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COMPETITION COMMITTEE**

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Working Party No. 3 on Co-operation and Enforcement

**ROUNDTABLE ON PROCEDURAL FAIRNESS: TRANSPARENCY ISSUES IN CIVIL AND
ADMINISTRATIVE PROCEEDINGS**

-- Japan --

16 February 2010

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item III of the agenda at its forthcoming meeting on 16 February 2010.

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1. Introduction

1. Since the Antimonopoly Act (“AMA”) is the basic rule of economic activities, it must be enforced with continuity and consistency by a neutral and fair institution. In this regard, Article 28 of the AMA stipulates that “the chairman and the commissioners of the Fair Trade Commission shall perform their authority independently.” The chairman and commissioners shall be appointed by the Prime Minister with the consent of both Houses of the Diet among persons who have knowledge and experience in law or economics (Article 29 of the AMA) and, in principle, the chairman or the commissioners may not, against their will, be dismissed from office while they are in office (Article 31 of the AMA).

2. As regards procedure on investigation against anticompetitive conduct (non-business combination) and procedure on review of business combination, other than the provisions of the AMA, the Japan Fair Trade Commission (JFTC) publishes various rules¹ and guidelines to strive to ensure fairness. When the JFTC intends to establish or revise a rule or guidelines, it conducts a public comment procedure on the draft and compiles an English version.

3. In this paper, we would like to introduce both (i) procedure on investigation against anticompetitive conduct (non-business combination) and (ii) procedure on review of business combination.

2. Procedure on Investigation against Anticompetitive Conduct

2.1 Ensuring Fairness by the AMA, the Rules and Guidelines

4. From the viewpoint of procedural fairness, in addition to the procedural provisions of the AMA (Section 2 of Chapter 8 (Article 45 to 70-22)), the JFTC has prescribed “Rules on Administrative Investigations by the Fair Trade Commission” (Investigation Rules) to strive to ensure the fairness of the investigation procedure.

5. The JFTC also publishes various guidelines to clarify the enforcement standards of the substantial provisions of the AMA, as well as to enhance transparency. Recently, to accompany an amendment of the AMA that added Exclusionary Private Monopolization and certain Unfair Trade Practices to the scope of surcharge payment orders, the JFTC published the “Guidelines for Exclusionary Private Monopolization under the Antimonopoly Act”² and revised the “Guidelines Concerning Unjust Low Price Sales under the Antimonopoly Act.”

6. In addition, the JFTC publishes a press release when it takes a legal measure or issues a warning and, regarding a caution and a closure of a case, also when it considers the case should be made public from the viewpoint of competition policy and the concerned party(ies) consent to the publication or the suspected violators want to make it public.

2.2 Investigation Procedure (See Annex 1)

7. In the investigations the JFTC carries out to find proof of violations of the AMA, there are “administrative investigations” and “compulsory investigations of criminal cases.” When the compulsory investigation procedure was introduced by an amendment of the AMA in 2005, the administrative

¹ In establishing rules with respect to the proceedings of cases, the JFTC shall keep in mind the need to ensure that the said proceedings are duly undertaken, including ensuring that the respondent has sufficient opportunity to state and prove his/her claims, etc. (Article 76 (2) of the AMA).

² <http://www.jftc.go.jp/e-page/pressreleases/2009/October/091028.pdf>

investigation procedure was also completely reviewed, then, the Investigation Rules and others were amended.

2.2.1 Procedure on administrative investigation

Administrative investigation

8. The JFTC is vested the authority of compulsory measures to carry out necessary investigations against suspected violations by the provisions of the AMA. This authority includes on-site inspections to the premises of entrepreneurs, etc., orders to submit the related materials, retention of the submitted materials, appearance orders and interrogation, and report orders (Article 47 of the AMA). In practice, the investigators appointed by the JFTC carry out investigations by using such authority. This authority of compulsory measures is the so-called indirect compulsory authority, that is, when a person does not obey the measure, he/she will be punished.

