

The importance of consultation

Etsuko Hara and Kentaro Kubo of Anderson Mori & Tomotsune discuss important issues related to merger filing in takeover bids

In recent months, there have been important amendments to the review process of merger filing under the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade in Japan (AMA) as well as issues arising pertaining to merger filing for a share acquisition through a takeover bid. On June 14 2011, the Japan Fair Trade Commission (JFTC) announced:

- (i) amendments to the Rules on Applications for Approval, Reporting, Notification, etc. Pursuant to the Provisions of Articles 9 to 16 of the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Fair Trade Commission Rule No 1 of 1953, as amended) (Rules);
- (ii) amendments to the Guidelines of Application of the Antimonopoly Act Concerning Review of Business Combination (JFTC, May 31 2004, as amended) (Guidelines);
- (iii) the abolition of Policies Dealing with Prior Consultation Regarding Business Combination Plans (JFTC, December 11 2002) (Old Policy); and
- (iv) the establishment of Policies Concerning Procedures of Review of Business Combination (JFTC, June 14 2011) (New Policy) (collectively, the Amendments).

These Amendments became effective on July 1 2011. Their main aim is to improve the predictability, speed and transparency of the review of business combinations. The effect of the New Policy has not yet been seen, but it is expected that the Amendments will enhance communication between filing companies and the JFTC and achieve greater predictability, speed and transparency.

The main points of the Amendments are:

- (i) to establish a consultation-before-notification process;
- (ii) to enhance communication between filing corporations and the JFTC; and
- (iii) to give filing corporations notification of clearance of a planned transaction.

Consultation before notification

The JFTC announced the abolition of the Old Policy and its replacement with the New Policy on June 14 2011.

Under the Old Policy, a so-called prior consultation process was available, under which a corporation planning to make a merger filing could consult with the JFTC before filing in order to obtain the JFTC's view on whether there were any problems with the contemplated transaction under the AMA. The review period by the JFTC (30 days for phase one and 90 days for phase two), however, tended to be protracted because time only began to run after all information requested by the JFTC had been submitted to it. This made it difficult for the filing corporation to predict when it would obtain the JFTC's opinion and then set the schedule for the transaction. In order to improve predictability, the JFTC abolished the prior consultation process and established the New Policy introducing the consultation-before-notification process (Paragraph 2 of the New Policy).

The consultation-before-notification process is available for a filing corporation to consult with the JFTC before filing, mainly with regard to how they can complete the form of notification.

The flowchart shows the JFTC's review process under the consultation-before-notification process for a business combination after the implementation of the Amendments (taken from page 11 of the Policies Concerning Procedures of Review of Business Combination (Tentative Translation), JFTC, June 14 2011 [<http://www.jftc.go.jp/en/pressreleases/uploads/110620attach2.pdf>]).

The form of notification for merger filing requires information such as market share ratios and ranking of the filing corporation and its competitors in the relevant markets, which are the key factors necessary to determine whether the contemplated transaction has any substantial competition issues. If the filing corporation consults with the JFTC about information relating to substantive issues, such as market definition, in order to complete the form of notification the JFTC will obtain

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necessary information from the filing corporation and explain its position to the extent possible based on the Guidelines and opinions it has issued in past cases.

If notification is officially filed with the JFTC later, the JFTC will carry out a review process on the notification based on the results of the consultation-before-notification process. However, the view expressed by the JFTC during the consultation-before-notification process may change during this review process.

It is important to note that even if a corporation does not consult with the JFTC before filing the notification, it will not be treated disadvantageously in the review process.

Plans not requiring notification

When a corporation plans a business combination that does not require the filing of notification because, for example, the transaction does not satisfy the merger-filing thresholds or a filing is not required for that category of transaction, but the corporation still wishes to consult with the JFTC about its business combination plan, it can use the consultation-before-notification process under the New Policy (Paragraph 7). The consultation-before-notification process will be applied *mutatis mutandis* to such cases.

