ANDERSON MŌRI & TOMOTSUNE

COMPETITION LAW LEGAL UPDATE

January 31, 2022

Contents

I. Operation of the Commitment Procedures

Takeshi Ishida / Yuri Shindo

1. Overview of the Commitment Procedures

The Japan Fair Trade Commission (hereinafter, the "JFTC") can decide to commence the so-called Commitment Procedures for any act suspected of violating the Anti-Monopoly Act (hereinafter, the "AMA"). If the JFTC initiates the Commitment Procedures against a business operator, said operator must submit a Commitment Plan to the JFTC, and if the JFTC decides that the competition law-related matter can be resolved through the implementation of the contents of the Commitment Plan (hereinafter, the "Commitment Measures"), the JFTC will approve the Commitment Plan and end the case investigation without finding a violation of the AMA.

In practice, JFTC investigators and business operators subject to scrutiny will continue to discuss matters such as whether their case will be subject to the Commitment Procedures, the possible content of the Commitment Measures, and the timing of the implementation of the same, with the goal of carefully developing an effective and workable Commitment Plan.

Please refer to the back issues of our Competition Law Update for a description of the types of conduct covered by the Commitment Procedures and for an overview of the flow of Commitment Procedures[1].

2. Benefits of using the Commitment Procedures

[1] https://www.amt-law.com/asset/pdf/bulletins8_pdf/181210.pdf

In cases where the JFTC has not yet completed an investigation and arrived at a finding of fact regarding a suspected violation of the AMA, the Commitment Procedures are a mechanism that allows a business operator to voluntarily resolve said suspected violation, and to do so based on an agreement between the JFTC and the business operator that is not premised on the finding of an actual violation. Therefore, if the Commitment Plan proposed by the business operator is approved by the JFTC, as long as the Commitment Measures approved by the JFTC are implemented, no administrative measures, such as a cease and desist order or a surcharge payment order in connection with the suspected violation, will be taken against the business operator. As such, in cases where the suspected violations arise from the kind conduct normally subject to surcharge payment orders, a business operator can be exempted therefrom.

Further, the Commitment Procedures can also be a way to enable business operators to continue their normal business activities. In other words, in biddings conducted by the central and local governments, the existence of a violation of the AMA is often set as a reason to suspend a nomination, but if the Commitment Plan is approved by the JFTC, the suspected conduct will not be officially recognized as a violation by the JFTC and, thus, there will be room for obtaining an exemption from a suspension of nomination. Similarly, it would be highly unlikely that claims for damages and penalties are brought from the business operator's business partners, and even if such claims are brought, they cannot be based on an eventual finding of a violation of the AMA by the JFTC.

3. Previously approved Commitment Plans and suspected violations

As shown in the table below, there have been eight cases in which a Commitment Plan has been approved during the period beginning December 30, 2018, when the Commitment Procedures was first adopted, and ending in January, 2022.

Since the introduction of the Commitment Procedures, only two cases of resale price maintenance have been subject to cease and desist orders against suspected violations that fall under unfair trade practices[2]. Since the approval of the Commitment Plan for Rakuten, Inc., the first time such approval was granted, no cease and desist order has been issued for suspected violations that fall under unfair trade practices, and the Commitment Procedures have been actively utilized for cases involving unfair trade practices.

In addition, the Commitment Plans in the suspected cases of abuse of superior bargaining position of Genky Stores, Inc. and of Amazon Japan G.K. include measures to restore monetary value. Specifically, measures to restore monetary value have been taken for suppliers regarding requests for the dispatch of employees, etc. in the case of Genkey Stores, Inc., and, the case of Amazon Japan G.K., regarding requests for the reduction of payment fees, the provision of support funds, etc., and returns. In cases where a cease and desist order or a surcharge payment order were issued, there is no precedent that the suspected business operators were ordered to take measures to restore the monetary value, which

[2] The cases against Aprica Children's Products G.K. (July 1, 2019) and Combi Corporation (July 24, 2019).

is a major feature of the Commitment Procedures.

Applicant	Commencement Date of JFTC Investigation	Date of Approval of Commitment Plan	Suspected Violation
Nippon Alcon Co., Ltd. *	June 11, 2019	March 26, 2021	Trading on restrictive terms
BMW Japan Corp.	September 11, 2019	March 12, 2021	Abuse of superior bargaining position
SEED Co., Ltd. *	June 11, 2019	November 12, 2020	Trading on restrictive terms
Amazon Japan G.K.	March 15, 2018	September 10, 2020	Abuse of superior bargaining position
Genky Stores Inc.	November 7, 2018	August 5, 2020	Abuse of superior bargaining position
CooperVision Japan Inc. *	June 11, 2019	June 4, 2020	Trading on restrictive terms
Nihon Medi-Physics Co., Ltd.	June 13, 2018	March 11, 2020	Exclusionary private monopolization; Interference with a competitor's transactions
Rakuten, Inc.	April 10, 2019	October 25, 2019	Trading on restrictive terms

* The JFTC commenced investigations on all of these cases on the same day.

