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Start-ups, killer acquisitions and merger control – Note by Japan

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More documents related to this discussion can be found at
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1. Introduction

1. Recently, having recognized not just killer acquisition issue in some sectors such as pharmaceutical sector but also the fact that some digital platforms tend to rapidly grow up to monopolize and oligopolize their market and have huge impacts on related competitive environments, the Japan Fair Trade Commission (hereinafter referred to as the "JFTC") has tried to grasp these issues and respond to them.

2. As for the digital platforms issue, in June 2017, the JFTC published the "Report of Study Group on Data and Competition Policy." The report points out that digital platforms may exclude rivals by strengthening their advantageous positions through integrating and analysing start-ups' important data with high technologies such as artificial intelligence (AI).

3. And also, from July 2018 to December 2018, together with the Ministry of Internal Affairs and Communications and the Ministry of Economy, Trade and Industry, the JFTC held the "Study Group Regarding Improvement of Rules Corresponding to the Rise of Digital Platform Business" to conduct a number of interviews from related businesses and receive various opinions through our public comment procedure, and to have a series of discussions. Through this process, the following anticompetitive concerns were pointed out; "Some digital platforms tend to expand their size rapidly by acquiring other different businesses, and to form conglomerate groups with expanded business fields, and also monopolize and oligopolize their markets," and "it is necessary to review how to evaluate competitive impacts of various factors, such as data accumulation, R&D, especially intellectual properties regarding artificial intelligence (AI), talented and skilled persons, and accumulated know-hows." And also, they pointed out, "Against this background, it is not appropriate just to review mergers notified in the existing framework."

4. Finally, in December 2018, the JFTC and the related ministries jointly published "Fundamental Principles of Improvement of Rules Corresponding to the Rise of Digital Platform Business" to propose some action plans including the ones responding to digital platforms' acquisition of start-ups and various assets necessary to bring about huge innovations, both of which cannot be assessed by the existing merger review guidelines and notification system.

5. Based on such proposals, in December 2019, the JFTC has published the amendment of the "Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination" (hereinafter referred to as the "Guidelines") and the "Policies Concerning Procedures of Review of Business Combination" (hereinafter referred to as the "Procedure Policies"), following public comment procedure for both of their drafts from August 2019.

6. This contribution paper is organized as follows: first, it illustrates overviews of the amendment of the Guidelines and the Procedure Policies in section 2. Then, section 3 introduces two related cases, a pharmaceutical killer acquisition case and a digital platform case. Lastly, section 4 briefly summarises this paper.

2. Amendment of the Guidelines and the Procedure Policies

2.1. Overview of amendment of the Guidelines

7. The newly amended Guidelines clarified what kind of factors the JFTC should bear in mind to review whether acquisitions[1] of potential competitors including nascent firms and start-ups would substantially restrain competition in the market.

8. Firstly, the Guidelines describe the necessity to consider whether the merger might lead the merging entity to lose incentive of R&D, which might be realized without the merger. For example, if the acquired company has invested in R&D for new products which would compete with the ones of the acquiring company, the merged entity would stop the R&D for new products.

9. Secondly, the Guidelines state that a merger and acquisition of a potential competitor may substantially impede competition in the case where the possibility of the competitor's new entry may be vanished by the merger, especially if it is likely for an acquired company to enter the market of an acquiring company due to low entry barriers of the said market and the acquired company is expected to become a powerful competitor of the acquiring company. In this case, the merged entity might easily be able to create a condition to manipulate the trade terms and conditions after the merger.

10. And also, it is pointed out that in evaluating whether the data of the acquired company would lead the merged entity to have a substantial impact on the market, the JFTC will consider four dimensions of data held or collected by the merging parties: variety, volume, velocity and value, which is called "four Vs" as follows: 1) what kind of data are held or collected by the acquired company (Variety). 2) how large quantity or how wide range of data are held or collected by the acquired company on a daily basis, in addition to the quantity of data accumulated by the acquired company (Volume). 3) how frequently is the data updated and collected by the acquired company (Velocity), and 4) to what extent is data held by the acquired company contributing to the improvement of services in the market for the acquiring party (Value).

11. The JFTC will take into consideration these four Vs in reviewing the merged entity's competitive advantage derived from the data of the acquired company, in contrast to the data available for its rivals.

12. Finally, the Guidelines also stress that the JFTC does not necessarily apply the Herfindahl-Hirschman Index (hereinafter referred to as "HHI") standard to a merger case where the acquired company holds important assets which increase competitive advantage of the merged entity, such as data or intellectual property rights, even though the acquired company has only small market share, and HHI and its increment after the merger does not meet the safe harbor criteria in the relevant market.

