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

22-Jan-2008

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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

DAF/COMP/WP3/WD(2008)7
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Working Party No. 3 on Co-operation and Enforcement

ANTITRUST ISSUES INVOLVING MINORITY SHAREHOLDING AND INTERLOCKING DIRECTORATES

-- Japan --

19 February 2008

The attached document is submitted by Japan to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 19 February 2008.

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JT03239067

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1. Relevant Provisions in the Antimonopoly Act

1. The Antimonopoly Act ("AMA"), the Japanese competition law, has provisions that regulate shareholding by a company (Article 10) and interlocking directorates (Article 13) in the chapter IV on the regulation of business combinations. (The scope of Article 10 is not limited to "minority" shareholding.)

2. Article 10-(1) of the AMA stipulates that no corporation shall acquire or hold shares of any other corporations where the effect of such an acquisition or holding of shares may be to substantially restrain competition in any particular field of trade. (In addition, Article 10-(2) requires a corporation whose assets and total assets exceed certain thresholds to submit a written report to the JFTC within 30 days after it acquires or holds the shares of another corporation whose total assets exceed certain thresholds, if the voting right-holding ratio[1] exceeds 10%, 25% or 50% by this shareholding.)

3. Article 13-(1) of the Act stipulates that neither an officer nor an employee of a corporation shall hold a position at the same time as an officer of another corporation where the effect of such an interlocking directorate may be to substantially restrain competition in any particular field of trade.

2. Subject of the Review of Business Combinations

4. The AMA prohibits a business combination if its effect may be to substantially restrain competition in a particular field of trade. The Act regulates business combinations because they can have an impact on competition in the market through the forming, maintaining or strengthening of the relationship where more than one company conducts business activities in a united form, fully or partially by shareholding or through other transactions (this relationship is hereinafter referred to as a "joint relationship"). Accordingly, if two or more companies continue to engage in business activities as independent competitive units though there are shareholdings or interlocking directorates between them, there is little impact on competition. Thus, these types of arrangements should rarely be prohibited.

5. Based on this fundamental policy, the Japan Fair Trade Commission has published the Business Combination Guidelines, and has identified shareholding and interlocking directorates that are subject to the review of business combinations as follows.

2.1 Shareholding

2.1.1 Shareholding by a Company

6. A joint relationship is to be formed, maintained or strengthened between an acquiring company and an acquired one in the following cases:

a) When the voting right-holding ratio exceeds 50%. However, if the acquiring company establishes the acquired company and the former acquired all of the voting rights of the latter concurrently with the establishment, it usually falls outside the scope of the review of business combinations; and

b) When the voting right-holding ratio exceeds 25% and the acquiring company is the sole leading holder of voting rights.

[1] The ratio of voting rights for share held by an acquiring company to the overall shareholder's voting rights in a share-issuing company (acquired company).

7. Other than in the cases described above, when the ratio of voting right-holding ratio exceeds 10% and the acquiring company is ranked among the top three voting right-holders, the following items will be taken into consideration in order to determine whether a joint relationship is formed, maintained or strengthened:

a) The extent of voting right-holding ratio;

b) The rank as a voting right-holder, the difference in the voting right-holding ratios and distribution among the holders, and other relationships among holders;

c) The cross-holding of voting rights (the acquired company concurrently holds voting rights of the acquiring company) and other mutual relationships among the companies involved (hereinafter referred to as "parties" in Part 2);

d) Whether officers or employees of one of the parties are holding the position of officers of the other parties;

e) The trading relationship between the parties (including the financial relationship);

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

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

8. In the event of a joint investment company (a company which was jointly established or acquired by two or more companies through a contract to pursue necessary operations in order to achieve mutual benefits; the same hereinafter), trading relationships between the parties and relationships based on business alliance, contracts, etc. will be considered in order to determine whether the business combination should be reviewed. (As far as a joint relationship between the investing companies is concerned, a joint relationship is indirectly formed, maintained or strengthened through the joint investment company. Accordingly, if the business activities of the shareholding companies are integrated through the establishment of the joint investment company, this fact itself indicates that there will be an impact on competition.)

2.1.2 Shareholdings by a Person Other than a Company

9. "A person other than a company" means a person other than a joint share company, a mutual company, a limited liability company, an ordinary partnership, a limited partnership or a foreign company as prescribed by the Commercial Code and other laws and ordinances; it does not matter whether the person is an entrepreneur or not. Specifically, incorporated foundations, corporate juridical persons, special corporations, regional public bodies, cooperatives, associations, natural persons and all other persons that can hold shares are included. The existence of shareholdings by a person other than a company will be examined in accordance with item 1.1 above.

