Publication of the New Guidelines on Merger Review

May 31, 2004
Fair Trade Commission

Today, the Japan Fair Trade Commission (JFTC) made public the new guidelines on merger review, "Guidelines on the Application of the Antimonopoly Act to Reviewing Business Combination"[1]. Concurrently, with the formulation of these Guidelines, the "Guidelines for Interpretation on the Stipulation that 'The Effect May Be Substantially to Restrain Competition in a Particular Field of Trade' Concerning M&As" published on December 21, 1998 shall be abolished.

(Background)

1. The JFTC has been making efforts to ensure transparency and clearness of merger reviews through issuing guidelines and making public results of the views on the important cases with reasoned explanation from the standpoint of the Antimonopoly Act. On the other hand, there has been recently increasing requests for the JFTC to further enhance transparency and predictability regarding how to delineate a "particular field of trade" (a relevant market) or how to assess effects of mergers on competition in the relevant market whether they may pose problems in view of the Antimonopoly Act.

2. With a view to responding such requests, the JFTC published the draft of the new merger guidelines on March 23 this year and invited every interesting party to submit its comments on the draft. As a result, comments were submitted by several trade associations and others. The JFTC carefully examined all the submitted comments, and finalized the guidelines with making some revisions in the part of the draft.[2]

3. The JFTC will properly implement merger review in accordance with the new guidelines, and further enhance transparency and predictability of merger reviews through making clear the views on cases with reasoned explanation in as a detailed manner as possible in the publication of important cases.

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1 You can find the overview of the new guidelines in the attachment. English text of the new guidelines will be published in due course.

2 In spite of such revisions, there are not any major changes in the JFTC's approaches to merger assessment from the draft guidelines, for example, how to delineate a relevant market or how to assess the effect of mergers on competition in a relevant market whether they may pose problems in view of the Antimonopoly Act. If you are interested in the points of revisions, please refer to the press release on this topic in Japanese.

[Attachment]

Overview of JFTC's New Merger Guidelines

1. Features of JFTC's New Merger Guidelines

- The assessment of mergers is more consistent with economic logic, and more congruent with the ones in the EU and US merger guidelines (than ever).
- Horizontal, vertical and conglomerate mergers are covered.
- Safe harbor rules for mergers are adopted. Presumptive illegality rules are not.
- The approach to remedial actions is explained.

2. Determination of Relevant Markets

- A relevant market is principally determined by demand substitution.
- Product and geographic dimensions specify the boundary of a relevant market.
- Price discrimination and supply substitution are also taken into consideration.

3. The Effects of Horizontal Mergers

- Common safe harbor for horizontal mergers:
  - A merging parties' combined market share is 10% or less.
  - A merging parties' combined market share is 25% or less and the HHI is less than 1000.
- Non-coordinated (unilateral) effects and coordinated effects are examined.
- Analysis of non-coordinated effects:
  - Safe harbor regarding non-coordinated effects:
    - A merging parties' combined market share is 25% or less, at least one rival's market share is 10% or more, and the HHI is less than 1800.
    - A merging parties' combined market share is 35% or less, at least two rivals' market shares are 10% or more, and the HHI is less than 1800.
    - An increment in HHI is less than 100, and at least one rival's market share is 10% or more.
  - The status of merging parties: market shares, market share ranks, pre-merger rivalries among the parties.
  - The competitive pressures from non-merging firms: market shares, differences in market share between a merged firm and its rivals, excess capacity for supply, the degree of product differentiation.
  - The potential and actual competitive pressures: import and entry, the presence of adjacent product and geographic markets, competitiveness in vertically related markets.
  - Efficiency and viability of merging parties.
- Analysis of coordinated effects:

- The status of merging parties and rivals: the number of participants, similarity in product and cost structure, pre-merger rivalries among the merging parties, excess capacity for supply.
- The relevant market environments: transparency in business transactions, frequency and size of orders, stability and maturity in demand, the speed of technological development, pre-merger competitiveness.
- The potential and actual competitive pressures: import and entry, the presence of adjacent product or geographic markets, competitiveness in vertically related markets.
- Efficiency and viability of merging parties.

4. The Effects of Vertical and Conglomerate Mergers

- Common safe harbor for vertical and conglomerate mergers:
  - A merging parties' market share is 10 % or less.
  - A merging parties' market share is 25% or less and the HHI is less than 1000.
  - A merging parties' market share is 25 % or less, at least one rival's market share is 10% or more, and the HHI is less than 1800.
  - A merging parties' market share is 35% or less, at least two rivals' market shares are 10% or more, and the HHI is less than 1800.
- Vertical or horizontal market foreclosure, facilitating coordinated effects, and elimination of potential competition are considered.
- Analysis: the aspects examined here are similar to the ones explained in horizontal mergers.

5. Remedies

- Following types of remedies are considered.
  - Remedies to restore or minimize a change in market structure: divestiture of a part of business, reduction in the shareholding ratio, etc.
  - Remedies to enhance competition that will be confronted by the merged firm: requiring access to essential inputs for import or entry, licensing know-how or intellectual property rights, etc.
  - Remedies to exclude or limit the merged firm's action to take advantage of the increased market power: a commitment to non-discriminatory behavior, obligation to refrain from information exchange (which may lead to collusion among firms), etc.