2.2. Overview of the amendment of the Procedure Policies

2.2.1. The current review system of a notification-free merger plan

13. Since the current notification system was established, the JFTC has kept an authority to conduct necessary investigations and issue a cease and desist order against notification-free merger plan, which does not meet the notification threshold.

[1] The term "merger" or "acquisition" used in this paper covers various types of transactions such as an acquisition of stock, mergers, joint share transfer and acquisition of business.

14. In fact, in the case of M3/Nihon Ultmarc (2019) described in section 3.2, which was a notification-free merger plan, the JFTC conducted its review by requesting the merging parties to submit the related documents because the JFTC got concerned that the merger might substantially restrain competition in the market.

15. In addition, the JFTC accepts a voluntary consultation from the parties with a notification-free merger plan (hereinafter referred to as “voluntary consultation”). Using this system, the merging parties get benefit from avoiding potential risks or burdens, such that after the consummation of the merger, the JFTC would request the merged entity to respond to inquiries and it would also be exposed to the risk of a cease and desist order pursuant to the Article 17(2) of the Antimonopoly Act. Actually, the JFTC receives such voluntary consultations in several cases per year.

2.2.2. Detail of new considerations on a notification-free merger plan

16. In the new Procedure Policies, the JFTC is making it clear that the JFTC reviews a merger case with a notification-free merger plan, if the total consideration for the acquisition of the other party (e.g, cash, stocks, securities and other assets) is large and the merger plan may be expected to affect domestic consumers.

17. The Procedure Policies also recommend voluntary consultations to parties with a notification-free merger plan, if the total consideration for the acquisition of the other party exceeds 40 billion yen and it would be expected to affect domestic consumers such that any of following conditions from 1) to 3) is met.

1. when the acquired company’s base of business or R&D is located in Japan
2. when the acquired company’s sales activities such as a Japanese website or pamphlet are targeting consumers in Japan
3. when the acquired company’s total domestic sales amount exceeds 100 million yen

3. Related cases

3.1. Takeda / Shire (2018)

3.1.1. Outline of the case

18. This section introduces the case of Takeda/Shire (2018), where Takeda Pharmaceutical Company Limited (hereinafter referred to as "Takeda") notified the JFTC of its plans to acquire all voting rights attaching to stocks in Shire Plc (hereinafter referred to as "Shire").

19. Both Takeda and Shire manufacture and supply various type of prescription drugs for inflammatory bowel diseases such as ulcerative colitis and Crohn's disease, and they were competing with each other for these products.

20. In this case, the JFTC also took into careful consideration the products being developed by both of the merging parties, that is, which had not been placed on the market but would be competing against each other after both of them are launched by the merging parties, through conducting counterfactual analysis, that is, comparison of the competition between the merger and the one without the merger.

3.1.2. Relevant Markets

21. In the review, the JFTC assessed several prescription drugs manufactured and supplied by the merging parties to evaluate anti-competitive effects brought about by the acquisition. In detail, as for inflammatory bowel disease drugs, the JFTC firstly distinguished biopharmaceutical drugs, the subject of this review, from small-molecule drugs because the former ones are used for moderate or severe conditions while the latter ones do not indicate positive effect on the diseases in such conditions. Furthermore, among several biopharmaceutical drugs, anti-integrin inhibitors, anti-TNF alpha inhibitors and anti-IL inhibitors were different according to each drug's different pharmacological action or side effects although they basically have similar medical effects on the diseases and can be a substitute of each other in a certain degree. Therefore, the JFTC defined the product market for anti-integrin inhibitors.

22. Also, the JFTC defined "Japanese market" as geographic market, based on the following factors. Firstly, because of each manufacture's supply network throughout Japan regarding each prescription drug for the diseases described above, medical institutions as users of this case can procure these drugs at the same pricing level. Secondly, pharmaceutical approval by the Ministry of Health, Labour and Welfare (hereinafter referred to as the "MHLW") is necessary to launch new products in the Japanese market.

3.1.3. "Counterfactual" analysis

23. Shire was a Takeda's potential competitor in the relevant market defined above, while both of them had not launched anti-integrin inhibitors in Japanese market when the merging parties notified the JFTC of its plan. The JFTC conducted careful review whether this merger would substantially restrain competition in the market.

24. Before the notification of this case, Takeda had already got an approval from the MHLW to launch its anti-integrin inhibitors in the Japanese market. On the other hand, Shire had not yet launched anti-integrin inhibitors, as the products were still in development, which were in the final stage for the approval process in Europe and the U.S. In addition, Shire had not developed the drug for Japanese market at the time of reviewing, and there was no plan to launch the products in the Japanese market at that time.

25. Then, the JFTC conducted a counterfactual analysis of the competition in the Japanese market by comparing it with the competition without the merger. If the merger is consummated, the merged entity is unlikely to develop Shire's new anti-integrin inhibitors and may withdraw from the market.