The consultation before notification will be discontinued if either:

- (i) the filing corporation does not submit materials requested by the JFTC; or
- (ii) the filing corporation withdraws its request for the consultation.

Enhanced communication with the JFTC

Communication between the relevant corporation (a corporation which has made a merger filing or a filing corporation) and the JFTC is, needless to say, important to the speed and transparency of the review process. The Amendments strengthen communication between the relevant corporation and the JFTC during the consultation-before-notification process as well as the review process.

For example, during the consultation-before-notification process, a filing corporation can submit to the JFTC materials that it believes are necessary for ensuring that it receives an appropriate explanation from the JFTC (Paragraph 2 of the New Policy). Further, in the review process, a corporation which has made a merger filing may, at any time, submit to the JFTC its opinion

“In a typical takeover bid, there is generally no agreement between the filing corporation and the issuing corporation”

or documents which the corporation considers to be necessary for the review by the JFTC (Article 7-2 of the Rules and Paragraph 4 of the New Policy).

Notification of clearance

Before the Amendments, the JFTC did not give any clearance letter and a corporation which had made a merger filing would only know that the JFTC had approved the notified transaction once the waiting period had expired and it had not received a notice from the JFTC stipulating that a cease-and-desist order would be issued. It was, therefore, difficult for a corporation which had made a merger filing to predict whether the JFTC would approve the transaction or not until the actual expiration of the waiting period. In order to give greater predictability and speed to the review process, it is now stipulated under the amended Rules that the JFTC must issue a notification to the effect that cease-and-desist order will not be issued (a clearance letter) when it approves the notified transaction (Paragraph 5(2) and Paragraph 6(3) of the New Policy). If the JFTC issues the clearance letter after the secondary review, it will also explain in writing the reasons why it considers that the contemplated transaction does not have any issues under the AMA.

It must be noted, however, that even if the corporation receives a clearance letter before the end of the waiting period, the corporation cannot close the transaction until the waiting period expires.

In the primary review period, the waiting period is 30 days. However, if the corporation which has made a merger filing makes a request to shorten the waiting period and the JFTC issues the clearance letter, the waiting period will be shortened until the date of the clearance letter (Paragraph 3 and Item (2), Paragraph 5 of the New Policy).

Analysis of issues in takeover bids

Before the amendments to the AMA in 2010, a share acquisition was only subject to a post-transaction report. However, as a result of the amendments to the AMA, a share acquisition is now subject to a prior notification. Therefore a corporation planning to acquire shares has to file a notification with the JFTC 30 days before the closing of the share acquisition if the transaction satisfies the thresholds under the AMA. This change caused various issues pertaining to the timing, information and attachments required for merger filings



About the author

Etsuko Hara is a partner at Anderson Mori & Tomotsune with broad experience in the area of corporate transactions, mergers and acquisitions, and general corporate matters. Her scope of experience also includes antitrust and franchising. She is a graduate of Columbia Law School (LLM) and The University of Tokyo (LL.B., 1998). She was admitted as a lawyer in Japan in 2001 and in New York in 2007.

Contact information

Etsuko Hara
Anderson Mori &
Tomotsune

Izumi Garden Tower, 6-1,
Roppongi 1-chome
Minato-ku, Tokyo 106-6036,
Japan
T: +81-3-6888-1000
E: inquiry@amt-law.com
W: www.amt-law.com

in the case of share acquisitions through takeover bids.

Timing

A notification by the filing corporation (a corporation which intends to make a takeover bid) has to be filed with the JFTC 30 days before a share acquisition through a takeover bid. Therefore, if the offering period for the takeover bid is less than 30 days (for example, the shortest offering period permitted under the Financial Instruments and Exchange Act is 20 business days), notification to the JFTC under the AMA has to be filed before an announcement of the takeover bid. It is also necessary to check whether the offering period will be extended if a clearance letter is issued or the waiting period expires during the offering period.

