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Minority Shareholding and coordinated effects – Note by Japan

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Japan

1. Introduction

1. The Antimonopoly Act (hereinafter referred to as "the Act") prohibits the acquisition or possession (hereinafter referred to as “holding”) of the shares of a company, among other business combinations which may be substantially to restrain competition in any particular field of trade. The Japan Fair Trade Commission (hereinafter referred to as "the JFTC") operates merger regulations in a prompt and appropriate way in order to ensure a competitive market structure in Japan. Under Article 10, Paragraph 2 of the Act, a company that meets certain standards and plans to acquire shares must notify the JFTC concerning its plan for the business combination (hereinafter the "business combination plan").

2. In addition, when a company plans a business combination for which notification is not required because the domestic sales, etc. do not meet the standards or any other business combination that is not subject to notification, and the said company consults with the JFTC concerning the said business combination plan by showing specific contents of the plan, the JFTC reviews it in the same manner as a business combination for which notification is required.

3. Whether the effect of a shareholding may be substantially to restrain competition in any particular field of trade is reviewed from two perspectives: "substantial restraint of competition through unilateral conduct" by the company group; and "substantial restraint of competition through coordinated conduct" between the company group and its competitors.

4. Following previous OECD work, this contribution uses "minority shareholding" to mean holding less than 50% of the voting rights[1].

5. This contribution first outlines the framework for reviewing shareholdings. It then presents a recent case in which the JFTC reviewed, from the perspective of coordinated conduct, a minority shareholding that did not meet the notification requirements.

2. Framework of the Review of Business Combination

2.1. Provisions of the Antimonopoly Act, etc.

6. Article 10, Paragraph 2 of the Act sets out the notification requirements for business combination plans involving shareholdings. A notification is required where all of the following apply: the acquiring company belongs to a group of combined companies whose total domestic sales exceed JPY 20 billion; it acquires shares of a company whose domestic sales, combined with those of its subsidiaries, exceed JPY 5 billion; and as a result, the ratio of voting rights held newly exceeds 20% or 50%. Japan’s merger review system therefore captures, through the notification system, minority shareholdings that do not

1 As in this contribution, the background note to OECD (2009), Minority Shareholdings and Interlocking Directorates, OECD Competition Committee, DAF/COMP(2008)30, defines a minority shareholding as one in which a shareholder holds less than 50% of the voting rights in a target firm.

amount to full control but exceed 20% of the voting rights. This allows the JFTC to review the competitive impact of such minority shareholdings within the business combination review framework before the plan is implemented.

7. Minority shareholdings below the 20% threshold are not captured by the notification system. To address this, the "Policies Concerning Procedures of Review of Business Combination" provide as follows. When a company plans a business combination for which notification is not required because the domestic sales, etc. do not meet the standards, or an interlocking directorate or any other business combination that is not subject to notification, and the said company consults with the JFTC concerning the said business combination plan by showing specific contents of the plan, the JFTC shall respond pursuant to the procedures for business combination plans for which notification is required. In addition, the JFTC may, on its own initiative, review business combinations, including minority shareholdings, irrespective of whether they are subject to the notification requirement. Through these consultations and such reviews, competition concerns arising from minority shareholdings below the 20% threshold can still be identified and addressed. The acquisition by Kubota Corporation of shares in the newly established manufacturing subsidiary of NIPPON CHUTETSUKAN K.K., presented in Section 3 below, is precisely such a case: a minority shareholding below the notification thresholds that the JFTC reviewed following a consultation by the parties.

2.2. Subject of the Review of Business Combinations

8. The review considers whether a joint relationship is to be formed, maintained or strengthened between the company acquiring shares (hereinafter referred to as a “shareholding company”) and the company whose shares are acquired (hereinafter referred to as a “share issuing company”) mainly in the following cases.

1. When the ratio of the total number of voting rights pertaining to shares held by companies, etc. that belong to the group of combined companies (the group of combined companies prescribed in Article 10, Paragraph 2 of the Act, the same shall apply hereinafter) to which the shareholding company belongs to all of the voting rights of the share issuing company (hereinafter referred to as the "ratio of voting rights held") exceeds 50%.
2. When the ratio of voting rights held exceeds 20% and the said ratio stands alone as the top-ranked.

