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Cross-border Mergers – Contribution from Japan

- Session II -

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More documentation related to this discussion can be found at: oe.cd/gfc24.

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Cross-border Mergers

- Contribution from Japan -

1. Introduction

1. Japan's Antimonopoly Act (AMA) prohibits a business combination (such as shareholdings, interlocking directorates, mergers, company splits, joint share transfers, acceptance of assignments of business, etc.) that may substantially restrain competition in any particular field of trade, and the JFTC conducts review of business combinations in accordance with the provisions of the AMA.
2. A business combination plan which meets the certain requirements should be notified to the JFTC prior to its implementation. Then the JFTC reviews the plan to determine whether it may lead to a situation where consumers have insufficient options or not, that is whether it may substantially restrain competition or not. The concepts of the JFTC's review are indicated in the "Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (Business Combination Guidelines)" (May 31, 2004).
3. As globalization in corporate activities and digitalization are progressing, we can see the increase in the number of business combinations not only in the domestic market but also across borders of multiple countries and regions. Under this circumstance, a business combination might sometimes be necessary to be notified to several competition authorities, and it might be reviewed by the authorities in parallel. The JFTC reviews such business combination with close communications with other competition authorities.
4. This paper describes the JFTC's efforts on international business combination cases and examples of cooperation with other competition authorities.

2. Cases of international business combination and cooperation among competition authorities

2.1. Notification on international business combination

5. In Japan, the required documents for a notification of a business combination plan are indicated in the "Rules on Applications for Approval, Reporting, Notification, etc. Pursuant to the Provisions of Articles 9 to 16 of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Notification Rules)" (September 1, 1953). In a case of an international business combination, a company concerned may submit a notification not only to the JFTC but also to competition authorities in other jurisdictions. As the Notification Rules doesn't mention the submission of a list of competition authorities to be notified, the JFTC doesn't ask the company concerned to submit the list actively. But the company may provide it voluntarily, or the JFTC may ask about the names of competition authorities to be notified in the course of the review. In such cases, in the early stage of its review, the JFTC may cooperate or collaborate including sharing information with those competition authorities as necessary. While the cooperation or collaboration doesn't affect the 30-day period which is stipulated in the AMA for the review period of a business combination.

6. In addition, even if the JFTC acknowledges that the company concerned has obligations to notify the business combination to other competition authorities, the JFTC doesn't recommend the company concerned to notify.

2.2. Definition of a particular field of trade (Geographic range) in international business combination cases

7. In accordance with the points of view indicated in the Business Combination Guidelines, the JFTC basically determines a geographic range of a business combination from the viewpoint of the substitutability for users. And it also takes into consideration the substitutability for suppliers as necessary. In many cases, geographic ranges of reviewed business combinations can be defined from the viewpoint of the substitutability for users among goods supplied in each region, in other words, from the viewpoint of which regional range the users usually purchase the goods from suppliers in.

8. According to the Business Combination Guidelines, the above principle is also applicable to a case where a geographic range is defined across national border, as it states that "if users, both inside and outside Japan for a certain product are conducting business without segregating domestic and foreign suppliers, even if suppliers try to raise the prices in Japan, the users in Japan will be able to substitute the purchase of products from overseas suppliers, which may obstruct the raising of prices in Japan. In that case, a geographical range has been determined across the border. It also states that "For example, if a major domestic and overseas supplier is selling at a materially equivalent price in the sales areas worldwide (or in East Asia), and if the user is selecting their major supply source from suppliers around the world (or in East Asia), then a world (or East Asia) market will be determined."

9. There was the acquisition of Fitbit, Inc. by Google LLC (announced on January 14, 2021), as an actual case where a geographic range was defined beyond Japan.

10. Among the business fields subject to the consideration regarding effect on competition in this case, "OS for wristwatch type wearable devices" and "OS for smartphones" were products supplied throughout the world. Then customers around the world purchased those OSs from the suppliers indifferently. In addition, due to the nature of OS, there was no transportation costs, etc., or no difference in license condition between Japan and overseas. Therefore, the geographic ranges for those OSs were defined as "entire world."

11. On the other hand, for example, in terms of "Application software for health care", the JFTC defined the geographic range as "Japan", taking into consideration that there is a need for providers of the software to deal with unique circumstance in each country where users located, or to adapt regulations on the treatment of health care relevant data in each country.

2.3. Exchange of information with other competition authorities on international business combination cases

12. The government of Japan has concluded the Japan-U. S. antimonopoly cooperation agreement (effective in 1999), the Japan-EC antimonopoly cooperation agreement (effective in 2003), and the Japan-Canada antimonopoly cooperation agreement (effective in 2005) as agreements concerning cooperation on anticompetitive activities. Some of the economic partnership agreements (EPA) concluded by Japan also have a competition chapter on cooperation between competition authorities. These agreements stipulate several types of cooperation in enforcement activities of competition law, which includes

review on business combination, such as notification, cooperation on enforcement, coordination on enforcement, request for enforcement activities and consideration of important interests of the governments of the other countries. In addition, the JFTC has concluded memorandums or arrangements on cooperation between competition authorities, including exchange of information, with several competition authorities.