2.1.3 Scope of a Joint Relationship

10. If a joint relationship is formed, maintained or strengthened between the parties concerned through the shareholdings, a joint relationship is also formed, maintained or strengthened among the parties and the companies which already have a joint relationship with the parties.

2.1.4 Shareholdings which do not fall within the Scope of the Review of Business Combinations

11. In the case of a.) below, a joint relationship is not formed nor strengthened so that, in general, it does not fall within the scope of the review of business combinations. In addition, even in the cases of item b.) to item f.) as below, a business combination is not formed nor strengthened so that, in general, most of them are not considered to fall within the scope of the review of business combinations. However, in the case that a joint relationship is formed or strengthened between a company, a subsidiary[2] or with sister companies[3] and other shareholders, such a joint relationship falls within the scope of the review of business combinations.

a) The acquiring company establishes the acquired company and the former acquired all of the voting rights of the latter concurrently with the establishment;

b) A company acquires the voting rights of the subsidiary of its subsidiary;

c) A company acquires the voting rights of its sister company;

d) A company acquires the voting rights of a subsidiary of its sister company;

e) A company acquires the additional voting rights of another company more than 50% of whose total shareholders' voting rights are jointly held by the acquiring company and its sister company; and

f) A company acquires the voting rights of another company where two or more sister companies jointly hold more than 50% of the total shareholders' voting rights of the acquiring and acquired company respectively.

2.2 Interlocking Directorates

2.2.1 Scope of Officers

12. An "officer" is defined in Article 2 (3) of the AMA as "a trustee, director, executive, partner with unlimited liabilities and executive power, an auditor or any person with a similar position, a manager or other employee in charge of the business of the main or branch office". Thus, officers are directors and auditors of joint share companies, limited liability companies and mutual companies; managers defined by the Companies Act (Article 10); and other employees in charge of business under the Companies Act (such as the general manager of a head office, a branch manager, the head of a business division) and the like.

13. A "person with a similar position" refers to a person who, while not a director or auditor, with the title of adviser, counselor, consultant or other, actually participates in the management of the company by attending board of directors' meetings or by handling other measures.

14. A person having only the title of division manager, department manager, section manager or supervisor is an employee, not an "officer".

15. Further, the restriction on interlocking directors will not apply if an officer or an employee of a company completes retirement procedures and is then appointed as an officer of another company.

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2 A company of which another company holds more than 50% of its total shareholders' voting rights.

3 Companies of which the same company holds more than 50% of their total shareholders' voting rights.

2.2.2 Joint Relationships through Interlocking Directorates

16. In the following cases, a joint relationship is formed, maintained or strengthened when an officer or an employee of a company serves concurrently as an officer of another company and that interlocking is within the scope of the review of business combinations:

a) The officers or employees of one company comprise a majority of the total number of officers of another company; and

b) Interlocking directorates hold the rights of representation of both companies.

17. Excluding item 16 above, the following items will be taken into consideration to determine whether a joint relationship is formed, maintained or strengthened:

a) Whether there is an interlocking directorate formed by the full-time or representative directors;

b) 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;

c) Mutual holding of voting rights' conditions between the interlocking companies; and

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

2.2.3 Scope of Joint Relationships

18. When a joint relationship is formed, maintained or strengthened between interlocking companies through interlocking directorates, a joint relationship is formed, maintained and strengthened between the companies, including those companies who already have a joint relationship with the interlocking companies.

2.2.4 Interlocking Directorates which are not within the Scope of the Review of Business Combinations

19. In cases such as those following below, a joint relationship is not formed, maintained or strengthened so that in general it is not within the scope of the review of business combinations:

a) Only those persons who do not have the right of representation serve concurrently as officers, and in either of the interlocking companies the ratio of officers or employees of the other company to the total number of its officers is 10% or less; and

b) Only those persons other than full-time officers serve concurrently in companies with 10% voting rights holding ratios or less, and in either of the interlocking companies the ratio of officers or employees of the other company to the total number of its officers is 25% or less.

20. In the cases of items (a) and (b) below, a joint relationship is not formed or strengthened so that in general it is not within the scope of the review of business combinations. In addition, even in the cases of items (c) to (f) below, a joint relationship is not formed or strengthened so that in general most of them are not considered within the scope of the review of business combinations. However, in a case in which a joint relationship is formed or strengthened with other shareholders, such a joint relationship is subject to the review of business combinations.

a) Interlocking directorates between a company and its subsidiary;

b) Interlocking directorates between sister companies;

c) Interlocking directorates between a company and a subsidiary of the company's subsidiary;

d) Interlocking directorates between a company and a subsidiary of the company's sister company;

e) Interlocking directorates between a company and a subsidiary whose total shareholders' voting rights are held, by more than 50%, by the company and its sister company; and

f) Interlocking directorates between companies where two or more sister companies of an identical company hold jointly more than 50% of the total shareholders' voting rights of both interlocked companies, respectively.