9. Even in cases other than (i) and (ii) above, a joint relationship may be formed, maintained or strengthened between the shareholding company and the share issuing company. The following items are taken into consideration to determine whether a joint relationship is formed, maintained or strengthened, and whether the case is subject to business combination review. Regarding such cases, except in the case of a joint investment company, where the ratio of voting rights held is 10% or less, or the shareholding company is not ranked among the top three holders of voting rights, in general a joint relationship is not formed, maintained or strengthened, and the case is not subject to business combination review.

a) The extent of the ratio of voting rights held
b) The rank as the ratio of voting rights held, differences in and distribution of the ratios of voting rights held among the holders, and other relationships between holders

c) Cross-holding of voting rights (the share issuing company concurrently holds voting rights of the shareholding company) and other mutual relationships between the companies involved (hereinafter referred to as “parties”)

d) Whether officers or employees of one of the parties are officers of the other parties

e) Trading relationship between the parties (including financial relationship)

f) Relationships between the parties based on business alliance, technical assistance and other agreements

g) Items a) through f), when including companies that already have joint relationships with the parties

2.3. Assessment of Substantial Restraint of Competition through Coordinated Conduct

10. Whether the effect of a business combination may be substantially to restrain competition in any particular field of trade is reviewed from two perspectives: "substantial restraint of competition through unilateral conduct" by the company group; and "substantial restraint of competition through coordinated conduct" between the company group and its competitors. The following outlines, for each type of business combination, the mechanism (theory of harm) by which coordinated conduct may substantially restrain competition, and the criteria used to assess it.

11. This framework applies to any business combination subject to review, whether or not it involves a minority shareholding.

2.3.1. Horizontal Business Combinations

Mechanism of Substantial Restraint of Competition (Theory of Harm)

12. A business combination between companies with a competitive relationship in the same particular field of trade reduces the number of competitive units (competitors). In addition, given the market structure, the characteristics of the goods or trade practices, there may be cases in which the business operators will be able to anticipate each other's behavior with a high degree of accuracy, and their coordinated conduct could bring profits to them. In such cases, a situation is likely to emerge in which the company group has some ability to control the price and other factors by coordinating its conduct with its competitors and the effect of the horizontal business combination may be substantially to restrain competition in a particular field of trade.

Criteria

13. Whether a horizontal business combination may be substantially to restrain competition through coordinated conduct is determined by comprehensively considering the following factors.

a. The Position of the Company Group and Competitors and the Competitive Situation in the Market, etc.

Number of Competitors:

14. When there are few competitors in the particular field of trade or the market share is concentrated on a few leading business operators, the behavior of the competitors can be forecast with high probability. Moreover, when the companies sell homogeneous goods

and have similar cost conditions, they tend to take coordinated conduct as they share common interests. In addition, it is easier to predict with high reliability whether competitors will take coordinated conduct or not.

Competition among the Parties in the Past, etc:

15. The fact that the parties have competed vigorously or the fact that their conduct in the market has stimulated competition may be deemed to contribute to a reduction in prices, an improvement in quality or an extension of the range of goods throughout the market. If the business combination eliminates these conditions, it will have a serious impact on competition, even if the combined market share or the rank of the parties is not high.

Excess Capacity of Competitors:

16. If a company does not have sufficient excess capacity, the opportunities to expand market share by cutting prices or depriving competitors of their market shares are limited. As a result, the company will not be able to generate substantial profits through such conduct, so that it is likely to commit to coordinated conduct with the competitors. In contrast, if the excess capacity of a company is large while that of its competitors is small, when it reduces prices to gain sales, the sales it will lose to competitors through their price reduction in the near future are limited. There will therefore be less incentive to commit to coordinated conduct with competitors, since profits from expanded sales are expected through reducing prices.

Treatment of Joint Investment Company:

17. If only part of certain business departments of each investing company is transferred to the joint investment company, whether the investing companies are committed to coordinated conduct with their competitors is examined as well. For example, when only the production sections of the goods are integrated into the joint investment company and each of the investing companies continues to sell the goods, even though measures are taken to prevent a coordinated relationship between the investing companies through the operation of a joint investment company, the production costs will be shared. As a result, there will be less room for price competition and they will have the incentive to commit to coordinated conduct with their competitors, including the other investing company.

b. Trade Realities, etc.

Conditions of Trade, etc:

18. When, for example, a trade association collects and provides such information as the sales prices or production quantities of the member companies, and each company can readily obtain information on the competitors' trading conditions, such as price and quantity, it is possible for each company to forecast the behavior of its competitors with a high degree of accuracy, and it is also easy to observe whether the competitors are coordinating their conduct or not. As a result, the company has little incentive to cut its price to increase its sales.

