

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

Working Party No. 3 on Co-operation and Enforcement

REMEDIES IN CROSS-BORDER MERGER CASES

-- Japan --

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CROSS-BORDER MERGER REMEDIES

– Japan –

1. Introduction

1. In Japan, it is necessary to notify the Japan Fair Trade Commission (hereinafter referred to as “the JFTC”) of mergers¹ that fall under certain requirements by 30 days before the implementation of such mergers. If the effect of a merger may be substantially to restrain competition in a particular field of trade, the merger in question shall be prohibited. (Articles 10, 15, 15-2, 15-3, and 16 of the Antimonopoly Act, hereinafter referred to as the “AMA”.) Furthermore, the JFTC may, pursuant to the procedures provided in the AMA, order the party in question to dispose of all or some of its shares, transfer a part of its business or take any other measures necessary to eliminate such acts in violation of the AMA (Article 17-2 of the AMA).

2. On the other hand, even though the effect of a merger may be substantially to restrain competition in a particular field of trade, such restraint may be remedied by certain appropriate measures taken by the party concerned. In response to the remedies proposed by the party, the JFTC will allow the merger when the JFTC concludes that the effect of the merger may not be substantially to restrain competition in a particular field of trade on condition that the proposed remedies are implemented.

3. The JFTC explains the basic principles of the remedies in the “Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combinations²” (the JFTC, 31 May 2004) and introduces on the JFTC’s website merger cases in which the JFTC determined that the mergers have no competition concerns conditional on the implementation of remedies.

2. Basic Principles of Remedies

4. Appropriate remedies should be considered based on the facts of individual cases. However, the remedies should, in principle, be structural measures such as the transfer of business and should basically be those that restore competition lost as a result of the merger in order to prevent the merging party from controlling the price and other factors to a certain extent. However, in a market featuring a rapidly changing market structure through technological innovations, there may be cases where it is appropriate to take certain types of behavioral measures.

5. In addition, the remedies should be completed before the implementation of the merger in principle.

¹ Hereinafter, “mergers” refer to all forms of business combination including “acquisitions of shares”, “mergers”, “joint incorporation-type splits”, “absorption-type splits”, “joint share transfers”, and “acquisitions of business”.

² http://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/110713.2.pdf.

6. Even if the remedies are to be taken without fail after the implementation of the merger, then an appropriate and definite deadline for the remedies should be imposed. Moreover, to transfer all or part of the businesses as remedies, for example, it is desirable to select the transferee of the business in advance of the merger. Otherwise, the parties may be required to obtain permission in advance from the JFTC with respect to the transferee.

7. Based on a request from the party, when the necessity of continuing the remedies is assessed in light of changes in the competitive conditions after the merger, if it is determined that the effect of the merger may not be substantially to restrain competition, the party is sometimes permitted to change or terminate the remedies.

3. Remedies against companies located in foreign countries

8. In the last 5 years, there are 3 cases the JFTC determined that the effects of the mergers would not be substantially to restrain competition conditional on the implementation of the remedies against companies located in foreign countries. In the following, we will introduce the short descriptions of each case.

3.1 Merger between Varian, Inc. and Agilent Technologies, Inc. (2010)³

3.1.1 Outline of the case

9. Agilent Technologies, Inc. (headquartered in the United States; hereinafter “Agilent”), which manufactures and distributes analytical instruments etc., plans to acquire all of the shares of Varian, Inc. (headquartered in the United States; hereinafter “Varian”), which also manufactures and distributes analytical instruments etc., thereby to make Varian a wholly owned subsidiary.

10. The parties distribute analytical instruments all over the world, and they also distribute their products in Japan through their Japanese affiliates etc.

11. Among various types of analytical instruments, the proposed merger would have significant impact on competition in the fields of trade regarding 3 products: Micro/portable gas chromatograph (Micro/portable GC), Triple quadrupole gas chromatography-mass spectrometry (Triple quadrupole GC-MS), and Inductive coupled plasma-mass spectrometry (ICP-MS). Regarding these 3 products, the proposed merger did not satisfy the safe harbor requirements for horizontal mergers.