Notification on suspected violation

9. The investigator shall, when carrying out an on-site inspection, make available the document stating “Title of the case”, “Main points of the alleged fact violating the provision of the Act” and “Applicable provisions of the Act” (“Notification on Suspected Violation”) for the concerned persons (Section 20 of the Investigation Rules).

10. The “Title of the case” is decided from the viewpoint to clarify the scope of the suspected violator(s). It contains (i) the type of business of the suspected violator(s) (E.g. manufacturer, wholesaler, retailer, etc.), (ii) the concerned good(s) (and/or service(s)) (E.g. cathode ray tubes for televisions) (for cartel cases) or the name(s) of suspected violator(s) (for unilateral conduct cases) in general.

11. The “Main point of the alleged fact violating the provision of the Act” is described as a short summary of the suspected violation and is based on the requirements of a violation of the AMA.

12. The “Applicable provisions of the Act” is concentrated on Article 3 (prohibition of private monopolization and unreasonable restraint of trade (cartel)) and Article 19 (prohibition of unfair trade practices) among the substantial provisions of the AMA. The JFTC tries to identify one applicable provision for each case; however, as regards unilateral conduct cases, sometimes the JFTC has to describe both Article 3 (prohibition of private monopolization) and Article 19 (prohibition of unfair trade practices).

13. In practice, at premises subject to the on-site inspection, the investigator refers the notification to the representative of the said premises at the beginning of the inspection. By this notification, the concerned persons are informed for the first time of the alleged fact violating the provision of the AMA.

14. This procedure was introduced by the complete amendment of the Investigation Rule in 2007 to ensure the concerned persons’ right of defense.

15. When taking the above measures (submission order, etc.), the investigator shall take measures by serving the stipulated document that indicates the “Title of the case”, “Requested matters” and “Penal provisions of the Act in the event of default” (Section 9 of the Investigation Rules).

16. If dissatisfied with the said measure, any person who was subject to the measures may make a motion for objection to the JFTC by a document stating the grounds (Section 22 of the Investigation Rules).

Cease and desist order

17. As a result of an investigation, if a violation of the AMA is found, the JFTC issues a cease and desist order to eliminate the violation (Article 49, Article 7, etc., of the AMA). From the viewpoint to ensure procedural fairness, the AMA stipulates that when the JFTC intends to issue a cease and desist order, in advance, it shall notify the expected content of the order, etc. (“Advance notification”), and shall provide the person who is to be the addressee of the cease and desist order an opportunity to express opinions and to submit evidence (Article 49 (3) to (5) of the AMA).

18. Advance notification is served by a document stating the matters, including the “tentative content of the cease and desist order,” “the facts found by the JFTC and the application of law thereto” and “the opportunity to present his or her opinions in writing and to submit evidence in support thereof to the Commission and the deadline therefore” (Section 24 (1) of the Investigation Rules).

19. The JFTC may, when recognizing that there is justifiable reason, extend the deadline upon its own motion or upon application (Section 24 (2) of the Investigation Rules).

20. When a person who received the notice or an appointed representative makes a motion, and when there are other necessities, the investigator shall explain the description of the document (Section 25 of the Investigation Rules).

21. A person who received the notice may state opinions and provide evidence in writing. The JFTC may, when recognizing that there is a particular necessity, have the person state his or her opinion orally (Section 26 of the Investigation Rules).

Surcharge payment order

22. If a violation corresponds to unreasonable restraint of trade, such as price fixing, bid-rigging, etc., or, private monopolization or certain types of unfair trade practices³, the JFTC issues a surcharge payment order (Article 7-2 etc. of the AMA). As regards a surcharge payment order, concerned persons will be given the notification on the expected content of the order and an opportunity to express their opinions and to submit evidence in advance, as well as a cease and desist order (Paragraph 6 of Article 50 of the AMA). The amount of surcharge is calculated based upon the sales amount related to the violation and certain rates which are set depending on the types of the violation, the types of business and the scales of the concerned person.

