

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

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Working Party No. 3 on Co-operation and Enforcement

INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

-- Japan --

25 February 2014

This note is submitted by Japan to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 25 February 2014.

Please contact Mr. Antonio Capobianco if you have any questions regarding this document [phone number: +33 1 45 24 98 08 -- E-mail address: antonio.capobianco@oecd.org].

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– Japan –

1. Introduction

1.1 *Prior notification of mergers*

1. The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (hereinafter, the “Antimonopoly Act”) requires prior notification of merger plans (Hereinafter, “mergers” refer to the acquisition of shares¹, mergers, joint incorporation-type splits, absorption-type splits, joint share transfers, and the acquisition of business, etc.) Specifically, in the case of a merger plan in which the total domestic sales of the relevant enterprises exceed a certain amount, the relevant enterprise is required to give prior notification to the JFTC. In the case of acquisition of shares, in addition to the total domestic sales, the ratio of voting rights held by the acquisition of shares (hereinafter, the “voting rights holding ratio”) becomes another notification threshold. The relevant enterprise is required² to give prior notification to the JFTC, only if the total domestic sales of the relevant enterprises exceed a certain amount and the voting rights holding ratio exceeds certain levels (20% and 50%).

1.2 *Waiting period after notification*

2. A notifying enterprise is prohibited from implementing mergers until a period of 30 days³ has elapsed from the day when notification is received by the JFTC.

2. Review of mergers not reaching the notification criteria

2.1 *Mergers subject to review*

3. Whether notification is given or not, the Antimonopoly Act prohibits mergers, if competition in any particular field of trade may be substantially restrained. This regulation takes particular note of the fact that the formation, maintenance and enhancement of the joint relationship (the relationship by which enterprises conduct a business in a united form whether partially or fully) as a result of mergers will make the market structure non-competitive and competition in any particular field of trade is somewhat influenced. Therefore, even in the case of merger plans that do not require notification to the JFTC because the total domestic sales or etc. do not reach the criteria, the mergers may be subject to review.

4. The Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combinations clarify the categories of mergers (acquisition of shares, merger, etc.) which are subject to review. If the joint relationship is formed, maintained or enhanced by mergers, the mergers will be subject to review.

¹ For the acquisition of shares, the ex-post reporting system was changed to the prior notification system under the 2009 revision of the Antimonopoly Act. For mergers other than the acquisition of shares, the prior notification system has been adopted from years earlier than 2009.

² Persons other than enterprises who acquire shares are not required to give notification at all. However, Article 14 of the Antimonopoly Act prohibits the acquisition of shares if any particular field of trade may be substantially restrained thereby, or if such acquisition of shares is made through unfair trade practices.

³ If a notifying enterprise files an application in writing to shorten the waiting period and the JFTC conducts Phase 1 review of the mergers and gives notice that a cease and desist order will not be issued for the reason that there are no problems under the Antimonopoly Act, the waiting period will be shortened to the date mentioned in the notice.

5. For example, in the case of acquisition of shares, even if the total of domestic sales doesn't reach the notification criteria, if (1) the voting rights holding ratio exceeds 50%, or if (2) the voting rights holding ratio exceeds 20% and this voting rights holding ratio is solely the highest among the shareholders, such acquisition of shares will be subject to review. Also, irrespective of the total domestic sales of the relevant enterprises, if (3) the voting rights holding ratio exceeds 10% and this voting rights holding ratio is in the highest three places among the shareholders, the acquisition of shares may be subject to review, depending on the degree of the voting rights holding ratio, the relationship between the relevant enterprises (for example, whether the enterprise issuing shares has voting rights in the enterprise acquiring shares of it), the existence of interlocking directors and other factors. Put simply, even the acquisition of shares which do not reach the notification criteria may be subject to review.