3. Cases

21. Some example cases are provided below where the JFTC regulated shareholding and interlocking directorates through its legal decision or pointed out problems on minority shareholding and/or interlocking directorates in response to consultations from companies. These cases are rare.

3.1 Case where Shareholding and Interlocking Directorates were Regulated by a Legal Decision: Case against Hiroshima Electric Railway Co., Ltd. and its Executives and Employees (Consent Decision made in 1972)

3.1.1 Facts

22. Hiroshima Electric Railway was operating train, tram, bus and other businesses in and around Hiroshima City, and persons A, B, C and D were its executives or an employee. Hiroshima Bus was operating bus and other businesses there.

23. Eight other companies were operating bus businesses in Hiroshima City, but most of their routes were located outside the City and were suburban routes. On the other hand, passenger transportation by tram and bus in Hiroshima City was being provided largely through both Hiroshima Electric Railway's tram rails and bus routes and Hiroshima Bus's bus routes, and they were competing in major areas.

24. Hiroshima Bus's three executives asked Hiroshima Electric Railway to acquire Hiroshima Bus's shares that were owned by these executives. In response to this offer, Hiroshima Electric Railway acquired a total of 110 thousand shares, which accounted for approximately 85% of all 130 thousand issued shares.

25. In addition, persons A, B, C and D were selected as board members or an auditor at a Hiroshima Bus shareholders meeting, and they acceded to these posts while maintaining executive or employee posts in Hiroshima Electric Railway. The total number of board members and an auditor within Hiroshima Bus was five and one, respectively.

3.1.2 Application of Provisions

26. Conduct by Hiroshima Electric Railway and persons A, B, C and D would substantially restrain competition in the field of passenger transportation by tram and bus in the major areas of Hiroshima City. Hiroshima Electric Railway violated Article 10-(1) of the AMA, and persons A, B, C and D violated Article 13-(1) of the Act.

3.1.3 Remedies

a) Hiroshima Electric Railway was ordered to sell 85 thousand shares of Hiroshima Bus out of 110 shares within seven days after the consent decision came into effect.

b) Persons A, B, C and D were ordered to resign as board members or an auditor of Hiroshima Bus within twenty days after the consent decision came into effect.

3.2 Cases where Problems on Minority Shareholding and/or Interlocking Directorates were Pointed Out in Response to Consultations from Companies

3.2.1 Acquisition of the Shares of JSAT Corp. by NTT Communications Corp. (FY 2000)

27. NTT Communications was a dominant company dealing in private line services using ground networks. JSAT was a satellite communications provider. NTT Communications handed over its two satellites to JSAT and made an 18.6% investment for JSAT.

28. The JFTC pointed out to the parties that their conduct would enhance JSAT's total business capability and might substantially restrain competition in the field of domestic private line services using satellites.

29. In response, the parties reported that they would take the following measures:

i) NTT Communications and JSAT would trade with each other under the same fair and appropriate conditions as those with other satellite communications providers;

ii) They would not jointly conduct material procurement, so that JSAT could not use NTT Communications' buying power;

iii) NTT Communications would not support JSAT through its unfair use of NTT Communications' selling power; and

iv) They would not tie up their advertisements. In addition, when JSAT made advertisements, NTT Communications would not support JSAT by using NTT Communications' advertising power, for example with NTT Communications' logo.

30. The JFTC judged that the parties' conduct would not substantially restrain competition in this particular field of trade if these measures were really carried out.

3.2.2 Dispatch of Board Members to Company B by Company A (FY 1997)

31. Company A was an influential manufacturer and distributor of product X. Company B was operating the same business as Company A. Company A dispatched two board members to Company B as the board members of Company B in order to restructure and stabilize Company B, whose business conditions had worsened due to intensive competition. Company A also owned approximately 30% of all issued shares of Company B and was the second largest shareholder.

32. The JFTC pointed out to the parties that Company A's conduct had formed a joint relationship between the two companies and might substantially restrain competition in the field of the production and distribution of product X.

33. In response, the parties reported that they would refrain from having the interlocking directorates and Company A would hold less than 25% of all issued shares of Company B.