4. Differences between Commitment Procedures and Termination of Investigation (or Examination)

Even if the JFTC commences an investigation or examination, it may be terminated if a violation is subsequently not found or if the suspicion of a violation is resolved (a so-called "termination of investigation (or examination)"). For example, in a recent case, Rakuten Group, Inc. indicated to merchants on Rakuten Ichiba (their online market place) that the latter would be treated unfavorably if they did not participate in the "common free shipping threshold." The JFTC commenced an investigation on based on a suspicion of abuse of superior bargaining position, but on December 6, 2021, the JFTC announced that the investigation would be terminated in response to a proposal by Rakuten Group, Inc.

for improvement measures[3].

Although a termination of investigation is similar to the Commitment Procedures in that a business operator voluntarily ceases to act in a manner that the JFTC has found to raise a competition law concern, unlike the Commitment Procedures, a termination of investigation is an informal resolution that is not an administrative disposition, and therefore the JFTC can resume the investigation of the suspected violation at any time. On the other hand, with regard to a suspected violation under the Commitment Procedures, the investigation on the suspected violation cannot be resumed as long as the Commitment Measures are implemented, which is a major difference.

Furthermore, in cases where a Commitment Plan has been approved, an outline of the suspected violation and the Commitment Plan will be published on the JFTC's website in accordance with the JFTC's "Policies Concerning Commitment Procedures." On the other hand, for a termination of investigation (examination), in addition to publishing the details of the improvement measures proposed by the business operator on the JFTC's website, the "facts of investigation" as determined by the JFTC will include a more detailed description of the suspected violation, the surrounding facts, the background to the business situation in question, as well as a description of the way in which the suspected violation is problematic under the AMA.

II. European Commission's new approach on merger case referrals

Vassili Moussis / Shinichi Douma

1. New Guidance on Article 22 EUMR

On March 26, 2021, the European Commission ("EC") issued a Staff Working Paper[4], which summarizes the findings of its evaluation of procedural and jurisdictional aspects of EU merger control (the "Evaluation").

The Evaluation concludes that the turnover-based jurisdictional thresholds, combined with the mechanisms for case referrals between the EC and the EU Member States' national competition authorities ("NCAs"), have generally been effective in capturing significant concentrations. However, it also points out that a number of concentrations where a very strong or even dominant player acquires a company with little to no turnover, but where the acquired company plays or could have played a significant competitive role in the markets but for said acquisition, have escaped review by both the EC and the NCAs.

In order to address this issue, the EC released a new guidance (the "Guidance") on Article 22 of the EU

[3] https://www.jftc.go.jp/en/pressreleases/yearly-2021/December/211206.html

[4] https://ec.europa.eu/competition/consultations/2021_merger_control/SWD_findings_of_evaluation.pdf

Merger Regulation (the "EUMR") on the same date that it issued the Evaluation.[5]

The Article 22 referral mechanism was initially designed to allow EU Member States with no national merger control regimes to refer cases to the EC. However, in its new Guidance, the EC has indicated that Article 22 will be used to catch deals not otherwise subject to review in sectors like tech and pharma, where innovation is an important parameter of competition and where newly launched products can rapidly grow in significance. In these areas, an emerging competitor or technology can have material competitive significance even if it has limited turnover at the moment of the concentration.

The Guidance provides a non-exhaustive list of example conditions for referral, including transactions in which the target:

i. is a start-up or recent entrant with significant competitive potential that has yet to develop or implement a business model generating significant revenues (or is still in the initial phase of implementing such business model);
ii. is an important innovator or is conducting potentially important research;
iii. is an actual or potentially important competitive force;
iv. has access to competitively significant assets (such as raw materials, infrastructure, data or intellectual property rights); and/or
v. provides products or services that are key inputs/components for other industries.

Although there are no dedicated thresholds based on the value of the transaction, the Guidance clarifies that the EC will take into account whether the value of the consideration received by the seller is particularly high compared to the current target revenues.

From a procedural perspective, the Guidance states that the EC will closely cooperate with NCAs to identify concentrations that may be potential referral candidates under Article 22 of the EUMR. In this regard, the EC may exchange information with such NCAs. The merging parties may also voluntarily provide information about the intended transaction in order to enable the EC to provide an early indication as to whether it considers the concentration to be a "good candidate" for referral. The Guidance also notes that third parties may contact the EC, or NCAs, to inform them of transactions that might be candidates for referral.

