the business combinations concerning foreign companies were not subject to notification, etc., although they should have been notified in light of their effects on the market in Japan. To address this problem, the same notification thresholds as applied to domestic companies have been applied to foreign companies since the amendments to the AMA in 2009.

9. Note: Other than the revisions described above, revisions, including simplification of percentage thresholds regarding voting rights with regard to acquisitions of shares, a raise in the amount of notification thresholds, etc., were also implemented pursuant to the amendments.

3. Cooperation in merger reviews with foreign competition authorities

3.1 Cooperation agreements or the like in the area of competition law

10. With regard to cooperation agreements related to the competition law, Japan has concluded bilateral agreements, such as the “Agreement between the Government of Japan and the Government of the United States of America concerning cooperation on anti-competitive activities (effective in 1999),” “Agreement between the Government of Japan and the Government of the European Community concerning cooperation on anti-competitive activities (effective in 2003)” and “Agreement between the Government of Japan and the Government of Canada concerning cooperation on anti-competitive activities (effective in 2005).” In addition, among the bilateral economic partnership agreements already signed and in force in Japan, the agreements with Singapore, Mexico, Malaysia, the Philippines, Chile, Thailand, Indonesia, Vietnam, and Switzerland contain chapters prescribing cooperation in the area of competition law. In these antimonopoly cooperation agreements and the chapters regarding competition in the economic partnership agreements, notification, cooperation in enforcement, coordination in enforcement, request of enforcement activity, consideration of important interests for the government of the other country, and so on are prescribed as their specific contents of cooperation applied to cases including business combinations. The JFTC, the competition authority in Japan, has actively engaged in cooperation with foreign competition authorities with regard to business combination cases across borders, based on the

antimonopoly cooperation agreements and the chapters regarding competition in the economic partnership agreements with the above-mentioned countries and based on the 1995 Council Recommendation of the OECD with the OECD member countries.

3.2 *Examples of cooperation with foreign competition authorities in merger review*

11. The chart below shows the recent cases in which the JFTC conducted reviews on business combinations in cooperation with the other competition authorities.

| Year | Case | Cooperating agencies | Results of reviews |
|------|--|--|--|
| 2005 | Share Acquisition of Guidant Corporation by Johnson & Johnson ⁴ | US Federal Trade Commission European Commission | Accepted on the condition of transfer of business |
| 2009 | Share Acquisition of Sanyo Electric Co., Ltd., by Panasonic Corporation. | US Federal Trade Commission European Commission | Accepted on the condition of transfer of business |
| 2010 | Share Acquisition of Varian, Inc., by Agilent Technologies, Inc. ⁵ | US Federal Trade Commission | Accepted on the condition of transfer of business |
| 2010 | Joint venture establishment between BHP Billiton and Rio Tinto for producing iron ore ⁶ | Australian Competition and Consumer Commission European Commission German Federal Cartel Office Korea Fair Trade Commission | The parties announced they would abandon the plan of the joint venture |

12. The outline of the share acquisition of Varian, Inc., by Agilent Technologies and the outline of the establishment of a joint venture for producing iron ore by BHP Billiton and Rio Tinto are explained as follows.

3.2.1 *Share acquisition of Varian, Inc., by Agilent Technologies*

13. Pursuant to the amendments to the AMA in 2009, a prior-notification system similar to that for other business combinations such as mergers, etc., was introduced regarding share acquisitions and the same notification thresholds as applied to domestic companies in Japan were to be applied to foreign companies. Against this background, this case is where a prior notification regarding a share acquisition was submitted to the JFTC based on the amended AMA and where the JFTC carried out a review of the business combination by exchanging information with the US Federal Trade Commission (USFTC).

- Outline of the case

In this case, Agilent Technologies, Inc., which manufactures and distributes analytical instruments, etc.⁷, planned to acquire 100% ownership of Varian, Inc., which also operates a similar business. Both companies have their HQs in the US, operating sales of analytical instruments all over the world, and they also sell their products in Japan through their Japanese affiliates, etc.

⁴ <http://www.jftc.go.jp/e-page/pressreleases/2005/Dec/051209.pdf>

⁵ <http://www.jftc.go.jp/e-page/pressreleases/2010/June/100609.pdf>

⁶ <http://www.jftc.go.jp/e-page/pressreleases/2010/October/101018rev.pdf>

⁷ Analytical instruments are the machines, apparatuses, or devices which qualitatively and quantitatively measure various factors of substance such as composition, nature, structure, state, etc., mainly used in industries such as oil, gas, pharmaceutical, food, semi-conductor, environment, etc.

- Conclusion of the JFTC

The JFTC analyzed the effects of the share acquisition on the analytical instruments market in Japan by investigating actual statuses of distribution, new entries, competing goods, trade with users for 3 competitive products such as Micro/Portable GC⁸, etc., because the share acquisition might have a significant impact on the competition of these products. This case was also subject to similar investigations by other competition authorities such as the USFTC and the European Commission (EC).

Regarding the particular fields of trade which the JFTC mainly investigated, concerns of serious harm to the competition, etc., were raised during the reviews by the USFTC and the EC. In response, the companies to the business combination proposed a remedy to the USFTC and the EC where they would transfer the business for these products to a third party which was expected to be a competitor to the concerned companies after the transfer. This remedy was also proposed to the JFTC and the JFTC concluded, based on the proposed remedy, that the share acquisition in this case would not substantially restrain competition.

3.2.2 *Establishment of a joint venture for iron ore production by BHP Billiton and Rio Tinto*

14. The JFTC, upon receiving a request for prior consultation from BHP Billiton and Rio Tinto (“the parties”), which operate businesses involving mining and sales of iron ore etc., on January 20, 2010, had undertaken a review of the proposed joint venture between the parties for iron ore production in west Australia.

15. In reviewing the business combination case, the JFTC received the submission of materials, etc., from the parties and conducted questionnaire surveys, etc., for overseas competitors to the parties in question and for domestic and overseas users (steel manufacturers) or the like. In addition to the JFTC, the Australian Competition and Consumer Commission, the European Commission, the German Federal Cartel Office, and the Korea Fair Trade Commission conducted reviews on the case respectively. The JFTC proceeded with its prior consultation review by exchanging information with these competition authorities.

16. On September 27, 2010, the JFTC made a notice of its concerns to the parties by noting that the proposed joint venture would substantially restrain competition in the field of the production and sale of (lumps and fines of) iron ores in the worldwide seaborne market. Since BHP Billiton and Rio Tinto made a press release on October 18, 2010, indicating they would abandon the proposed joint venture, the JFTC closed its prior consultation review on the proposed joint venture on the same day.

⁸ GC refers to gas chromatograph, which is a device that separates volatile specimens into individual components for analyzing the existence of specific substances.