26. On the other hand, even without merger, Shire had no specific plan to launch anti-integrin inhibitor in Japanese market in the near future.

27. Additionally, as for pro-competitive factors to be considered, there were some likelihood of other pharmaceutical companies to launch anti-integrin inhibitor in the market, which could be competitive pressures for the merged entity. Consequently, the JFTC concluded that the consolidation would not likely to substantially restrain competition in the market**.**

28. In the meantime, EU Commission also reviewed and approved this case with conditions of remedies. The difference of decisions between the JFTC and EU Commission might be derived from the difference of the two markets. Takeda had already launched anti-integrin inhibitors and Shire was in the final stage of pharmaceutical approval process in the EU market. Shire's anti-integrin inhibitors was expected to compete with Takeda's products in the EU market. In addition, the EU's decision said that there was some

likelihood that the merged entity would delay or suspend the final stage of pharmaceutical approval process in the EU market.

3.2. M3 / Nihon Ultmarc (2019)

3.2.1. Outline of the case

29. The case of M3/Nihon Ulrmarc, where M3 acquired all of the voting rights attached to the shares in Nihon Ultmarc, was a conglomerate merger with a notification-free merger plan. Although there was not a notification, the JFTC recognized the anticompetitive concerns of the plan and reviewed it.

3.2.2. Relevant Markets

30. M3 operates online platform which provides doctors with medicinal drug information and advertisements of medicinal prescription drug for free of charge (e.g. proper dosage or administration, prescription, advertisement and other relevant topics of the drugs) (hereinafter referred to as "medicinal drug information platform"). M3 is the leading company with around 75% share in the market of medicinal drug information platform [downstream market], while the Nihon Ultmarc is deploying its business in the market of medical personnel-information database service (hereinafter referred to as the "MDB service") with no competitors [upstream market].

3.2.3. Assessment of vertical aspects

31. Although this merger has a vertical aspect and a conglomerate aspect, this section focuses only on the vertical aspect[2], that is, input foreclosure by refusing supply and sharing sensitive information of the acquiring company's competitors in the downstream market.

32. Nihon Ultmarc supplies MDB service in the upstream market for "online medicinal drug information platforms" (hereinafter referred to as "medicinal platforms"), and they, including M3, compete with each other in the downstream market.

33. Nihon Ultmarc's MDB service is the unique medical personnel information database service covering all medical institutions and doctors in Japan, and any other company cannot provide the same level service.

34. The pharmaceutical regulations such as "Pharmaceutical and Medical Device Act" describe that pharmaceutical companies are not allowed to advertise or supply prescription drugs' information to persons other than pharmaceutical personnel such as doctors. Therefore, pharmaceutical companies necessarily rely on MDB service to advertise in compliance with the regulations.

35. If Nihon Ultmarc refuses to provide medicinal platforms such as M3's rivals with MDB service after the merger is consummated, the rivals may be excluded from the market, and new entry into the downstream market is difficult. Thus, the JFTC recognized that the merged entity had the ability and also incentive to implement input foreclosure for profitability.

36. Besides, the merged entity can utilize sensitive information of the M3's rivals favourably for M3 business, such as making strategic decision based on the sensitive information of the rivals, because the rivals have to provide Nihon Ultmarc with their new

[2] As for detailed analysis of the conglomerate aspects of the case M3/Nihon Ultmarc (2019), please refer the Note from Japan for OECD Roundtable on Conglomerate Effects Mergers "Best Practice of Conglomerate Mergers" (10-12June 2020).

medicinal service to use its MDB. Thus, the JFTC was concerned that the merger was likely to substantially restrain competition.

37. The JFTC concluded that this acquisition would substantially restrain competition, unless mainly following remedies would be implemented in the context of vertical merger;

38. The merged entity would have the obligations to; 1) continue to provide their competitors with MDB service and other databases; and 2) refrain from discriminatory treatment on their competitors in price and other trade terms for their MDB service and other databases.

39. The merged entity would take measures to prohibit directors and employees of M3 from having access to their competitors' non-public information for an infinite period of time after the merger is consummated.

4. Conclusion

40. As the newly amended Procedure Policies are not mandatory system, under which the JFTC does not order merging parties to submit related documents, but recommends voluntary consultations with it in certain types of cases as described above. Under rapidly changing markets environment, the JFTC is expected to let all of the business communities know the Policies thoroughly. On the other hand, the newly amended Guidelines clarify new factors to be considered in the review practices related to start-ups and killer acquisition, of which assessing ways to be further developed by the JFTC's future accumulation of various cases. We will continuously monitor market and competition environments to review our practices for more predictable and more accurate judgements.