

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

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Working Party No. 3 on Co-operation and Enforcement

DISCUSSION ON INTERNATIONAL CO-OPERATION

-- Japan--

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INTERNATIONAL CO-OPERATION IN MERGER REVIEW

1. Introduction

1. In recent years, there have been a growing number of international activities of enterprises, which may affect several jurisdictions. In order to cope with the anticompetitive effect of these activities on Japan, the JFTC is keeping a close-knit co-operative relationship with the competition authorities of other countries. More specifically, the JFTC is engaging in international co-operation in cartel investigations, as we introduced to the roundtable of the Global Forum in February, 2012¹. Furthermore, given that there have been a growing number of merger cases that require simultaneous reviews by more than one competition authority, the JFTC is also engaging in international co-operation in merger review. We will now introduce international co-operation in merger review.

2. We will describe the framework for international co-operation in merger review (part 2) and the case examples where the JFTC co-operated with foreign competition authorities in merger review (part 3). Part 4 will focus on progress in international co-operation in merger review.

2. Frameworks for International Co-operation in Merger Review

3. The JFTC is to engage in international co-operation in merger review based on the following frameworks.

2.1. Agreements between Governments or Economies concerning Co-operation on Anticompetitive Activities and Economic Partnership Agreements

4. The government of Japan concluded Agreements between Governments or Economies concerning Co-operation on Anticompetitive Activities with United States of America (1999), European Commission (2003) and Canada (2005) as co-operative agreements regarding competition law. These are administrative implementation agreements concluded independent of the vote by the Japanese Diet, which stipulate procedures regarding: the notification of enforcement activities, co-operation (assistance), the co-ordination of the enforcement activities, the request of the enforcement activities, the consideration of the important interests of other governments, regular meetings between the competition authorities, the handling of information provided, etc. The JFTC engages in co-operation such as the notification, liaison and co-ordination of enforcement activities etc. with the competition authorities in the U.S., EU, and Canada based on these agreements.

5. In addition, the government of Japan concluded 11 Economic Partnership Agreements (hereinafter referred to as “EPA”), which include chapters concerning competition. Moreover, there are concrete provisions on co-operation in the competition chapters in EPAs between Japan and Singapore (put into effect in 2002), Mexico (put into effect in 2005), Thailand (put into effect in 2007), Indonesia (put into

¹ [DAF/COMP/GF/WD\(2012\)42](#)

effect in 2008), Switzerland (put into effect in 2009) and Peru (put into effect in March, 2012) which are similar to the provisions of agreements concerning co-operation on anticompetitive activities, as described above. The JFTC can carry out co-operation such as the notification, liaison and co-ordination of enforcement activities with these competition authorities based on the EPAs.

2.2. *Revised Recommendation of the Council Concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade (1995)*

6. Based on the 1995 Recommendation, the JFTC carries out co-operation such as the notification, liaison and co-ordination of enforcement activities with competition authorities of OECD member countries which have not concluded agreements concerning co-operation on anticompetitive activities or EPA with the Japanese government.

3. *Examples of Co-operation with Foreign Competition Authorities in Merger Review*

7. The chart below shows the recent cases in which the JFTC conducted merger reviews in co-operation with the other competition authorities.

| Year | Case | Co-operating agencies | Results of reviews |
|-------------|---|--|--|
| 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. | US Federal Trade Commission | Accepted on the condition of transfer of business |
| 2010 | Establishment of a joint venture between BHP Billiton and Rio Tinto for producing iron ore | 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 |
| 2011 | Proposed M&As of Hard Disc Drive (HDD) Manufacturing and Sales Entities (a. Share Acquisition of Viviti Technologies Ltd. by Western Digital Ireland, Ltd. b. Transfer of the HDD business of Samsung Electronics Co., Ltd. by Seagate Technology International) | US Federal Trade Commission European Commission Korea Fair Trade Commission | Regarding a., accepted on the condition of transfer of business. Regarding b., accepted without any conditions. |

8. The outline of the establishment of a joint venture for producing iron ore by BHP Billiton and Rio Tinto, and the outline of proposed M&As of Hard Disc Drive (HDD) manufacturing and sales are explained as follows:

3.1. *Establishment of a joint venture establishment between BHP Billiton and Rio Tinto for producing iron ore*

9. 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, the JFTC had undertaken a review of the proposed joint venture between the parties for iron ore production in west Australia.