3.1.2 Contents and assessment of the remedies

12. Before the JFTC reached conclusion, the U.S Federal Trade Commission (hereinafter “US-FTC”) and the European Commission (hereinafter “EC”) pointed out to the Parties in their investigation processes that the proposed transaction might bring serious adverse effects on competition in some relevant markets including those of the above-mentioned 3 products. Accordingly, the parties proposed several measures including (1) to sell Micro/ portable GC business owned by Agilent to INFICON Holding AG (headquartered in Switzerland; hereinafter "INFICON") and (2) to sell Triple quadrupole GC-MS business and ICP-MS business owned by Varian to Bruker Corporation (headquartered in the United States; hereinafter "Bruker"). The US-FTC and the EC reached a conclusion that the proposed transaction would not violate competition laws subject to the proposed remedial measures.

³ <http://www.jftc.go.jp/en/pressreleases/yearly-2010/jun/individual-000018.html>.

13. Agilent offered to the JFTC to take the same remedial measures. With these measures, there would be no increment of market shares caused by the transaction.

14. Since both INFICON and Bruker distribute analytical instruments etc. all over the world and have been distributing their products in Japan through their Japanese affiliates over a certain period, they are considered to have acquired sufficient management know-how and have developed distribution channel in Japan. Consequently it is expected that INFICON and Bruker, through their Japanese affiliates, continue and develop each business transferred from the parties to become strong competitors in Japanese markets.

15. The JFTC concluded that, with the remedial measures, the merger would not substantially restrain competition in any particular fields of trade.

3.1.3 Coordination or cooperation with any other agencies

16. The JFTC had conducted the review of this case while exchanging information with US-FTC about the schedule of the reviews and contents of remedies and so on, with waivers from parties.

3.2 Proposed Mergers of Hard Disc Drive (HDD) Manufacturing and Sales Entities (2011)⁴

3.2.1 Outline of the case

17. Upon the receipt of the notifications of the following plans concerning proposed mergers, the JFTC has reviewed the plans.

- (Western Digital Ireland, Ltd. (headquartered in the Cayman Islands of the British Overseas Territory; hereinafter “WDI”), which engaged in the business of controlling subsidiaries that manufacture and sell HDDs, planned to acquire all the shares of Viviti Technologies Ltd. (headquartered in Singapore, formerly known as Hitachi Global Storage Technologies Holdings Ltd.; hereinafter “HGST”), which engaged in the business of controlling subsidiaries that manufacture and sell HDDs.
- (Seagate Technology International (headquartered in the Cayman Islands of the British Overseas Territory; hereinafter “STI”), which engaged in the business of controlling subsidiaries that manufacture and sell HDDs, planned to acquire the HDD business of Samsung Electronics Co., Ltd. (headquartered in Korea; hereinafter “SEC”), which engaged in the business of manufacturing and selling HDDs.

18. The JFTC defined 5 products in the entire world as relevant markets. Regarding 2 products out of these five -- 3.5-inch PC/CE (personal computer and consumer electronics devices) HDDs and 2.5-inch PC/CE HDDs --, neither the WDI-HGST merger nor STI-SEC merger satisfied the safe harbor requirements for horizontal mergers. Also regarding 3.5-inch business critical HDDs, the WDI-HGST merger did not satisfy the safe harbor requirements for horizontal mergers.

19. The JFTC reviewed these 3 products individually from various perspectives including competitive situations, excess capacity of competitors, entry pressure, competitive pressure from neighboring markets, and competitive pressure from users. Regarding 3.5-inch PC/CE HDDs, it was judged that the mergers may be substantially to restrain competition in a particular field of trade.

⁴ <http://www.jftc.go.jp/en/pressreleases/yearly-2011/dec/individual-000460.html>.

3.2.2 *Contents and assessment of the remedies*

20. In consequence, the JFTC explained to WDI and STI that the proposed mergers would substantially restrain competition in the market for 3.5-inch PC/CE HDDs. WDI then proposed the following remedies.

1. WDI's facilities for manufacturing the volume of 3.5-inch PC/CE HDDs corresponding to approximately 10 % of its market share in 2010 will be divested in terms of transfer.
2. WDI will make it possible for the transferee to use the intellectual property required for the manufacture and sale of 3.5-inch PC/CE HDDs.
3. Complying with the request of the transferee, WDI will supply HDD components to the transferee at competitive prices for a certain period of time.
4. The transferee will be selected based on criteria, including but not limited to, independence from the group of combined companies that belongs to WDI, sufficient financial resources, expertise and incentives to maintain and develop the transferred business. Regarding the actual transferee, WDI will report to the JFTC, upon the conclusion of a transfer agreement with the transferee, by submitting a copy of the transfer agreement.
5. The deadline for the closing of the transfer will be no later than 3 months from the date when the copy of the transfer agreement is submitted to the JFTC. If, upon the conclusion of the transfer agreement, a copy thereof is not submitted to the JFTC, the merger will not be implemented.