Pursuant to Article 22 EUMR, an NCA only has 15 working days to request a referral after a transaction has been made known to them. The Guidance clarifies that "made known" should be interpreted as implying sufficient information to make a preliminary assessment as to the existence of the criteria relevant for the assessment of the referral. Further practice will be necessary to determine what form this process will have to take in order to satisfy these factors. Other NCAs may join the request within a period of 15 working days starting from the moment the EC informed them of the initial request. The EC may decide to examine the concentration by no later than 10 working days after the expiry of the 15-

[5] https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf

working day period for NCAs to join the referral request.

The EC must inform the parties concerned as soon as possible once a referral request is being considered. Although this does not immediately oblige the parties to take any actions in relation to the implementation of the transaction, a suspension obligation (i.e. an obligation to not close the transaction) will be applicable from the date that the EC has informed the relevant parties that the referral request has been accepted.

Regarding transactions that have already closed, the Guidance states that the time elapsed since closing is "a factor" that the EC may consider, and that it would generally not consider a referral appropriate when more than six months have passed after the implementation of the concentration, or, if the implementation of the concentration was not in the public domain, this period of 6 months would run from the moment when material facts about the concentration have been made public in the EU. The Guidance also clarifies that the EC may accept a later referral, for example, based on the magnitude of the potential competition concerns and the potential detrimental effect on consumers, leaving a material degree of uncertainty as to the potential timeframe for review.

This change in the EC's policy is a novel concept because it could mean that any transaction (even those that do not meet EUMR or Member States' thresholds) could be subject to review by the EC and, consequently, could trigger gun-jumping issues if the parties go ahead and implement the transaction without waiting for the EC to complete its review.

2. Illumina-GRAIL

The first transaction caught by the EC's change of policy is Illumina's proposed $7.1 billion acquisition of GRAIL, a biotechnology company developing multi-cancer early detection tests that screen for cancer in asymptomatic patients using DNA sequencing. Illumina founded GRAIL in 2016 and already owned 14.5% of the company prior to the transaction.

On February 19, 2021, the EC invited NCAs to request a referral of the Illumina/GRAIL transaction, despite the fact that it does not meet the EUMR or any EU national jurisdictional thresholds and despite GRAIL not having any revenues in the EU. On March 9, 2021 the French NCA requested that the Illumina/GRAIL transaction be referred to the EC under Article 22 of the EUMR. The request was subsequently supported by Belgium, Greece, the Netherlands, Iceland, and Norway. Illumina appealed the Dutch and French NCAs' decisions before national courts, which dismissed Illumina's appeals on March 31 and April 1, 2021, respectively.

On April 19, 2021, the EC announced that it had accepted the referral request submitted by the six NCAs and had asked Illumina to notify the GRAIL acquisition, which was subject to the standstill obligation pursuant to Article 7 EUMR pending the EC's clearance. Subsequently, on April 28, 2021, Illumina appealed before the General Court of the EU against the EC's decision to accept the aforementioned referral, arguing that the EC had no jurisdiction to examine the deal and that the acceptance of the

referral was untimely (seven months after the deal was announced). Furthermore, it accused the EC of acting contrary to Illumina's legitimate expectations and legal certainty, stating that the invitations for referral to NCAs were sent before the EC had published the Guidance in March 2021.

On July 22, 2021, the EC opened an in-depth investigation into the proposed transaction, as it was concerned that the proposed acquisition might reduce competition and innovation in the emerging market for the development and commercialization of cancer detection tests based on sequencing technologies.

Despite the aforementioned standstill obligation, and while still under investigation by the EC, Illumina decided to complete its acquisition of GRAIL on August 18, 2021. The reason for this is that Illumina was obliged under its agreement with GRAIL to close the agreement before a certain deadline which would have expired before the end of the EC's investigation. Furthermore, Illumina believed that, as GRAIL had no business in the EU, the EC had no jurisdiction to review the merger given that the EUMR thresholds, as well as those of the Member States, had not been met. Nevertheless, it voluntarily promised to maintain GRAIL as a separate entity during the EC's in-depth investigation.

In reaction to Illumina's decision to complete the acquisition of GRAIL, the EC decided on August 18, 2021 to investigate Illumina for alleged "gun-jumping" for breaching their standstill obligation under Article 7 EUMR. [VM: I thought Illumina appealed the EC's decision?][SND: My understanding is that they appealed against the EC's decision to accept requests by the 6 Member States for a referral under Article 22 (i.e., the decision on 19 April). I have included this in the above.]