Trends in Demand, Technological Innovation, etc:

19. When demand is changing significantly or technological innovation is frequent and the product lifecycle is short, substantial profits are more likely to accrue from cutting prices and increasing sales and from taking sales from competitors. As a result, there will

be less incentive to coordinate conduct with competitors and it will be difficult to anticipate the behavior of competitors, so that coordinated conduct with competitors is not likely to occur.

Past Competitive Situation:

20. When past changes in market shares and prices are substantial, coordinated conduct with competitors is not likely to occur because it is difficult to forecast competitors' behavior. In contrast, if these changes are small, it will be easier to forecast competitors' behavior and there is a stronger possibility that coordinated conduct will occur.

c. Competitive Pressure from Import, Entry, Related Markets, etc.

21. When there is significant competitive pressure from imports, entry, related markets and users, if companies raise the price through coordinated conduct, they will lose sales to imports, new entrants, products in related markets, etc., or the price increase will be prevented by the bargaining power of the users. There will therefore be less chance of coordinated conduct.

d. Efficiency and Financial Conditions of the Company Group

Efficiency:

22. When improvements in efficiency through the business combination are deemed likely to make the company group take competitive action, this factor will also be considered to determine the impact of the business combination on competition. Efficiencies 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.

Financial Conditions of the Company Group:

23. The financial conditions, such as whether the results of part of the company group or the business section in question are poor or not, are also taken into consideration. In particular, where it is obvious that a party to the combination would be highly likely to go bankrupt and exit the market in the near future without the business combination, and it is difficult to find any business operator that can rescue the party with a combination that would have less impact on competition than the business operator that is the other party to the combination, the possibility that the effect of the business combination may be substantially to restrain competition is usually thought to be small.

2.3.2. Vertical Business Combinations

Mechanism of Substantial Restraint of Competition (Theory of Harm)

24. In some cases, subsequent to a vertical business combination, the company group may be more apt to engage in coordinated conduct by obtaining confidential information of its competitors, etc. If, as a result, the coordinated conduct between the company group and its competitors is able to easily create a condition that would allow them to manipulate price, etc. of the relevant product to certain extent, the vertical business combination may be substantially to restrain competition in a particular field of trade.

Criteria

25. It will be determined whether a vertical business combination may be substantially to restrain competition in a particular field of trade through coordinated conduct or not, after taking into consideration the extent to which subsequent to the vertical business combination the company group and its competitors become more likely to engage in coordinated conduct as described in a. below, and then the determining factors mentioned in b. below.

a) Case Where the Business Operators are more apt to Engage in Coordinated Conduct

26. As the result of the company group obtaining confidential information of its competitor after a vertical business combination, the company group becomes able to predict fairly accurately that the company group and its competitor will engage in coordinated conduct in the downstream or upstream market. At the same time, after a vertical business combination, because the number of competitive units decreases as the result of the input foreclosure or customer foreclosure implemented by the company group, in some cases the company group and its competitors find it easier to engage in coordinated conduct in the downstream or upstream market.

b) Consideration of Competitive Pressure:

27. Each of the determining factors referred to above will be considered.

Conglomerate Business Combinations

Mechanism of Substantial Restraint of Competition (Theory of Harm)

28. In some cases, subsequent to a conglomerate business combination, the company group and its competitors may be more apt to engage in coordinated conduct where (i) the company group obtains confidential information of its competitors, or (ii) the number of competitive units decreases because of the closure of or exclusion from the market through combined supply, etc. (conglomerate market foreclosure). If, as a result, the coordinated conduct between the company group and its competitors is able to easily create a condition that would allow them to manipulate price, etc. of the relevant product to a certain extent, the conglomerate business combination may be substantially to restrain competition in a particular field of trade.

Criteria

29. Whether a conglomerate business combination may be substantially to restrain competition in a particular field of trade through coordinated conduct will be determined by considering whether or not subsequent to a conglomerate business combination the company group and competitors are likely to engage in coordinated conduct in a case where the company group obtains confidential information of its competitor or a case where the number of competitive units decreases because of a conglomerate market foreclosure. Then, the determining factors mentioned above are taken into consideration in what corresponds.

Cases Where Coordinated Conduct Becomes More Likely Subsequent to a Conglomerate Business Combination

30. Subsequent to a conglomerate business combination, as a result of the company group obtaining confidential information of its competitor, or as a result of a decrease in

the number of competitive units because of a conglomerate market foreclosure, in some cases the company group and its competitors find it easier to engage in coordinated conduct.