13. The JFTC has been actively cooperating with foreign competition authorities including exchange of information on international business combination cases in accordance with those agreements. While the information exchanged is classified into non-confidential information or confidential information, the JFTC is able to provide the non-confidential information without any particular procedure, within our resources as necessary. On the other hand, in terms of the treatment of confidential information, staff of the JFTC are legally required to maintain its confidentiality. Because of that, only when the JFTC get a waiver which means a consent from informant such as a company concerned or a third party to share the information with other competition authorities, the JFTC will exchange information on the business combination including confidential information with the other competition authorities and discuss it.

14. The following are examples of cases in which the JFTC conducted its review in parallel with exchanging information with other competition authorities.

2.3.1. Acquisition of Asiana Airlines Inc. by Korean Air Co., Ltd. (announced on January 31, 2024)

15. As this case was a business combination between global companies, it had been reviewed by competition authorities based in many jurisdictions in parallel. The JFTC conducted its review in close cooperation with other authorities. After obtaining a waiver from the companies concerned, the JFTC exchanged information on this case with the Australian Competition and Consumer Commission, the U.K. Competition and Markets Authority, the U.S. Department of Justice, the European Commission, the Korea Fair Trade Commission, and the State Administration for Market Regulation of China.

2.3.2. Acquisition of Activision Blizzard, Inc. by Microsoft Corporation (announced on March 28, 2023)

16. The JFTC conducted its review on this case in cooperation with the U.K. Competition and Markets Authority, the European Commission, the Korea Fair Trade Commission, the Australian Competition and Consumer Commission, and the US Federal Trade Commission. After obtaining a consent of the company group concerned to exchange information which is submitted to the JFTC with other competition authorities, the JFTC exchanged information including the possible impacts of the business combination on the video game-related markets.

2.3.3. Acquisition of Fitbit, Inc. by Google LLC (announced on January 14, 2021)

17. As foreign competition authorities were also examining this case, the JFTC proceeded its review in cooperation with the European Commission, the Australian Competition and Consumer Commission, the Competition Commission South Africa and others. After obtaining a waiver of the company group concerned, the JFTC exchanged broad range of information including possible impacts on competition, necessity of remedies and its details.

2.4. Remedies on international business combination cases

18. Even if a business combination may substantially restrain competition in a particular field of trade, the company concerned may be able to resolve the problem by taking appropriate remedies. It should be considered specifically and individually based on the conditions of each business combination to determine what kind of remedies are appropriate for resolving that problem. Basically, a remedy should be able to recover competition which may be restrained by the business combination. For that reason, a structural measure such as a transfer of business is adopted in general. On the other hand, when it comes to a market which changes its structure rapidly due to technological development, etc., it may be more appropriate to take a measure regarding certain actions.

19. As an example of such remedies, there were business combination cases that the JFTC appointed the same monitoring trustees as those in other competition authorities. In the case of Korean Air's acquisition of Asiana Airlines' shares (announced on January 31, 2024), the transfer of freighter business in the part of international air cargo services was taken as a common structure measure with the European Commission. As for the monitoring trustee of both the JFTC and the European Commission, Forvis Mazars LLP was appointed. The JFTC judged and approved the qualifications of the monitoring trustee from the following viewpoints:

- (i) track record (experience as a monitoring trustee and knowledge in the airline industry);
- (ii) operation structure and system (number of the people in charge, their career and availability of Japanese in communication with the JFTC); and
- (iii) conflict of interests and independence (current or past business records with the company group concerned, the situation of interlocking directorates, the remuneration system, etc.).

20. In the case of the acquisition of Fitbit, Inc. by Google LLC (announced on January 14, 2021), the JFTC exchanged wide range of information such as the necessity and details of the remedies to resolve the problem with other competition authorities including the European Commission. So as to implement the measures to resolve the problem appropriately, the JFTC approved the same monitoring trustee with the European Commission, who had been selected by the company group concerned.

3. Cases of international business combinations that have different conclusions among competition authorities

21. In general, every competition authority estimates how a business combination affects competition, and decides the necessity and contents of a remedy, etc. based on its analysis regarding the impact on the domestic or regional customers. Therefore, the JFTC will not change its conclusion regarding a business combination case, even when other competition authorities reach different conclusions in the same case.

22. The following describe the case of acquisition of Activision Blizzard, Inc. by Microsoft Corporation (announced on March 28, 2023), where the JFTC reached different judgements or conclusions with other competition authorities and factors thereof.

23. The JFTC concluded that there was no problem with the AMA in this business combination as a result of its review based on the situation in the Japanese video game related market. At that time, other competition authorities including the U.S. Federal Trade

Commission, the U.K. Competition and Markets Authority and the European Commission were still on the processes with concerns for this business combination. Additionally, these authorities made decisions such as approving it subject to remedies, unlike the JFTC. The differences in the progress of the reviews and conclusions of this case are considered to be due to the differences in market structures of each jurisdictions. As the reason of the differences above, there were competitors which had much higher market share than the company group concerned in the Japanese video game console market. Also, in Japanese video game software market, there were competitors which provide much popular game software titles in Japan than the “Call of Duty” series, which is a game title provided by Activision Blizzard Group and popular all over the world.

4. Conclusion

24. As these recent cases of business combination suggest, the number of international cases affecting the Japanese market are expected to increase continuously. And it means that the needs for international cooperation among competition authorities, such as exchanges of information on schedules of a merger review or remedies, are also increasing. Therefore, the JFTC will make further efforts to strengthen the international cooperation through contributing to the activities of multilateral framework such as the OECD and the ICN as well as developing bilateral cooperation.