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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

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Working Party No. 3 on Co-operation and Enforcement

DEFINITION OF TRANSACTION FOR THE PURPOSE OF MERGER CONTROL REVIEW

-- Japan --

18 June 2013

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 18 June 2013.

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [phone number: + 33 1 45 24 98 08 -- E-mail address: antonio.capobianco@oecd.org].

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1. Summary of merger regulations under the Antimonopoly Act and the "Definition" of merger transaction

1. Chapter IV of the Antimonopoly Act (hereinafter referred to as the “AMA”) prohibits (1)the acquisition or possession (hereinafter referred to as “holding”) of the shares of a company (including shares of partnership, the same shall apply hereinafter) (Article 10 of the AMA), (2)interlocking directorates (Article 13 of the AMA), (3)shareholding by a person other than a company (Article 14 of the AMA) or (4)a merger of companies (Article 15 of the AMA), (5)joint incorporation-type split or absorption-type split (Article 15-2 of the AMA), (6)joint share transfer (Article 15-3 of the AMA), or (7)acquisition of businesses, etc. (Article 16 of the AMA) (hereinafter referred to as a “business combination”), where it creates a business combination that may be substantially to restrain competition in any particular field of trade, or where a business combination is created through an unfair trade practice. Under the AMA, the acts described in (1) to (7) above constitute a "business combination."

2. The AMA prohibits any business combination that may be substantially to restrain competition in a particular field of trade. The AMA regulates business combinations because they can have an impact on competition in the market (a particular field of trade) through the forming, maintaining or strengthening of a relationship in which two or more companies operate a business in a united form, whether fully or partially by shareholding, mergers or other transactions (this relationship is hereinafter referred to as a “joint relationship”). For each business combination described in (1) to (7) above, the guidelines for business combinations (hereinafter referred to as the “Merger Guideline”) clearly indicates in which cases a joint relationship is to be formed, maintained or strengthened. For the details, please see the following discussions.

3. In addition, under the AMA, any company that meets certain criteria is required to notify the Japan Fair Trade Commission (hereinafter referred to as the “JFTC”) in advance of the formation of a business combination. 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. The details of the standards for prior notification differ according to the types of business combinations described in (1) to (7) above. Whether or not prior notification is required is generally determined based on the total amount of domestic sales of the company concerned, including its group companies. For example, in the case of the acquisition of shares, when the company acquiring shares (hereinafter referred to as a “shareholding company”) that is part of a group of combined companies[1] and whose total domestic sales exceed 20 billion yen acquires the shares of the company whose shares are acquired (hereinafter referred to as the “share issuing company”) whose total domestic sales, including those of its subsidiaries, exceeds 5 billion yen, and the percentage of voting rights held exceeds 20% or 50%, the company acquiring the shares is obliged to notify the JFTC of its plan.

4. Regarding the minority shareholding, an interlocking directorate, or a joint venture that may become an issue for a round table, the views of the "joint relationship" based on the guidelines for business combinations and the related cases will be shown below.

[1] A group consisting of the company, its subsidiary companies, its parent company which is not a subsidiary company of another company, and subsidiary companies of the said parent company (excluding the said company and subsidiary companies of the said company)

2. Minority Shareholding

2.1 Merger Guideline

5. Whether a joint relationship is to be formed, maintained or strengthened between the shareholding company and share issuing company and is to be subject to merger review or not is basically determined considering the ratio of voting rights held (the ratio of the voting rights pertaining to shares held by the shareholding company to all the voting rights of the share issuing company, the same shall apply hereinafter) and the order of voting rights held. In addition, other factors will be considered in some cases. The detail is as follows. In the case of (2) or (3), transactions would fall under minority shareholdings.

(1) When the ratio of the total number of voting rights pertaining to shares held by companies, etc. that belong to the group of combined companies (the group of combined companies prescribed in paragraph (2), Article 10 of the AMA, the same shall apply hereinafter) to which the shareholding company belongs to all of the voting rights of the share issuing company exceeds 50%.

(2) When the ratio of the total number of voting rights pertaining to shares held by companies, etc. that belong to the group of combined companies to which the shareholding company belongs to all of the voting rights of the share issuing company exceeds 20% and the said ratio stands alone as the top-ranked.

(3) Excluding the cases described above, it is considered that most of the cases do not require business combination review in general but the following items will be taken into consideration to determine whether a joint relationship is formed, maintained or strengthened. Regarding such cases, the ratio of voting rights held is 10% or less, or and the shareholding company is not ranked among the top three holders of voting rights, a joint relationship is not formed, maintained or strengthened so that in general the case does not require a business combination review.