Consideration of Competitive Pressure

31. Each of the determining factors referred to above will be considered.

3. Case Study

32. Recent cases reviewed by the JFTC involving minority shareholdings include:

- the acquisition of shares in TOYOTA MAPMASTER INCORPORATED by ZENRIN CO., LTD. and AISIN CORPORATION (review results published July 5, 2024);
- the acquisition of shares in the newly established manufacturing subsidiary of NIPPON CHUTETSUKAN K.K. by Kubota Corporation (review results published March 27, 2025); and
- the acquisition of shares in Daikin Applied Systems Co., Ltd. by Miura Co., Ltd. (review results published June 18, 2025).

33. This section presents the Kubota case, in which the JFTC reviewed substantial restraint of competition through coordinated conduct in detail.

3.1. Outline of the Case

34. In this case, Kubota Corporation (hereinafter referred to as "Kubota") planned to acquire 19.9% of the voting rights in the shares of a manufacturing subsidiary to be established by NIPPON CHUTETSUKAN K.K. (hereinafter referred to as "NIPPON CHUTETSUKAN") spinning off its ductile iron pipe[2] manufacturing plant (hereinafter referred to as the "Newly Established Manufacturing Subsidiary") (hereinafter referred to as the "Transaction"). As a result of the Transaction, the Newly Established Manufacturing Subsidiary would become a joint investment company of Kubota and NIPPON CHUTETSUKAN. Kubota and NIPPON CHUTETSUKAN are hereinafter referred to as the "Parties", and a group of companies comprised of Kubota Group and NIPPON CHUTETSUKAN Group is hereinafter referred to as the "Parties Group".

35. Although the Transaction did not meet the notification requirements stipulated in Article 10, Paragraph 2 of the Act, the Parties consulted with the JFTC, presenting the specifics of their business combination plan. In response, the JFTC reviewed the Transaction in accordance with the "Policies Concerning Procedures of Review of Business Combination," applying principles as equivalent to those for business combinations that require notification.

3.2. Issues

36. The Newly Established Manufacturing Subsidiary is a joint investment company, and the Transaction would form an indirect joint relationship between the Parties through

2 Ductile iron pipes are iron pipes made of ductile cast iron, which has improved strength and ductility compared to ordinary cast iron, and are mainly used as water pipes for water supply applications.

the Newly Established Manufacturing Subsidiary. After the Transaction, Kubota would outsource the upstream processes (melting, casting and annealing)[3] for small diameter ductile iron pipes to the Newly Established Manufacturing Subsidiary, whereas NIPPON CHUTETSUKAN would outsource all manufacturing processes for all diameter ductile iron pipes to it, and each of the Parties Group would individually conduct sales activities. With respect to small diameter ductile iron pipes of which both the Parties would outsource the manufacturing to the Newly Established Manufacturing Subsidiary, the manufacturing costs in the upstream processes would be common between the Parties, and there were concerns on sharing of sensitive information between the Parties through the Newly Established Manufacturing Subsidiary. Therefore, there was a possibility that a coordinated relationship would arise between the Parties. Accordingly, the following focuses on substantial restraint of competition through coordinated conduct.

37. The JFTC also examined substantial restraint of competition through unilateral conduct. However, the JFTC did not find that the Transaction would substantially restrain competition in the particular field of trade through unilateral conduct, comprehensively taking into account the following: (a) on the premise of the remedies described in (4) below, a certain degree of competition was likely to take place between the Parties; (b) the ability of Company X, a powerful competitor, to constrain the Parties Group's price rise; (c) competitive pressure from the adjacent market described in (3)C below; and (d) efficiency improvement.

3.3. Assessment of Substantial Restraint of Competition through Coordinated Conduct

3.3.1. Position of the Parties Group and Competitors, and the Competitive Situation in the Market, etc.

(A) Number of Competitors, etc.

38. After the Transaction, the manufacture of small diameter ductile iron pipes by the Parties Group would be carried out by the Newly Established Manufacturing Subsidiary, and therefore the apparent number of manufacturers would be decreased from three to two. However, the scope of Kubota's manufacturing outsourcing was limited to the upstream processes (melting, casting and annealing) for small diameter ductile iron pipes, and the costs common between the Parties were likewise limited to these upstream processes. In addition, on the premise of the remedies described in (4) below, the concerns on the sharing of sensitive information between the Parties through the Newly Established Manufacturing Subsidiary would be addressed. For these reasons, the JFTC found that a certain degree of competition would be maintained between the Parties even after the Transaction.

