

Policies dealing with prior consultation regarding business combination plans

(Tentative Translation)

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Fair Trade Commission

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1. Purpose

The Fair Trade Commission (hereinafter "FTC") has with regard to plans for mergers and other business combinations adopted a notification system based on the Antimonopoly Act and has undertaken reviews of business combination in accordance with the procedures stipulated in the Act.

When, with regard to concrete business combination plans, there are consultation (hereinafter "prior consultation") prior to the statutory notification from the parties (this refers to the individuals planning the business combination and includes the directors and employees stipulated in Section 13 of the Antimonopoly Act and the individuals other than companies stipulated in Section 14 of this Act all references below shall have this meaning) concerning whether the plans raise issues of concern in light of Chapter 4 of the Antimonopoly Act, the FTC responds concerning the results of its review. In recent years there have been demands for further improvements in both the speed and transparency of the FTC's reviews regarding prior consultation.

As a result, the FTC has, from the perspective of further increasing the speed and transparency of prior consultation, established a policy "policies dealing with prior consultation regarding business combination plans" as set forth below.

2. Application requirements

Prior consultation applications will be accepted when they meet all of the requirements noted below.

Even though the business combination plan has not been publicly announced by the parties at the point in time of the application for prior consultation (hereinafter "non-public plan"), the parties may apply for prior consultation.

- (1) The application is from the parties attempting to implement the business combination plan which is the subject of the consultation.
- (2) The parties present a concrete plan concerning the expected business combination which the parties themselves will undertake in the future.
- (3) In the event that a phase review referred to 4 below is undertaken, the parties agree that the facts relating to the prior consultation and the contents of the FTC's response will be made public.

3. Phase review

(1) The application of prior consultation

The parties can apply prior consultation by submitting materials showing the concrete contents of business combination plans (refer to (2) below).

When prior consultation is applied, the FTC shall examine whether any additional materials are required for the commencement of review. As a general rule, within 20 days from the day on which materials showing the concrete contents of the business combination plans are submitted, in the event that it is determined that additional materials are not required, then the FTC shall provide notice of such, and in the event that it is deemed that additional materials are required, shall present a list of additional materials in writing.

In order to smoothly initiate prior consultation, the parties before applying prior consultation can make inquiries to the FTC concerning the general outline of the Antimonopoly Act, "Guidelines to application of the Antimonopoly Act concerning review of business combination" (hereinafter "merger guidelines"), prior consultation procedures, and the content of the materials showing the concrete contents of business combination plans, etc. (inquiries should be directed to the reception window for prior consultation).

(2) Materials showing the concrete contents of business combination plans

The "materials showing the concrete contents of business combination plans" as noted in (1) above shall be as set out below.

a. Materials required to be submitted as materials showing an outline of business combination plans.

The materials required to be submitted as materials showing an outline of business combination plans shall be as set out below. However, in the event that some of the materials listed below are difficult to submit because, for example, they do not exist, etc., then if notice of this fact is provided, those materials may not need to be submitted.

(a) Items showing an outline of the parties

Company names (trading names), names of representatives, dates of establishment, locations of head office and branch offices, number of employees, and nature of their businesses.

Latest business results (Report on Business Activities, Financial Statements, and Profit and Loss Statements)

Shareholder breakdown, cross-involvement by the parties (share ownership, executive appointments, business partnerships, financing arrangements, business dealings, etc.)

Matters relating to affiliate companies (Same as - above)(NB 1)

(b) Concrete contents of business combination plans

The objectives of the combination, the method of the combination, the scope of the business operations subject to combination

The schedule for combination

Materials made public by the parties and agreement documentation, etc. regarding the combination plans

(c) Outline of products and services subject to combination

Characteristics (form, properties, raw materials, method of production, applications, etc.) of products (hereinafter including services as well).

Market size

Sales and distribution channels

Products thought to be in competition with the products subject to combination

(d) Outline of companies providing products subject to combination
Names and business locations of each company providing products subject to combination.

Names and market shares of each company providing products subject to combination. (NB2)

The Herfindahl-Hirschman Index (hereinafter "HHI") after said business combination and increase in HHI due to said business combination. (NB2)

b. Materials showing the basis for factors thought to bear a significant influence on the judgment regarding competition

In the event that within the concrete factors for making a judgment noted in the merger guidelines there are, from the parties' perspective, factors with regard to the products subject to combination thought to bear a significant influence on the judgment regarding competition, then the parties shall be able to submit materials showing the basis for such (see Appendix for examples) at their discretion.

c. Additional materials that the parties believe should be tendered

The parties shall be able to submit additional materials they believe should be tendered as materials showing the concrete contents of the business combination plans.

Please note also that 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 FTC's review process.

