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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
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## **Working Party No. 3 on Co-operation and Enforcement**

### **Efficiencies in Merger Control – Note by Japan**

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## Japan

### 1. Introduction

1. In Japan, the Antimonopoly Act (AMA) prohibits a business combination that may substantially restrain competition in any particular field of trade, and the Japan Fair Trade Commission (JFTC) conducts review of business combinations in accordance with the provisions of the AMA.

2. The viewpoints of the JFTC's review are released as the "Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination (Business Combination Guidelines)". The guidelines state that factors such as the position of the concerned company groups and competitors, the state of competition in the market, imports, and entry are comprehensively considered in determining whether there may be a substantial restraint of competition for each of horizontal mergers, vertical mergers, and conglomerate mergers. "Efficiency" is listed as one of these determining factors.

3. When improvement in efficiency, whether through economies of scale, integration of production facilities, specialization of factories, reduction in transportation costs or efficiency in research and development, is deemed likely to make the company group take competitive action after the business combination, this factor will also be considered to determine the impact of the business combination on competition.

4. Efficiencies to be considered in this case are determined from three aspects: (i) efficiencies should be improved as effects specific to the business combination; (ii) improvements in efficiencies should be materialized; and (iii) improvements in efficiency contribute to the interests of users.

5. In March 2023, the JFTC formulated and published the "Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society Under the Antimonopoly Act (Green Guidelines)." As part of efforts by enterprises, etc. toward the realization of green society, which aims to combine the reduction of environmental burdens and the accomplishment of economic growth, enterprises may engage in activities that require consideration from the perspective of business combinations. In relation to such activities the Green Guidelines explain the framework and factors for analyzing competition issues under the AMA, as well as views on efficiency in reviewing business combinations. It may be expected that a business combination toward the realization of green society is likely to generate pro-competitive effects such as the creation of innovations in technologies contributing to reduction of greenhouse gas, or the creation of new products that can contribute to reduction of greenhouse gas. The Green Guidelines show a perspective that the aspect of "efficiency" among the factors for determining the substantial restraint of competition will be considered in such cases.

6. Furthermore, this contribution paper introduces cases of business combination in which the JFTC examined the efficiency claimed by the concerned companies: (i) the case where BHP Billiton and Rio Tinto planned to establish a joint venture for iron ore production, and (ii) the case where Kubota Corporation planned to acquire shares of a newly established manufacturing subsidiary of NIPPON CHUTETSUKAN K. K."

## 2. Viewpoints on Efficiency in Reviewing Business Combination

### 2.1. Business Combination Guidelines

7. In Japan, the Antimonopoly Act (AMA) prohibits a business combination (such as shareholdings, interlocking officers, mergers, splits, share transfers, acceptance of assignments of business, etc.) that may substantially restrain competition in any particular field of trade, and the Japan Fair Trade Commission (JFTC) conducts review of business combinations in accordance with the provisions of the AMA. The viewpoints of the JFTC's review are released as the "Guidelines to Application of the AMA Concerning Review of Business Combination (Business Combination Guidelines)."

8. The guidelines state that factors such as the position of the concerned company group and competitors, the state of competition in the market, imports, and entry are comprehensively considered, in determining whether there may be a substantial restraint of competition for each of horizontal mergers, vertical mergers, and conglomerate mergers. "Efficiency" is listed as one of these determining factors, and is explained as follows.