(B) Excess Capacity

39. The Parties Group and Company X[4] each had a certain degree of excess capacity. The existence of excess capacity leads to an incentive to expand sales by cutting prices and to increase profits unilaterally. On the other hand, it also enables retaliatory action (such as

3 The manufacturing processes for ductile iron pipes consist of (i) melting, casting and annealing, and (ii) machining, internal coating and external coating. Process (i) is referred to as the "upstream processes," and process (ii) as the "downstream processes".

4 Company X is a powerful competitor with approximately 30% market share (ranked second), next to the Parties Group, in the manufacture and sale of small diameter ductile iron pipes.

counter price reductions) against a business operator that deviates from the coordinated conduct. Therefore, the JFTC found that whether there were concerns about coordinated conduct cannot be determined solely from the perspective of excess capacity.

3.3.2. Trade Realities, etc.

(A) Trends in Demand, Technological Innovation, etc.

40. The demand for small diameter ductile iron pipes is mainly the demand for renewal of water supply pipes and is therefore relatively easy to predict. In addition, the products are mature, and the room for technological innovation was considered to be small. Since they are standardized products, there is little difference in quality among manufacturers. For these reasons, the JFTC found that the Parties Group and Company X can easily predict each other's actions.

(B) Past competitive situation

41. There had been no significant change in the market shares of the Parties Group and Company X over the past several years, and the JFTC found it difficult to say that competition had been vigorous.

3.3.3. Competitive Pressure, etc.

42. Polyethylene pipes are earthquake-resistant like ductile iron pipes and cheaper than ductile iron pipes. Therefore, a considerable amount of switching from ductile iron pipes to polyethylene pipes had occurred. In the market for polyethylene pipes for water supply applications, Kubota Group held a market share of approximately 60% (ranked first). However, there was a powerful competitor, Company Y (approximately 40%, ranked second), which was recognized to have a certain degree of excess capacity. Therefore, a certain degree of competitive pressure from the adjacent market for polyethylene pipes was recognized.

3.3.4. Efficiency and Financial Conditions of the Parties Group

43. Through the Transaction, the Parties Group planned to replace the current cupola furnaces, which emit a large amount of carbon dioxide, with electric furnaces, which emit less, as the melting furnaces used to manufacture small diameter ductile iron pipes, and to install them at the Newly Established Manufacturing Subsidiary. With regard to the efficiency improvement related to the reduction in carbon dioxide emissions, the JFTC examined it in line with the "Guidelines Concerning the Activities of Enterprises, etc. Toward the Realization of a Green Society Under the Antimonopoly Act" from the following three aspects: (i) improvement in efficiency should be an effect specific to the business combination; (ii) improvement in efficiency should be feasible; and (iii) improvement in efficiency should enhance the interests of users. As a result, the JFTC recognized the efficiency improvement resulting from the Transaction.

3.3.5. Summary

44. As described above, it was undeniable that even pre-Transaction, the Parties Group and Company X could easily predict each other's actions. However, the costs common between the Parties were limited to the upstream processes; on the premise of the remedies described in (4) below, a certain degree of competition was considered to be maintained between the Parties; and a certain degree of competitive pressure from the adjacent market and the efficiency improvement were recognized. Therefore, the JFTC did not find that the

Transaction would substantially restrain competition in the particular field of trade through coordinated conduct by the Parties Group and the competitor.

3.4. Remedies

45. To eliminate concerns on sharing of sensitive information between the Parties through the Newly Established Manufacturing Subsidiary, the Parties proposed the following information firewall measures to prevent the sharing of sensitive information: (i) prohibiting officers and employees of the ductile iron pipe sales departments from concurrently engaging in operations in which they may obtain sensitive information; (ii) establishing system-based and physical access restrictions; (iii) restricting the transfer of personnel engaged in such operations (not assigning them to the sales departments for two years after they cease to be engaged in such operations); and (iv) obtaining written pledges from such personnel. In addition, as measures to ensure compliance, the Parties decided to implement (v) periodic inspections by the Parties (at least once a year) and (vi) monitoring by a third party who is independent of the Parties Group, approved by the JFTC (a monitoring trustee). On the premise that these remedies would be implemented, the concerns on the sharing of sensitive information between the Parties through the Newly Established Manufacturing Subsidiary would be addressed, and thus, a certain degree of competition between the Parties was considered to be maintained.

3.5. Conclusion

46. Based on the above, the JFTC did not find that the Transaction would substantially restrain competition in any particular field of trade.