(NB1) Affiliate companies refers to those companies in a horizontal or vertical relationship with the parties with regard to the products subject to combination that the parties hold over 10% of shareholder voting rights in or that hold over 10% of shareholder voting rights in the parties.

(NB2) Regarding the market share and HHI, it is sufficient if the parties indicate the market which they believe to be appropriate as the area in which there is a competition. However, the parties should indicate the types of materials upon which the calculation was based.

(3) Phase review process

From the day on which notice is provided to the parties that additional materials are not required to be submitted as noted in (1) above or from the day that additional materials are submitted in the event that a list of additional materials was presented, the FTC shall commence review (this is referred to as the "Phase review"), and will, as a general rule, within 30 days, notice the parties to the effect that there are no issues relating to the Antimonopoly Act or to the effect that a further detailed review (this is referred to as the "Phase review") is required.

4. Phase review

(1) Request for submission of materials required for phase review

In the event that notice is given to the effect that a phase review is required as noted in 3 (3) above, the FTC will, having identified the products, and the geographic scope which will become the subject of the review, explain the specific points at issue as concerns of the Antimonopoly Act and request the submission

of concrete materials which are judged to be required to undertake a phase review.

(2) Phase review process

a. The commencement of phase review

Following notice to the parties to the effect that a phase review is required as noted in 3 (3) above, the FTC will initiate a phase review.

b. Public announcement of non-public plans by the parties

In the event that said plan is non-public plan, then prior to the submission of documentation requested as noted in (1) above, the parties are required to undertake to make a public announcement of said plan because the FTC needs to conduct interviews with suppliers, etc. during the phase review. In the event that the parties do not undertake to make a public announcement of said plan, then prior consultation shall be suspended as noted in 7 (4) below.

c. Handling of opinions from third parties

Following notice to the parties to the effect that a phase review is required and after the parties have undertaken to make a public announcement of the non-public plan, the FTC will make a public announcement to the effect that a phase review will be conducted in relation to said business combination plan. After the FTC has made a public announcement to the effect that a phase 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 FTC.

d. Procedures for notice of problems

In the event that the FTC seeks to provide notice of problems with said business combination plans in relation to the provisions of Chapter 4 of the Antimonopoly Act during the phase review process, then the FTC shall provide the basis (certification of facts asserted by the parties, and the results of investigations, analyses, or surveys conducted by the FTC) for the judgment that there is a problem, with the exception of parts which cover the business secrets of other companies.

e. Response in relation to review results

From the day on which the parties submitted the concrete materials requested as noted in (1) above, the FTC will, as a general rule, within 90 days, respond in writing on the results of the phase review, including the reasons for those results, and make a public announcement of the results, with the exception of parts which cover the business secrets of the parties.

5. Exceptions to notice and response deadlines

The notice and response deadlines stipulated in 3(3) and 4(2)e above will not, for example, be applicable in the following circumstances.

(1) Following submission of materials, when there is an alteration in the business combination plans for which there has been an initial consultation

(2) When there has been an application from the parties to set a different due date than the notice and response deadlines

6. Public announcement date

The date for the public announcement of the contents of the prior consultation

and the contents of the response noted in 4(2)e above will, from the perspective of providing an opportunity to the parties to review whether there are parts which cover business secrets, take place within one week following the response noted in 4(2)e above.

7. Suspension of prior consultation

For example, in the following circumstances the review concerning the prior consultation will be suspended.

- (1) When there has not been a submission of the materials sought from the parties
- (2) When, during prior consultation, a notification based on the stipulations in Chapter 4 of the Antimonopoly Act concerning said business combination plan has been made
- (3) When there has been an application from the parties to discontinue the prior consultation
- (4) Concerning non-public plan, when at the stage that the FTC gave notice to the effect that a phase review is required and the parties do not undertake to make a public announcement of said plan

8. The relationship to statutory procedures

In the responses noted in 3(3) and 4(2)e above, following a response to the effect that there is not an issue concerning the Antimonopoly Act, when the statutory notification is made with the same content as the business combination plan which was the subject of prior consultation, statutory measures will not be taken. However, this does not necessarily apply when the business combination plan differs from that which was the subject of prior consultation and when circumstances fall within the purview of 9 noted below.

9. Withdrawal of the response

In the event that it is ascertained that the materials and the explanations submitted at the time of the prior consultation differ from the facts, the response to the prior consultation will be withdrawn.

