



Submitting Opinions Against M&A Transactions to the Fair Trade Commission of Japan

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Hokuetsu Paper, the fifth-biggest company in the Japanese paper industry, and Daio Paper, No. 3, have reportedly submitted an adverse opinion to the Fair Trade Commission of Japan (JFTC) against the recent takeover efforts of market leader Oji Paper to make Hokuetsu Paper its subsidiary. In this article, I will discuss adverse opinions submitted to the JFTC focusing on the acquisition of stock, of the various types of M&A transactions.

Background and significance

Under the *Anti-Monopoly Act of Japan (AMA)*, acquisition of stock is subject only to *ex post facto* reporting, and no prior clearance is required. However, there is a serious risk that the acquirer may receive a cease and desist order after the acquisition of stock, resulting in the complete loss of transaction costs. As such, unless safe-harbour requirements are met, an informal prior consultation is commonly employed and a *de facto* prior review by the JFTC is the common practice.

In the first phase of an informal prior consultation (documentary review), the JFTC keeps the matter confidential. However, if the matter goes to the second phase (detailed review), the JFTC would interview competitors, customers and users, and seek comment from the general public (see the *Policy Regarding Accepting Prior Consultation on M&A Plans*).

Alternatively, irrespective of whether or not an informal prior consultation has been requested, the JFTC may, on its own initiative, conduct a voluntary review. If the initiation of a voluntary review is somehow reported on by the media, those who oppose such an M&A could potentially submit adverse opinions to the JFTC.

Because such a prior review system employed by the JFTC has no explicit legal basis, there are no mandatory information collection measures that the JFTC may enforce against third parties. The scope of document review is essentially limited to information and materials voluntarily submitted by the parties to the M&A transaction, as well as publicly available information. Under such circumstances, submission of an adverse opinion could potentially have a significant impact, not only because opinions adverse to M&A transactions are themselves recognized by the JFTC but, more importantly, because it would result in information adverse to the transaction being submitted to the JFTC.

Some points to note

As there are no legal provisions directly related to the submission of adverse opinions, there are no rules regarding the format or the timing of such submissions. However, in order to maximize a submission's effectiveness, it is advisable to submit as early in the JFTC's decision-making process as possible. Regarding content, an adverse opinion itself carries only limited weight with the JFTC; it matters much more to collect information relevant to a review of the M&A transaction, and to explain the submission to the JFTC from the viewpoint of competitors or consumers. As a general rule, one should compile information that is described as important in the *Guidelines to the Application of the Anti-Monopoly Act Concerning Review of Business Combination* and submit a well-organized opinion.

From the perspective of a competitor, the submission of an adverse opinion may allow it to block the emergence of strong rivals. However, if a competitor submits negative information on the competitiveness of a particular market to the JFTC, this information may later have an adverse impact on M&A transactions that the competitor itself would like to conduct. As such, it would be prudent for a potential submitter to carefully consider whether it is in its best interest to submit an adverse opinion, and/or to what extent materials and information should be included in such a submission, particularly in light of the fact that it is not common for the JFTC to conclude that an M&A transaction should not proceed.

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