2.2.2 Procedure on compulsory investigation of criminal cases

Compulsory investigation of criminal cases

23. An amendment of the AMA in 2005 introduced the procedure on compulsory investigation of criminal cases. The JFTC may execute authority for compulsory investigation against cases suspected to correspond to criminal accusation, and conduct investigations through visits, searches, seizures, etc., by obtaining a warrant from the judicial court (Article 102 and 103 of the AMA). The JFTC shall file an accusation with the Prosecutor General if, as a result of an investigation, a violation corresponding to an accusation is found (Article 74 of the AMA). The introduction of the procedure on compulsory

³ When the amendment of the AMA took effect on January 1, 2010, private monopolization and certain types of unfair trade practices (Unjust low price sales, Discriminatory pricing, Concerted refusal to trade, Resale price maintenance and Abuse of dominant bargaining position) became the scope of conduct subjected to surcharges in addition to existing unreasonable restraint of trade and control monopolization.

investigation of criminal cases aimed to enhance the evidence-collection ability of the JFTC, as well as its ability to appropriately conduct an investigation against cases suspected of corresponding to criminal accusations based on a warrant.

Criminal penalties

24. Any person (a director, an officer or an employee of a judicial person) that has affected unreasonable restraint of trade or private monopolization shall be punished by imprisonment of no more than five years or by a fine of no more than five million yen (Article 89 of the AMA). Also, the said judicial person shall be punished by a fine of no more than 500 million yen (Article 95 of the AMA). Criminal punishment shall be imposed only when a criminal accusation is filed by the JFTC. The JFTC has a policy to prosecute the cases where administrative measures are not enough to attain their objectives, such as vicious and serious violations or repeated violations.

3. Procedure on Review of Business Combination

3.1 Securing transparency by guidelines, etc.

25. The JFTC publishes the “Guidelines to Application of the Antimonopoly Act concerning Review of Business Combinations” to improve transparency and predictability regarding the review of business combinations. These guidelines illustrate (i) the categories of business combinations that are to be reviewed, (ii) the criteria for defining a market, (iii) the meaning of “may be substantially to restrain competition”, (iv) the analytical framework and the criteria for assessing whether a business combination may be substantially to restrain competition and (v) the examples of remedies.

26. On the other hand, in many cases, the parties voluntarily hold prior consultations with the JFTC in advance of prior notifications to avoid risks, such as blocking of the merger. (i) To ensure the transparency and fairness of prior consultations are the same as for the statutory procedures, and (ii) to enhance the predictability of the judgment in business combination reviews, the JFTC published “Policies dealing with Prior Consultations regarding Business Combination Plans” (“Prior Consultation Policies”) in December 2002.

27. In addition, the JFTC publishes details of the review on some cases among those in which notification has been accepted or prior consultation has been made and which are thought to be helpful as a reference to entrepreneurs planning business combinations.

3.2 Prior consultation (See Annex 2)

3.2.1 The initiation of prior consultation

28. When parties apply for prior consultation concerning business combination plans, as a general rule, within 20 days from the day on which materials showing the concrete contents of the business combination plans are submitted, if the JFTC determines that additional materials are not required, then it shall provide notice of such, and in the event that it deems that additional materials are required, the JFTC shall present a list of additional materials in writing. In order to smoothly initiate prior consultation, the parties, before applying for prior consultation, can make inquiries to the JFTC concerning the general outline of the AMA and the content of the materials showing the concrete contents of business combination plans, etc. (3 (1) of the Prior Consultation Policies).

29. The parties shall be able to submit any materials or written opinions, etc., that they believe should be tendered, not only at the time of initiating prior consultation, but at any time during the JFTC’s review process (3 (2) of the Prior Consultation Policies).