Furthermore, on October 29, 2021, the EC adopted several interim measures in order to restore and maintain conditions of effective competition, such as a prohibition on sharing confidential business information, an obligation to maintain arm's length business interactions, and an obligation to explore alternative options to the transaction in order to prepare for a scenario in which the deal would have to be undone were the EC to declare that the transaction would be incompatible with the internal market. This is the first time the EC has adopted interim measures following the early implementation of a concentration. The interim measures aim to prevent the potentially irreparable detrimental impact of the transaction on competition, as well as the possible irreversible integration of the merging parties, pending the outcome of the EC's merger investigation. These measures are being applied during the interim period, pending the final outcome of the EC's in-depth merger investigation, regarding which the EC has until February 4, 2022 to issue a decision.

The outcome of the various proceedings in relation to this case will undoubtedly have a significant impact on the future of the referral mechanism under Article 22 of the EUMR. In the meantime, the merging parties need to be well aware of the Guidance and must be ready to address in their transaction documents issues such as deal certainty, the timing for such transactions, as well as the risk of a possible referral request.

III. Release of Draft Amendments to the Anti-Monopoly Law of The People's Republic of China

Kiyoko Yagami

On October 23, 2021, draft amendments to the Anti-Monopoly Law of the People's Republic of China (Draft Amendments) were officially released by the Standing Committee of the 13th National People's Congress for public comment. The Draft Amendments address various issues that have arisen in connection with the implementation of the Anti-Monopoly Law since its implementation in 2008, including (i) the introduction of a safe-harbor provision for anti-monopoly agreements, (ii) an optimization of the merger review system by introducing a "stop-the-clock" system and enhancing the investigation powers of the reviewing authorities, (iii) a strengthening of anti-monopoly regulations involving internet platformers, and (iv) an enhancement of anti-monopoly law enforcement in the form of increased fines. It is anticipated that the Draft Amendments will be finalized and officially enacted during the course of 2022.

IV. Recent publications

- Insight and Pointers on Recent Merger Control Trends in Japan for Foreign Investors
  Dec 2021 (Ryoichi Kaneko) Mondaq
  Link here

- Market Intelligence - Merger Control 2021 - Japan
  Dec 2021 (Yusuke Nakano Vassili Moussis Kiyoko Yagami) Law Business Research Ltd.
  Original PDF here

- Merger Remedies Guide - Fourth Edition (Japan chapter)
  Nov 2021 (Vassili Moussis Yoshiharu Usuki Kiyoko Yagami Ryoichi Kaneko) Law Business Research Ltd
  Original PDF here

- Introduction to Japanese Business Law & Practice Fifth Edition
  Nov 2021 (Kenichi Masuda Yoshimasa Furuta (1966-2021) Takeshi Watanabe Shigeyoshi Ezaki Junichi Kondo Yukiko Imazu Yusuke Nakano Hiroshige Nakagawa Michi Yamagami Shinji Nakamura Etsuko Hara Taro Awataguchi Kei Akagawa Yoichiro Yukimura Kei Sasaki Kensuke Otsuki Kazuaki Tobioka Yoshiharu Usuki Yusuke Sahashi Masayuki Yamanouchi Kanako Watanabe Akira Tanaka) Anderson Mori & Tomotsune

- Lexology Getting The Deal Through – Intellectual Property & Antitrust 2022 (Japan Chapter) Law Business Research
  Nov 2021 (Yusuke Nakano Atsushi Yamada Ryo Murakami)

Original PDF here

- The Merger Control Review, Twelfth Edition (Japan Chapter)
  Aug 2021 (Yusuke Nakano Takeshi Suzuki Kiyoko Yagami Kenichi Nakabayashi) Law Business Research
  Original PDF here

- Doing Business In... 2021 - Law & Practice
  Aug 2021 (Nobuhito Sawasaki Etsuko Hara Shigeki Tatsuno Wataru Shimizu Yutaka Shimoo) Chambers and Partners
  Link here

- Legal Issues and Practice regarding Digital Platform
  Aug 2021 (Takeshi Ishida) Seirin Shoin

- Overview of the Amendment to the Franchise Guidelines and Practical Response
  Jul 2021 (Takeshi Ishida Yuki Nishino) Chuokeizai-sha, Inc

- Getting the Deal Through - Pharmaceutical Antitrust 2021 (Japan Chapter)
  Jul 2021 (Yusuke Nakano) Law Business Research
  Original PDF here

(Information)

- We are pleased to announce that Takeshi Ishida have been promoted to partners of the firm as of January 1, 2022.

- This newsletter is published as a general service to clients and friends and does not constitute legal advice. Should you wish to receive further information or advice, please contact the editors below:

- Editors:
Vassili Moussis(vassili.moussis@amt-law.com)
Takeshi Ishida(takeshi.Ishida@amt-law.com)
Kiyoko Yagami(kiyoko.yagami@amt-law.com)
Yuri Shindo(yuri.shindo@amt-law.com)
Shinichi Douma(shinichi.douma@amt-law.com)

- If you wish to unsubscribe from future publications, kindly contact us at General Inquiry.

- Previous issues of our newsletters are available here.