2.2 *Remedy for non-notifiable mergers*

6. If competition in any particular field of trade may be substantially restrained by mergers, the JFTC may order the relevant enterprise 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 related provisions pursuant to the provisions of Article 17-2, which prescribe a cease and desist order under the merger regulations, of the Antimonopoly Act. The contents of a cease and desist order (remedy) and the applicable types of remedies are the same regardless of the requirement of notification. However, in the event that a remedy is required against notifiable mergers, the JFTC has, in general, asked the relevant enterprises to give notification or its amendment report that contains particulars of the remedy and the deadline for implementation of the remedy, and if the particulars of the remedy are found to be appropriate, the JFTC will complete the merger review without issuing a cease and desist order.

2.3 *Court orders and cease and desist orders for non-notifiable mergers*

7. Under the provisions of Article 70-13 of the Antimonopoly Act, the court may, if petitioned by the JFTC, where it finds the matter to be one of urgent necessity, order the person committing an act suspected of violating the provisions prohibiting mergers which may substantially restrain competition in any particular field of trade to temporarily suspend the said act, the exercise of voting rights, or the execution of business by an officer in a corporation, or may rescind or modify such order. Such order may be issued irrespective of the requirement of notification.

8. Even if a non-notifiable merger has already been consummated, the JFTC may issue a cease and desist order pursuant to the provisions of Article 17-2 of the Antimonopoly Act.

9. However, if no notification has been made of non-notifiable mergers, the JFTC cannot bring a lawsuit to have the merger or company split concerned declared invalid pursuant to the provisions of Article 18 of the Antimonopoly Act explained below.

2.4 *Different procedure for the review of non-notifiable mergers*

10. In the case of a review of non-notifiable mergers, an enterprise can, at any time, implement the mergers, since the provision concerning the waiting period after notification under the Antimonopoly Act will not apply. On the other hand, the "Policies Concerning Procedures for Reviewing Business Combinations" published by the JFTC in 2011 state that if necessary, the JFTC will give guidance on non-notifiable merger plans and if requested, the JFTC will treat such cases in accordance with the same procedure the one as for notifiable merger plans.

2.5 Consultation on notification

11. On its website, the JFTC gives an easy-to-understand explanation of notifiable cases and responds to questions from enterprises on notification⁴. When it becomes possible for enterprises to indicate the concrete contents of merger plans, they can consult the JFTC regarding their mergers which fall in the category of non-notifiable as described in above item 2.4.

2.6 Cases of review of non-notifiable mergers

12. In Japan, there are some cases in which the JFTC reviewed non-notifiable mergers upon request. However, there are no cases in which the JFTC issued a cease and desist order or filed a petition with the courts for the issuance of an urgent temporary suspension order. In the case of consummated and non-notifiable mergers, the JFTC has never to date taken legal actions such as a cease and desist order.

3. Review of notifiable but non-notified mergers

3.1 Penal provisions under the Antimonopoly Act

13. For a violation of the duty of notification, a fine of not more than 2 million yen (about 14,144 euro) may be imposed on the infringing person pursuant to the provisions of Article 91-2 of the Antimonopoly Act.

3.2 Measures under the Antimonopoly Act

14. If non-notified mergers may substantially restrain competition in any particular field of trade, the JFTC may issue a cease and desist order pursuant to the provisions of Article 17-2 of the Antimonopoly Act. In the order, the JFTC may order the relevant enterprise to dispose of all or some of its shares, to transfer a part of its business, or to take any other measures necessary to remove such acts in violation of the related provisions. In this case, time for taking statutory measures is not limited.

15. As in the case of above paragraph 2.3, under the provisions of Article 70-13 of the Antimonopoly Act, the JFTC may file a petition with the courts for the issuance of an urgent temporary suspension order against the mergers, or for a change or rescission of such an order.

16. In the case of merger, joint incorporation-type split, absorption-type split, joint share transfer (hereinafter, “merger, etc.”) among mergers, if an enterprise implements a merger, etc. in violation of the requirement of notification, the JFTC may bring a lawsuit to have the merger, etc. declared invalid pursuant to the provisions of Article 18 of the Antimonopoly Act.