*"When improvement in efficiency, whether through economies of scale, integration of production facilities, specialization of factories, reduction in transportation costs or efficiency in research and development, is deemed likely to make the company group take competitive action after the business combination, this factor will also be considered to determine the impact of the business combination on competition.*

*Efficiencies to be considered in this case are determined from three aspects: (i) efficiencies should be improved as effects specific to the business combination; (ii) improvements in efficiencies should be materialized; and (iii) improvements in efficiency contribute to the interests of users.*

*Business combinations that create a state of monopoly or quasi-monopoly are hardly ever justified by their efficiency.*

#### *(i) Improvements in Efficiency Should Be Specific to the Business Combination*

*Improvements in efficiency should be specific to the business combination.*

*Therefore, such factors related to the expected efficiency as economies of scale, integration of production facilities, specialization of factories, reduction in transportation costs, or efficiency in research and development such as next-generation technology and environmentally friendly capabilities cannot be achieved by other means that are less restrictive on competition.*

#### *(ii) Improvements in Efficiency Should Be Materialized*

*Improvements in efficiency should be materialized. This is analyzed, for example, using documents of internal procedures leading to the decision of the business combination, explanatory materials for shareholders and financial markets regarding the expected efficiency, and studies by external specialists concerning the improvement in efficiency.*

#### *(iii) Improvements in Efficiency Contribute to the Interests of Users*

*The outcome of improvements in efficiency through the business combination must be returned to users through reduced prices of products and services, improved quality, the supply of new products, or efficiencies in research and development, such as next-generation technology and environmentally friendly capabilities. In this regard, in addition to the materials listed in (ii), these are to be analyzed, for*

*example, as information related to improved capabilities that will bring effects such as a price reduction and of the history of actual price reductions, quality improvement and supply of new products being realized through competitive pressure from the demand and supply side.”*

## **2.2. Green Guidelines**

9. In March 2023, the JFTC formulated and published the “Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society Under the Antimonopoly Act (Green Guidelines).”

10. As part of efforts by enterprises, etc. toward the realization of green society, which aims to combine the reduction of environmental burdens and the accomplishment of economic growth, enterprises may engage in activities that require consideration from the perspective of business combinations. These activities include acquiring shares or establish a joint investment company<sup>1</sup> to promote joint R&D or the streamlining of business activities.

11. In relation to such acts, the Green Guidelines explain the framework and factors for analyzing issues under the AMA by reference to supposed cases: “Business Combinations that do not pose problems under the AMA” and “Business Combinations that pose problems under the AMA.”

12. It may be expected that a business combination toward the realization of green society is likely to generate pro-competitive effects such as the creation of innovations in technologies contributing to reduction of greenhouse gas, or the creation of new products that can contribute to reduction of greenhouse gas. The Green Guidelines show a perspective that the aspect of “efficiency” among the factors for determining the substantial restraint of competition will be considered in such cases.

## **3. Case Examples**

13. In the following, this contribution paper introduces business combination cases where the JFTC examined efficiency in its review.

### **3.1. Establishment of a Joint Venture by BHP Billiton and Rio Tinto**

#### **3.1.1. Overview**

14. The concerned companies were BHP Billiton PLC and BHP Billiton Limited (hereinafter collectively referred to as "BHP Billiton") and Rio Tinto PLC and Rio Tinto Limited (hereinafter collectively referred to as "Rio Tinto"), which were engaged in mining and sale of iron ore and other related businesses. The concerned companies planned to establish a joint venture for the production of iron ore in Western Australia (hereinafter referred to as "the JV").

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<sup>1</sup> A joint invest company refers to a company jointly established or acquired by two or more companies on the basis of a contract, etc. for the purpose of having this company execute necessary business for the sake of common benefits.

### 3.1.2. Review Process

15. The JFTC received a preliminary consultation from the concerned companies regarding the establishment of the JV. On June 16, 2010, the JFTC began the Primary review, and on July 16, 2010, moved to the Secondary review. During the detailed examination in the Secondary review, on September 27, 2010, the JFTC pointed out concerns to the concerned companies that the establishment of the JV would substantially restrain competition in the production and sales of lump ore and fine ore supplied through global maritime trade. Subsequently, on October 18, 2010, since the concerned companies announced the withdrawal of their plan to establish the JV, the JFTC ceased its review.