3.2.2 *Phase I review*

30. From the day on which notice is provided to the parties that they are not required to submit additional materials, as noted in a. above, or from the day that additional materials are submitted in the event that a list of additional materials is required, the JFTC shall commence the review (this is referred to as the “Phase I review”), and will, as a general rule, within 30 days, either notify the parties that the business combination plan has no issues relating to the AMA or that a further detailed review (this is referred to as the “Phase II review”) is required (3 (3) of the Prior Consultation Policies).

31. In the event notice is given that a phase II review is required, the JFTC will, having identified the products and the geographic scope that will become the subject of the review, explain the specific points at issue concerning the AMA and request the submission of concrete materials which are judged to be required to undertake a phase II review (4 (1) of the Prior Consultation Guidelines).

3.2.3 *Phase II review*

32. Following notice to the parties that a phase II review is required, the JFTC will initiate a phase II review. From the day on which the parties submitted the concrete materials requested, as noted in b. above, the JFTC will, as a general rule, within 90 days, respond in writing on the results of the phase II review, including the reasons for those results, and make a public announcement of the results (4 (2) e of the Prior Consultation Policies).

33. In the event that said plan is a non-public plan, the parties are required to undertake to make a public announcement of said plan because the JFTC needs to conduct interviews with suppliers, etc., during the phase II review (4 (2) b of the Prior Consultation Policies).

34. Following notice to the parties that a phase II review is required, and after the parties have undertaken to make a public announcement of the non-public plan, the JFTC will make a public announcement that a phase II review will be conducted in relation to said business combination plan. After the JFTC has made a public announcement that a phase II review will be conducted, any persons who hold an opinion in relation to said business combination plan may, within 30 days, submit their opinions in writing to the JFTC (4 (2) b and c of the Prior Consultation Policies).

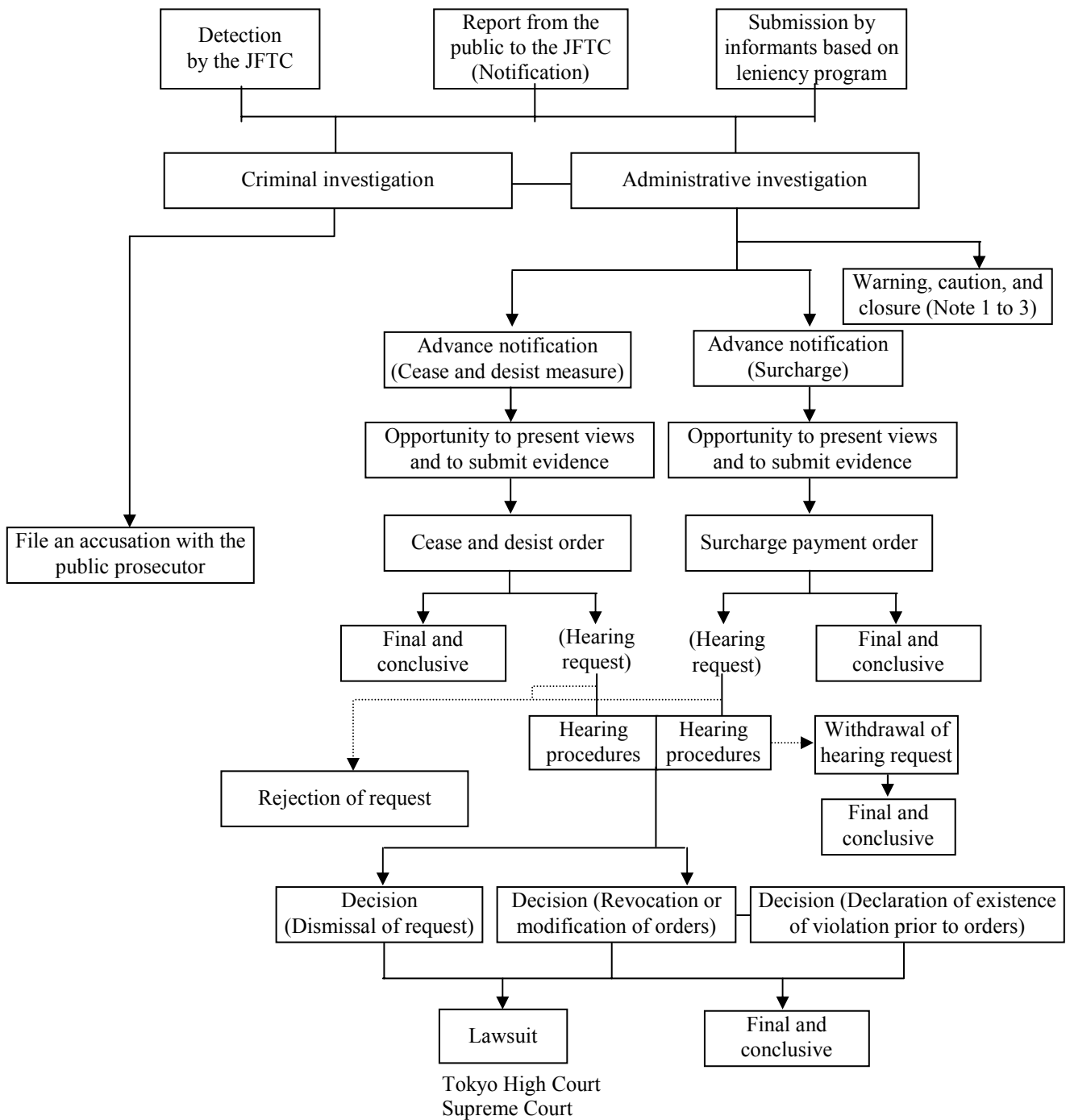
35. In the event that the JFTC seeks to provide notice of problems with said business combination plan in relation to the provisions of Chapter 4 of the AMA during the phase II review process, then the JFTC shall provide the basis (certification of facts asserted by the parties, and the results of investigations, analyses, or surveys conducted by the JFTC) for the judgment that there is a problem, with the exception of parts which cover the business secrets of other companies (4 (2) d of the Prior Consultation Policies).