3.3 Measures against consummated mergers in violation of the duty of notification

17. In the case of consummated mergers in violation of the requirement of notification, if the mergers may substantially restrain competition in any particular field of trade, the JFTC may issue a cease and desist order pursuant to the provisions of Article 17-2 of the Antimonopoly Act. In addition, the JFTC may bring a lawsuit to have the merger or company split concerned declared invalid pursuant to the provisions of Article 18 of the Antimonopoly Act.

⁴ In July 2011, the JFTC abolished the prior consultation system in which enterprises inquire voluntarily about the presence of any problems under the Antimonopoly Act before giving the statutory notification and the JFTC replies to such questions. However, the JFTC continues to reply to general questions from enterprises on the necessity of notification and other matters.

4. Subsequent review of consummated mergers for which no objection was made

18. If the JFTC is to issue a cease and desist order pursuant to the provisions of Article 17-2 of the Antimonopoly Act, it must give prior notice to the relevant enterprise within a certain period from the date of acceptance of the notification for the mergers, etc. On the contrary, if no objection is to be made against mergers, no prior notice will be given to the relevant enterprise within a certain period. For consummated mergers for which no objection was made, therefore, the JFTC can neither review it nor issue a cease and desist order. However, if (i) an important matter in a merger plan is not carried out by the scheduled deadline (for example, the divestiture of a specific asset is not carried out by the deadline), or if (ii) notification contains false statements with respect to important matters, the JFTC may take measures. In the case of (i) above, the JFTC must give prior notice for a cease and desist order within one year from the deadline for implementation of the important matters set out in the merger plan.

19. The JFTC has never issued a cease and desist order for any case that falls under above (i) or (ii).

5. Related issues

5.1 *Case in which a foreign corporation becomes a relevant enterprise*

20. If a foreign corporation does not directly sell their products to consumers or enterprises, etc. in Japan but recognizes that their products are sold on condition that the final destination is Japan, or sold to their sales offices, etc. in Japan, without changing their properties or shape, the foreign corporation's sales to enterprises, etc. in foreign countries will be counted as domestic sales in the notification criteria⁵. For example, in the case in which the seller is a foreign corporation and the buyer is an overseas subsidiary of a Japanese enterprise, if it is apparent that the overseas subsidiary transports products to their parent company in Japan, sales of products to the overseas subsidiary will be counted as domestic sales which constitute the criteria for notification. Therefore, even in the case of mergers between foreign corporations which do not directly sell their products in Japan, domestic sales may exceed the threshold amount and notification must be given.

5.2 *Potential entry*

21. Even if an enterprise implements mergers with another company that has no domestic sales at that time but will definitely enter the market in the near future, the enterprise is not required to give notification of the mergers. However, if competition in any particular field of trade may be substantially restrained by the mergers, the JFTC may issue a cease and desist order against the enterprise pursuant to the provisions of Article 17-2 of the Antimonopoly Act.

22. The JFTC has never to date issued a cease and desist order against mergers with potential entrants for which no notification is required.

⁵ Article 2, paragraph 1, item 3, of the Rules on Applications for Approval, Reporting, Notification, etc. Pursuant to the Provisions of Article 9 to 16 of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (the Antimonopoly Act).

5.3 *Acquisition of companies having important intellectual property*

23. In the case of acquisition of shares, notification is made based on domestic sales. Therefore, even if an enterprise acquires shares in a company with important intellectual property but a small sales volume, the enterprise is not required to give notification thereof. However, for example, if an enterprise acquires shares in a company with a standard essential patent (SEP) and therefore obtains a dominant position in the field of a specific product or service, or if a company which is conducting clinical tests on the efficacy of a certain drug is acquired by an enterprise that has already started sales of the drug with the same efficacy and the acquiring enterprise becomes monopolistic in the field of the relevant efficacy and as a result competition in a particular field of trade may be substantially restrained, the JFTC may issue a cease and desist order against the enterprise pursuant to the provisions of Article 17-2 of the Antimonopoly Act.

24. The JFTC has never to date issued a cease and desist order against an enterprise implementing a merger with an enterprise possessing intellectual properties, including patents, for which no notification is required.