### 3.1.3. Consideration concerning Efficiency

16. The concerned companies claimed that the purpose of establishing the JV was to integrate their iron ore production operations in Western Australia, achieving improvement in efficiency worth more than 10 billion USD. The JFTC reviewed the validity of this claim as follows. It should be noted that the JFTC's views outlined below represent its stance at the time of pointing out the concerns mentioned in B. above and do not constitute its final decision which would incorporate the opinions of the concerned companies.

17. Regarding lump ore among products under the review, the combined market share of the concerned companies was approximately 55–60%. Moreover, there was significant gap between their market share and that of the next-largest supplier, and there were no other suppliers with mines capable of producing large quantities of lump ore at low cost. Consequently, no suppliers could effectively constrain the concerned companies. Therefore, concerning lump ore, it was considered that the JV would lead to a situation close to monopoly. For this reason, even if the improvement in efficiency claimed by the concerned companies was achieved, it was deemed unlikely that they would engage in competitive behavior. Hence, the improvement in efficiency was judged insufficient to justify the JV.

18. Additionally, regarding fine ore, the improvement in efficiency claimed by the concerned companies was examined based on three perspectives below, it was concluded that none of them could be recognized.

1. whether the improvement in efficiency is specific to the business combination (Specificity),
2. whether the improvement in efficiency would be *materialized* (Feasibility), and
3. whether the improvement in efficiency would contribute to the interests of users (Possibility of consumer welfare enhancement).

#### *Specificity*

19. Regarding the improvement in efficiency claimed by the concerned companies, it was considered that the improvement in efficiency could be achieved through many other methods less restrictive to competition than the JV.

#### *Sharing Infrastructure*

20. The concerned companies claimed that integrating their infrastructure in Western Australia would lead to the improvement in efficiency. However, it was believed that improvement in efficiency could be achieved by establishing a company to manage and operate their respective infrastructures, such as railways and ports, and jointly utilizing these resources to a similar extent.

### *Sale and Purchase of Mines and Iron Ore between the Concerned Companies*

21. In the Yandi area of Western Australia, where the mines of both concerned company groups are located closely, they argued that integrating operations in the Yandi area would achieve improvement in efficiency. However, it was considered that efficiency could be achieved by selling and reorganizing their own mining areas between themselves to a similar extent. Furthermore, the concerned companies claimed that blending the iron ore they mine would make it possible to utilize some ores currently treated as waste, thereby enabling greater iron ore sales post-establishment of the JV. Nevertheless, it was considered that similar blending could be achieved, to a certain extent, by selling and purchasing the relevant iron ore between the concerned company groups as needed.

### *Sharing Best Practices*

22. Regarding cost reduction through sharing best practices, it was not necessarily recognized that the best practices of one concerned company group are based on unique technologies or know-how that competing businesses cannot develop.

### *Feasibility and Possibility of Consumer Welfare Enhancement*

23. The concerned companies claimed that the JV would achieve improvement in efficiency worth more than 10 billion USD through increased iron ore production and reduced operational costs, and that standardizing quality by blending iron ore would lead to an increase in consumer welfare. However, it was not necessarily recognized that the improvement in efficiency can be realized through the establishment of the JV, nor that they would result in an increase in consumer welfare, as outlined below.

### *Increase in Iron Ore Production*

24. The concerned companies claimed that, compared to the planned production volume if the JV were not established, the establishment of the JV would enable them to supply a greater production volume to the market more quickly. However, the plan for expanding their production capacity submitted by the concerned companies appeared excessively ambitious compared to the capacity expansions previously implemented by them. It raised doubts about whether the plan was genuinely intended to be carried out. Moreover, it was unclear how supply and demand would balance if the production capacity expansion plans of other competing businesses were to be realized as claimed by the concerned companies.

### *Reduction of Operational Costs*

25. The feasibility of reducing capital expenditures and operational costs through the establishment of the JV was not necessarily clear. Furthermore, even if capital expenditures were reduced, this primarily pertained to fixed costs and did not directly benefit consumers. Additionally, even if operational costs of both concerned companies were reduced and the supply curve shifted downward on its left side, this did not affect the intersection of the supply curve and the demand curve<sup>2</sup>, meaning it did not lead to price reductions or an increase in consumer welfare.