21. Given these remedies proposed by WDI, the merger will satisfy the safe harbor requirements for horizontal mergers.

22. Regarding the transferee, it is considered that it will become a strong independent competitor in the market for 3.5-inch PC/CE HDDs, if the requirements stated in (4) above are met. Whether or not the actual transferee satisfies the said requirements will be judged by the JFTC following the receipt of a copy of the transfer agreement from WDI.

23. Even if the transfer of business is implemented after the merger, the deadline for the closing of the transfer will be no later than 3 months from the date when the copy of the transfer agreement is submitted to the JFTC. Considering this, the deadline for the implementation of the remedies is appropriately and clearly determined.

24. Based on the above and given the remedies, it was judged that the merger would not substantially restrain competition in a particular field of trade.

25. As for the STI-SEC merger, the JFTC reviewed it again, considering these remedies by WDI would be taken. Consequently, the JFTC found that the merger would not substantially restrain competition in the particular field of trade.

3.2.3 *Coordination or cooperation with any other agencies*

26. The JFTC had conducted the review of this case while exchanging information with US-FTC, EC and Korea Fair Trade Commission (hereinafter "KFTC") about the schedule of the reviews and contents of remedies and so on, with waivers from parties.

3.3 *Proposed Merger between ASML Holdings N.V. and Cymer Inc. (2012)*⁵

3.3.1 *Outline of the case*

27. ASML US Inc. (headquartered in the United States; hereinafter “ASML US”), the subsidiary of ASML Holdings N.V. (headquartered in the Netherlands; hereinafter the said group of combined companies whose ultimate parent company is ASML Holdings N.V. shall be collectively referred to as “ASML”) that runs business of manufacturing and selling lithography systems used in the front-end process of semiconductor manufacturing, is planning to acquire all the shares of Cymer Inc. (headquartered in the United States; hereinafter the said group of combined companies whose ultimate parent company is Cymer Inc. shall be collectively referred to as “Cymer”) which runs business of manufacturing and selling light sources composing an important part of the lithography system.

28. In manufacturing lithography systems, ASML procures light sources from Cymer. Therefore, the merger falls under the category of vertical merger in which a market of manufacturing and selling light sources is defined as the upstream market and a market of manufacturing and selling lithography systems is defined as the downstream market.

29. Concerning the Deep Ultraviolet Light source in which the parties make transactions can be divided into KrF (krypton and fluoride) light source and ArF (argon and fluoride) light source, the JFTC defined KrF light source and ArF light source in the entire world as relevant markets (upstream markets) respectively. Concerning the lithography systems which can be divided into KrF lithography systems, ArF lithography systems and ArF immersion lithography systems, the JFTC defined these 3 products (KrF lithography systems, ArF lithography systems and ArF immersion lithography systems) in the entire world as relevant markets (downstream markets). Regarding any of the relevant markets, the merger did not satisfy the safe harbor requirements for vertical mergers.

3.3.2 *Contents and assessment of the remedies*

3.3.2.1 *Refusal of sale, etc. of light sources transaction*

30. After the JFTC explained to ASML US as saying that such input foreclosure might be a point potentially to argue in the review of the merger, ASML US has proposed that it would take the following measures against the concern of the input foreclosure.

1. With respect to Deep Ultraviolet Light sources, Cymer will continuously do business with Company X (downstream company) and Company Y (downstream company) under fair, reasonable and non-discriminatory (FRAND) terms of trade as well as in the manner of paying regard to and being consistent with the existing agreements. Moreover, with respect to Extreme Ultraviolet Light sources, after the merger, Cymer will do business with Company X and Company Y under FRAND terms of trade as well as in the manner of paying regard to and being consistent with the industry standard.
2. Cymer will implement joint development activities with Company X and with Company Y under reasonable terms of trade. With respect to Deep Ultraviolet Light sources, Cymer will implement it in the manner consistent with the existing agreements.
3. For five years from the execution of the merger, the parties will report the status of compliance with the measures mentioned above to the JFTC once a year.

⁵ <http://www.jftc.go.jp/en/pressreleases/yearly-2013/may/130507.html>.

4. The report mentioned (3) is to be created by an audit team independent from parties, which will be appointed subject to a prior approval of the JFTC.