3.3 *Statutory proceedings (See Annex 3)*

36. The JFTC shall judge whether it should request the parties to submit additional information or whether there is no problem in light of the provisions of the AMA within 30 days from the acceptance of a notification on a business combination, such as a share acquisition, merger, etc. Also, the JFTC shall judge whether there is any problem in light of the AMA, either 90 days from the acceptance of any additional information necessary for the review, or 120 days from the acceptance of the original notification, whichever is later (Article 10 (9), Article 15 (3) etc. of the AMA). If any problems exist in light of the provisions of the AMA, in advance, the JFTC notifies the parties and gives them an opportunity to present views and to submit evidence, then issues a cease and desist order, such as blocking of the business combination (Article 17-2 of the AMA). Provisions regarding advance notification and an opportunity to present views and to submit evidence are the same as for cease and desist orders in the procedure on administrative investigations for non-business combination (See above).

ANNEX 1

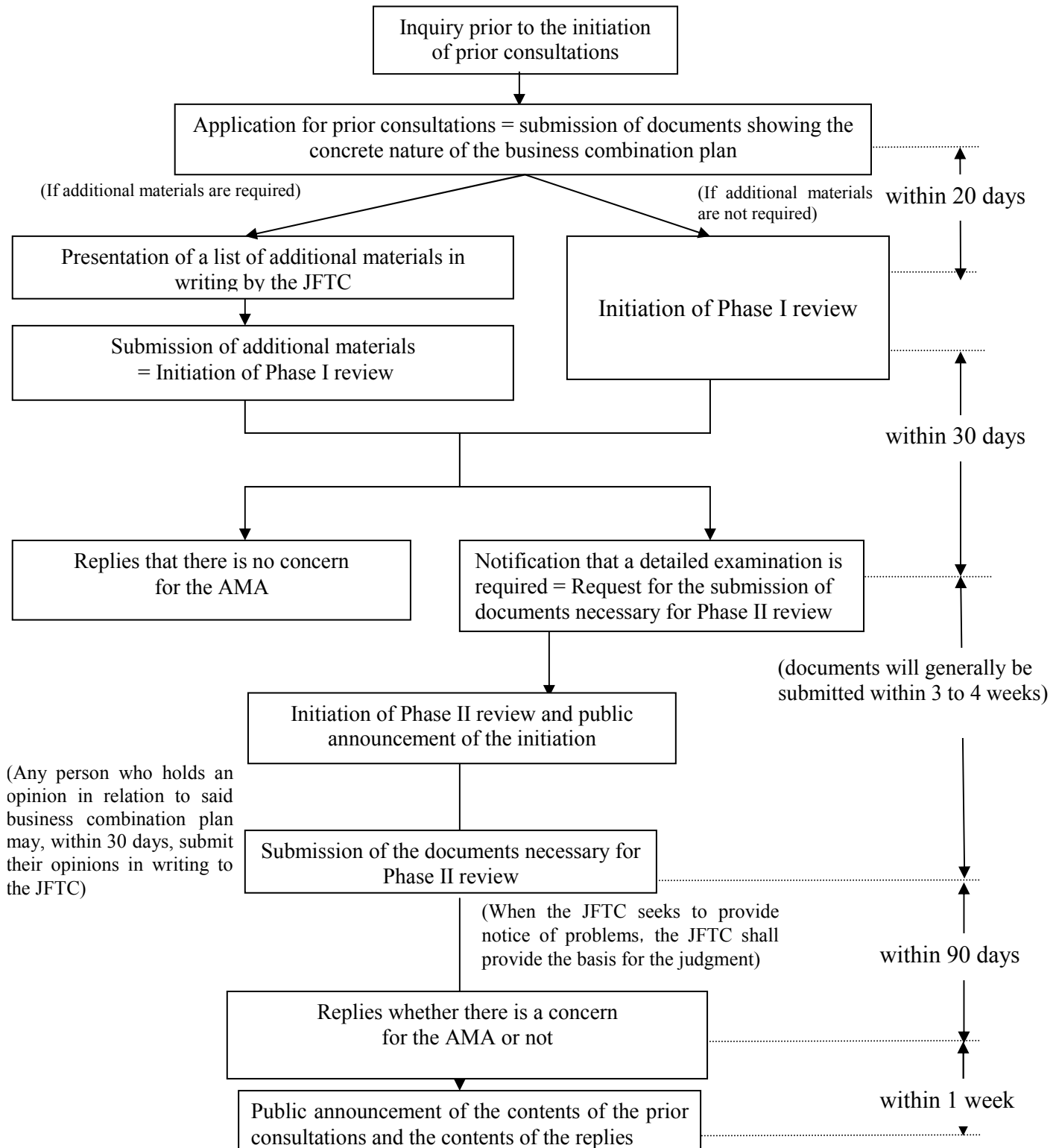
PROCEDURE ON INVESTIGATION AGAINST ANTICOMPETITIVE CONDUCT



- (Note)
1. Warning: A case where there is no evidence to take a legislative measure but where there is a suspicion of violation
 2. Caution: A case where there is no evidence to suspect the existence of violation but where there is a possibility that could lead to violation in the future
 3. Closure: A case where the investigation is terminated because there is no conduct violating the Antimonopoly Law

ANNEX 2

PROCEDURE ON REVIEW OF BUSINESS COMBINATION: PRIOR CONSULTATION



- Note 1: The parties shall be able to submit any materials or written opinions, etc. that they believe should be tendered at any time during the JFTC's review process.
- 2 : In the case that the JFTC replies that there is problem in light of the provisions of the AMA, when the parties offers remedial measure, the JFTC will reply with taking account the contents of such an offer.

ANNEX 3

PROCEDURE ON REVIEW OF BUSINESS COMBINATION: STATUTORY PROCEEDINGS