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<sup>2</sup> Typically, the marginal cost for iron ore suppliers remains almost constant up to their maximum production capacity. Companies like the concerned companies, which are capable of supplying at low cost and on a large scale, are positioned on the left side of the supply curve.

### *Standardization of Quality through Blending Iron Ore*

26. Blending the iron ore produced by both concerned companies could lead to potential issues, such as quality degradation, a relative increase in prices, and additional management burdens for steel companies in handling the iron ore. As a result, even if quality standardization were achieved, it was unlikely to benefit consumers.

## **3.2. Acquisition of Shares in a Newly Established Manufacturing Subsidiary of NIPPON CHUTETSUKAN K. K. by Kubota Corporation**

### *3.2.1. Overview*

27. The concerned companies were Kubota Corporation (hereinafter referred to as "Kubota") and NIPPON CHUTETSUKAN K. K. (hereinafter referred to as "NIPPON CHUTETSUKAN".) They were engaging in the manufacturing and sales of ductile iron pipes<sup>3</sup> and other products. Kubota had planned to acquire 19.9% of the voting rights in the shares of a newly established manufacturing subsidiary of NIPPON CHUTETSUKAN (hereinafter referred to as the "Transaction").

### *3.2.2. Review Process*

28. Although the Transaction did not meet the notification requirements stipulated in Article 10, Paragraph 2 of the AMA, the concerned companies consulted with the JFTC, presenting the specifics of their business combination plan. In response, the JFTC conducted review of the Transaction in accordance with Section 6(1) of the "Guidelines Concerning Procedures of Review of Business Combination" (June 14, 2011), applying principles similar to those for business combinations that require notification.

29. As a result, it was recognized that, provided the remedies proposed by the concerned companies are implemented, the Transaction would not be likely to substantially restrain competition in any particular field of trade. Thus, the JFTC concluded its review.

30. Additionally, the concerned companies specifically claimed that the Transaction would enhance efficiency by reducing carbon dioxide emissions. In light of this, the JFTC examined the matter in line with the Green Guidelines.

### *3.2.3. Consideration concerning Efficiency*

31. With regard to efficiency, the JFTC examined the internal documents of the concerned companies and the specifically calculated carbon dioxide reduction effects provided by the concerned companies, in accordance with the Green Guidelines. The concerned company group planned to replace the current cupola furnaces<sup>4</sup> with electric furnaces at the newly established manufacturing subsidiary after the Transaction to manufacture ductile iron pipes with lower carbon dioxide emissions.

32. It was recognized that one concerned company alone would not have been able to realize the early introduction of electric furnaces, and the introduction of electric furnaces were decided on the premise of the Transaction. The reduction in carbon dioxide emissions could be considered an efficiency improvement specific to the Transaction (Specificity).

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<sup>3</sup> Ductile iron pipes refer to iron pipes made of ductile cast iron, mainly used as water supply pipes for drinking water applications.

<sup>4</sup> A cupola furnace refers to a device for melting iron using the heat from coke combustion.

33. The electric furnaces had already been ordered, and the switch to electric furnaces was expected to result in a significant reduction in carbon dioxide emissions compared to the previous methods, making the efficiency improvement achievable (Feasibility).

34. The substantial reduction in carbon dioxide emissions could be regarded as an improvement in quality, and this increase in quality was recognized as enhancing consumer welfare (Possibility of consumer welfare enhancement)<sup>5</sup>. As all three efficiency criteria were satisfied as above, the efficiency improvement resulting from the Transaction were recognized.

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<sup>5</sup> Example 5 under Section 1.1 of the Green Guidelines states that "if it is clear that greenhouse gas emissions can be significantly reduced by changing manufacturing process, it is considered an improvement in quality, even if there is no direct change in the value in use for consumers, and it is recognized to have a competition promotion effect.