   (a) The extent of the ratio of voting rights held

   (b) The rank as a holder of voting rights, differences in and distribution of the ratios of voting rights held among the holders, and other relationships between holders

   (c) Cross-holding of voting rights (the share issuing company concurrently holds voting rights of the shareholding company) and other mutual relationships between the companies involved (hereinafter referred to as “parties”)

   (d) Whether officers or employees of one of the parties are officers of the other parties

   (e) Trading relationship between the parties (including financial relationship)

   (f) Relationships between the parties based on business alliance, technical assistance and other agreements or agreements

   (g) Items (a) through (f), when including companies that already have joint relationships with the parties

2.2 The case of minority shareholdings

Acquisition of shares of Fuji Heavy Industries Ltd. by Toyota Motor Corporation (Case No.4 of major business combinations in FY 2008)

6. In this case, Toyota Motor Corporation (hereinafter referred to as Toyota) engaged in the manufacture and sale of automobiles plans to acquire shares of Fuji Heavy Industries Ltd. (hereinafter referred to as FHI), which is engaged in the same business. The concerned law provision is Article 10 under the AMA.

7. Because Toyota will increase its ratio of voting for FHI from 9.50% to 16.61% by this acquisition of shares, the JFTC made a following judgment on whether a joint relationship between Toyota and FHI was formed and the minority shareholdings would become subject to review of business combination.

8. "Toyota has been conventionally the single top shareholder of FHI. If this acquisition of shares is put into practice, the difference in the voting ratio between Toyota and the second shareholder will be 10% or more. In addition, FHI plans to develop small vehicles jointly with Toyota, to be entrusted with the production of such vehicles, and to have light vehicles supplied by OEM from Daihatsu Motor Co., Ltd. (hereinafter referred to as Daihatsu).

9. However, even after this acquisition of shares,

(1) The parties concerned will be doing business independently based on their own management strategies and will maintain their brands and sales networks as they were before.

(2) There is no interlocking directorates between FHI and Toyota as well as between FHI and Daihatsu or Hino Motors, Ltd., both of which are in a joint relationship with Toyota.

10. Considering these situations and on the basis of the explanation from the parties concerned, it is considered that FHI will continue to compete with Toyota mainly with regular passenger automobiles as its major products even after the increase of Toyota's voting ratio for FHI to 16.61%. Therefore, the JFTC judges that this acquisition of shares would not establish a joint relationship between the parties concerned and they would not be subject to a business combination review."

3. Interlocking Directorates

11. In the following cases, a joint relationship is formed, maintained or strengthened between interlocking companies when an officer (a trustee, director, executive officer, managing member, auditor, company auditor or any person with an equivalent position, a manager or other employee in charge of business of the main or branch office) or an employee of a company serves concurrently as an officer of another company and that interlocking requires a review.

(1) The officers or employees of one company comprise a majority of the total number of officers of another company.

(2) Interlocking directorates in which the directors have the authority to represent both companies.

12. Excluding item 1 above, the following items will be taken into consideration to determine whether a joint relationship is formed, maintained or strengthened.

(1) Whether an interlocking directorate is formed by full-time or representative directors

(2) The ratio of officers or employees of one of the interlocking companies to the total number of officers of one of the other interlocking companies

(3) Mutual holding of voting rights between the interlocking companies

(4) The trading relationships (including financial relationships), business alliance and other relationships between the interlocking companies

4. Joint Venture

13. Merger Guideline defines a joint investment company (JV) as "a company jointly established or acquired by two or more companies through an agreement to pursue operations necessary to achieve mutual benefits".

14. Also, Merger Guideline defines the shareholdings as "holding shares of other companies". In the case where JV is established, direct shareholding relationship between the investing companies is not formed. However, a joint relationship is indirectly formed, maintained or strengthened through the establishment of the JV. In addition, if the business activities of the shareholding companies are integrated through the establishment of the JV, this fact itself indicates that there will be an impact on competition. In light of these facts, Merger Guideline explicitly states that establishing JV can be subject to the merger review under the framework for shareholdings regulation.

15. The JFTC will consider trading relationships between the parties and relationships based on business alliances and agreements when determining whether the establishing JV should be reviewed.

5. Exemptions

16. As described above, companies are obliged to notify the JFTC of their plan with regard to merger which would fall under certain requirements. However, merger transaction between companies which belong to the group of combined companies would be subject to the obligation of prior notification to the JFTC of their plan (proviso in paragraph (2) of Article 15, 15-2, 15-3 and 16 of the AMA).

17. Also, Merger Guideline states that when merger transactions such as shareholdings, interlocking directorate, merger, split and acquisition of business would be conducted within the group of combined companies, most of them would not become subject to merger review because in principle joint relationship would not be formed or strengthened.