31. These measures proposed by ASML US are interpreted as follows: Cymer will continuously deal with Company X and Company Y in a manner consistent with the terms of trade equivalent to that of prior to the merger. Moreover, an audit team independent of the parties', which will be appointed subject to a prior approval of the JFTC, conducts an audit and Cymer will report to the JFTC regarding the result of audit for a certain period of time after the merger, thus the effectiveness of the measures will be ensured. Moreover, there is competitive pressure from chipmakers to a certain degree.

32. Therefore, taking the measures proposed by ASML US, etc. into consideration, the merger will not cause the input foreclosure.

3.3.2.2 Refusal of purchase, etc. of lithography systems transaction

33. After the JFTC explained to ASML US that such customer foreclosure might be a possible issue in the review of the merger, ASML US has proposed that it would take the following measures against the concern of the customer foreclosure.

1. When ASML develops in partnership with Cymer or Company A (upstream company) and places orders for products, parts and services of light sources to them, ASML will determine the supplier based on objective and non-discriminatory criteria, such as quality, logistics, technology, cost and chipmakers' preferences etc.
2. ASML will continuously permit chipmakers to choose light sources of their choice, and not unduly exert influence on the decision of chipmakers with respect to the choice of light sources.
3. ASML will substantially simultaneously provide both Cymer and Company A with information which is necessary in research and development of light sources and order placements for light source products, parts and services.
4. For five years from the execution of the merger, the parties will report the status of compliance with the measures mentioned above to the JFTC once a year.
5. The report mentioned (4) is to be created by an audit team independent from parties, which will be appointed subject to a prior approval of the JFTC.

34. These measures proposed by ASML US represent its promise that after the merger, ASML will continuously deal with Company A in a manner consistent with the terms of trade equivalent to that of prior to the merger. Moreover, an audit team independent of the parties', which will be appointed subject to a prior approval of the JFTC, conducts an audit and ASML will report to the JFTC regarding the result of audit for a certain period of time after the merger, thus the effectiveness of the measures will be ensured. Moreover, there is competitive pressure to a certain degree from chipmakers.

35. Therefore, taking the measures proposed by ASML US etc. into consideration, the merger will not cause the customer foreclosure.

3.3.2.3 Access to confidential information

36. After the JFTC explained to ASML US that handling confidential information of competitors might be a possible issue in the review of the merger, ASML US has proposed that it would take the following measures against the handling of confidential information.

1. Directors/employees of Cymer who are responsible for the confidential information of Company X (downstream company) or Company Y (downstream company) will be prohibited from providing the confidential information to directors/employees of ASML and enter into a non-disclosure agreement.
2. Directors/employees of ASML who are responsible for the confidential information of Company A (upstream company) will be prohibited from providing the confidential information to directors/employees of Cymer and enter into a non-disclosure agreement.
3. To comply with (1) and (2) above, the parties will create a protocol of information blackout for its employees.
4. For five years from the execution of the merger, the parties will report the status of compliance with the measures mentioned above to the JFTC once a year.
5. The report mentioned (4) is to be created by an audit team independent from parties, which will be appointed subject to a prior approval of the JFTC.

37. These measures proposed by ASML US represent its promise that after the merger, the parties implement measures to prevent disclosure of confidential information which includes their directors/employees to enter into a non-disclosure agreement. Moreover, an audit team independent of the parties', which will be appointed subject to a prior approval of the JFTC, conducts an audit and ASML will report to the JFTC regarding the result of audit for a certain period of time after the merger, thus the effectiveness of the measures will be ensured.

38. Therefore, taking the measures proposed by ASML US, etc. into consideration, the merger will not raise an issue of access to confidential information of competitors.

3.3.3 Coordination or cooperation with any other agencies

39. The JFTC had conducted the review of this case while exchanging information with U.S Department of Justice and KFTC about the schedule of the reviews and contents or necessity of remedies and so on, with waivers from parties.

40. In addition, although the JFTC and Taiwan Fair Trade Commission (TFTC) had not obtained the waiver from the parties, the JFTC exchanged information with TFTC about schedule of the review and so on under regulated conditions.

4. Conclusions

41. As these recent cases suggest, cross-border mergers involving Japanese firms and/or affecting Japanese markets have been increasing and are expected to increase further. Accordingly, there is an increasing need for international cooperation such as information exchange on the schedule of review processes and remedial measures. The JFTC intends to make further efforts to enhance international cooperation with foreign competition authorities by means of contributing to activities of the OECD and the ICN, and developing bilateral cooperative relationship.