Appendix: Examples of materials showing the basis for factors thought to bear a significant influence on the judgment regarding competition

Section under business combination guidelines	Factors from the parties' perspective thought to bear a significant influence on the judgment regarding competition	Examples of materials
Part 2-2	Particular field of trade (Product range)	<ul style="list-style-type: none"> • Outline of products (form, properties, etc.) • Raw materials, method of production, production process charts • Extent of difference between products in terms of quality, performance, standards, or systems • Products with the same or similar utility • Changes in product prices and quantities • User recognition and behavior characteristics • Outline of factory production facilities (potential for line switching, etc.) • Relevant documentation, surveys, analyses, etc. (Same hereinafter)
Part 2-3	Particular field of trade (Geographic range)	<ul style="list-style-type: none"> • Country and area of business (of the parties and competitors) • Addresses of factories and offices, areas of business (of the parties and competitors) • Geographic scope of user purchasing and user purchasing behavior • Product characteristics • Means of transporting and supplying products, transportation costs • Changes in prices by country/region and quantities • Sales and distribution channels
Part 4-2 (1)	Position of the parties' group and state of competitors (including state of competition in the market, etc.)	<ul style="list-style-type: none"> • Changes in market size (quantities, values), demand forecasts • Changes in the production and shipment quantities and values for each party (and competitor) (broken down by application, demand sector, personal consumption, and external sales, etc.) • Sales (profits and costs) of the products subject to combination by the parties • Changes in market share and competition between the parties in the past • Monthly changes in sales prices by product (broken down by cross-transactions and market conditions, user groups, and distribution channels, etc.) • Methods for determining price (sales promotion costs, rebate and advertising and promotional costs, etc.) • Frequency of price negotiations, timing of and factors in price changes • Breakdown of distribution channels, distribution channel quantities and values, sales organizations, and distribution chains by product

		<ul style="list-style-type: none"> • Outline of factory production facilities (details of equipment, changes in production capacities, production volumes and excess capacities, methods for calculating such, and production capacities of planned facilities and facilities under construction, etc.) • Changes in export quantities and values (pricing factors, price difference with domestic items) • Product lineup of the parties (product catalogs, etc.), outline of other companies' products (product lineups, features, etc.) • Product differentiation (brands, grades, etc.) and brand evaluations • Patent rights held or licensed, details of partnerships for technology introductions • New product development status, investment in research and development (outline of personnel, facilities, etc.) • Speed and extent of technical innovation both within Japan and overseas in relation to said products, product obsolescence, changes in ratio of research and development expenses to sales
Part 4-2 (2)	Import	<ul style="list-style-type: none"> • Changes in import quantities and prices (pricing factors, and price difference with domestic items) • Customs and other taxes associated with international transactions, existence and details of other legal regulations. • Import item prices, quality, technologies, and import-related costs and facilities (distribution and warehouse facilities, etc.) • Demand and excess export capacities in countries exporting import items, outline of leading companies overseas • Future export and import forecasts
Part 4-2 (3)	Entry	<ul style="list-style-type: none"> • Existence of legal regulations on market entry, such as licenses, etc. • Existence of entry barriers in practice (appropriate scale of production facilities required for market entry and required capital expenditure on such, site conditions, technical conditions, raw material procurement conditions, and sales conditions, etc.) • Past cases of market entry and the effect of such • Existence of companies capable of entering the market, existence of market entry plans, business plans of those planning to enter the market
Part 4-2 (4)	Competitive pressure from related markets	<ul style="list-style-type: none"> • State of competition in related markets, and extent of effect competition in adjacent markets will have on competition in the particular field of trade (comparable goods, geographically neighboring market)
Part 4-2 (5)	Competitive pressure from users	<ul style="list-style-type: none"> • Names of main users (locations, and changes in sales quantities and values) • Sales destinations broken down by scale of major users (small- or large-lot contracts), business relationship (change in sales quantities/values, transaction methods, etc.) • State of competition between users

		<ul style="list-style-type: none"> • Ease of changing suppliers (cost of switching suppliers, users' purchasing from multiple suppliers, examples of switches in supplier, etc.)
Part 4-2 (7)	Efficiency	<ul style="list-style-type: none"> • Details of plans for rationalization and efficiency enhancements through business combination and details of economic benefits, and the basis for calculation (economies of scale, integration of production facilities, specialization of factories, cutting of transportation costs, efficiency of research and development, etc.) • Documentation on internal procedures for deciding on said business combination, explanatory documents to be provided to shareholders and financial markets on efficiency, etc. • Past results in terms of cutting prices, improving quality, and supplying new products through efficiency improvements
Part 4-2 (8)	Financial condition of the parties' groups	<ul style="list-style-type: none"> • Financial status of parties posting poor business results • Status of negotiations with other companies capable of bailing out parties posting poor business results

(NB)Preferably, normally three to five years worth of data should be submitted in relation to changes in market size, prices, quantities, and market share, etc., but the period over which changes are looked at will differ depending on the details of the plan, the nature of the transaction, and the data available at the time.

Possible sources for collecting this kind of data might include government statistics, industry group statistics, market research organization materials, and POS data (for consumer products), etc.