10. 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 of 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, European Commission, 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.

11. 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 ore in the global seaborne market. Since BHP Billiton and Rio Tinto made a press release on October 18, 2010, indicating that they would abandon the proposed joint venture, the JFTC closed its prior consultation review on the proposed joint venture on the same day.

3.2. Proposed M&As of Hard Disc Drive (HDD) Manufacturing and Sales Entities

12. This case concerns the following two business activities in the field of trade of HDD manufacturing and sales, and these activities were planned simultaneously.

- a) Share acquisition of the shares of Viviti Technologies Ltd.(former Hitachi Global Storage Technologies Holdings Ltd.) by Western Digital Ireland, Ltd. (hereinafter the “WDI”) (hereinafter “the acquisition of shares”)
- b) Transfer of the HDD business of Samsung Electronics Co., Ltd. (hereinafter “the transfer of business”) by Seagate Technology International (hereinafter the “STI”)

13. Regarding these two plans, the JFTC has received a submission respectively pursuant to the provisions of the Antimonopoly Act, and determined that a more detailed review is required; the JFTC requested that companies submit the necessary reports etc., and then started the secondary review. The JFTC proceeded its review with co-operation on liaison and co-ordination with other competition authorities; U.S. Fair Trade Commission, European Commission and Korean Fair Trade Commission.

14. As a result of the review regarding the acquisition of shares, the JFTC acknowledged that, given the remedies (transfer of business of HDD manufacturing facility) proposed by WDI, competition in the field of trade would not be substantially restrained by the acquisition of shares. On November 24, the JFTC issued a notification to WDI that a cease and desist order would not be issued.

15. Moreover, the JFTC acknowledged, without any condition, that competition in the field of trade would not be substantially restrained by the transfer of business. On December 15, the JFTC issued a notification to STI that a cease and desist order would not be issued.

4. Progress in International Co-operation in Merger Review—ICN (International competition Network)’s Framework for Merger Review co-operation²

16. As described above, recently, in accordance with the progress of globalization such as internationalization of enterprises activities, there have been a growing number of international merger cases that require simultaneous reviews by more than one competition authority. Given this trend and in order to ensure that a competition authority coping with international merger cases can effectively enforce the review in co-operation with authorities from other countries, it is necessary to establish a framework for more systematic co-operation.

17. Based on such recognition, the JFTC had propounded the establishment of an international co-operative framework for merger review which is intended to facilitate effective and efficient co-operation

² <http://www.internationalcompetitionnetwork.org/uploads/2011-2012/icn%20framework%20for%20merger%20review%20cooperation.pdf>

between and among member agencies of the ICN. The framework has been approved in the Annual Conference of the ICN (April 2012 in Rio de Janeiro).

18. Main contents of the framework are as follows:

- a) Compiling a contact list of liaison officers in each member jurisdiction of the ICN.
- b) Procedure of contact and information exchange with interested competition authorities.

19. The characteristics of the framework are as follows:

- a) The framework is open to all ICN member agencies.
- b) The framework does not create any legally binding rights or obligations.

20. The agencies which participate in the framework can engage in co-operation such as information exchange with interested agencies in merger review insofar as it is compatible with international agreements or the law in each jurisdiction with due considerations to the confidentiality obligation. Participating in the framework can achieve a cut-down in competition authority's costs for searching contact points when they are considering co-operating with other interested agencies. They can have the benefit of being able to communicate with interested agencies more rapidly, and launch the merger review more swiftly.

21. However, it should be kept in mind that regarding merger cases where more than one agency is reviewing, the liaison and co-ordination among the agencies through this framework does not result in the prevention of each agency's own independent decision on the merger case, nor does it require some kind of results from the liaison and co-ordination.