A filing corporation should also check carefully exactly when the title to the offered shares will be transferred in the takeover bid process, because the timing of the title transfer may be different in each country (as of the settlement date or as of the date when the bid becomes unconditional, for example). Merger filing for the takeover bid has to be made 30 days before the date when the title to the shares will be transferred.

Information required

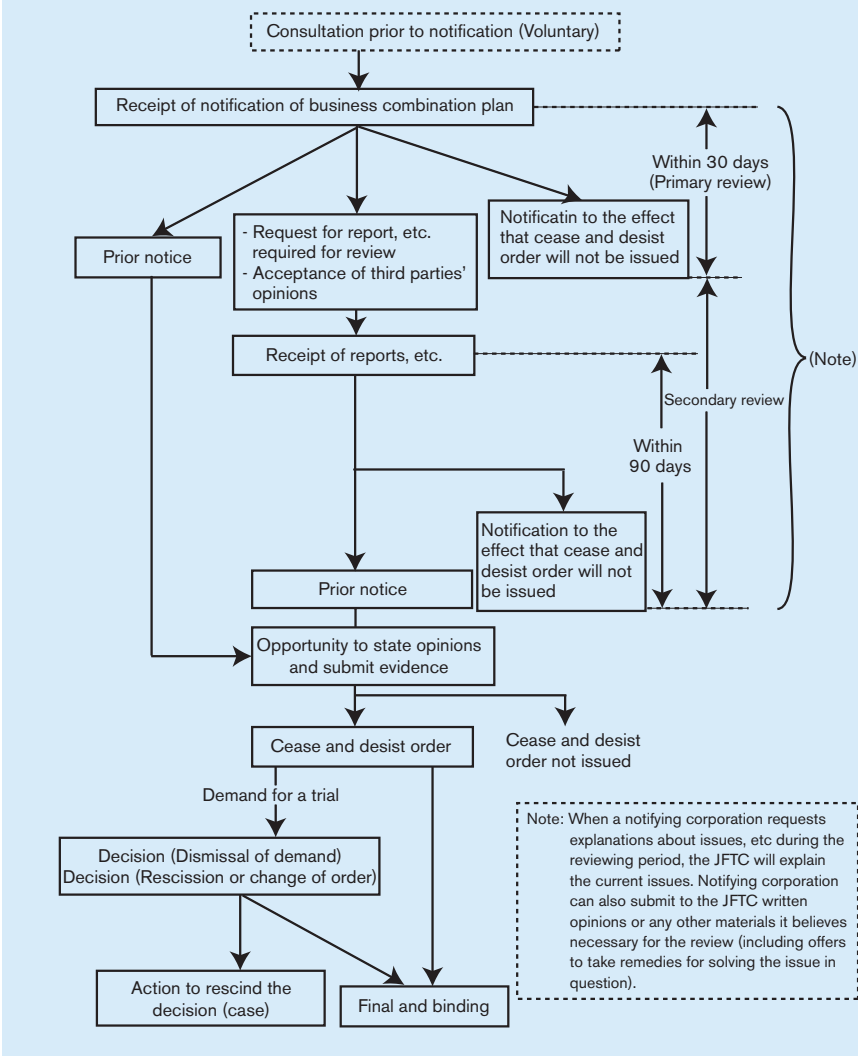
A notification form requires various information on the issuing corporation, such as the market share of the issuing corporation and the turnover of its subsidiaries. In the case of a hostile takeover bid, the filing corporation usually does not have access to the information of the issuing corporation. It is hence likely to be very difficult for the filing corporation to provide information such as the market share of the issuing corporation. In the case of a hostile takeover bid, it would be important to use the consultation-before-notification process and consult with the JFTC as to how the notification form should be completed with such limited access to information.

Documents to be attached

Under the Rules, the following documents should be attached to a notification with regard to a share acquisition:

(i) a power of attorney;

Business combination review



(ii) a copy of the agreement for the planned transaction or a certificate of filing of the corporation's intention to carry out the planned transaction;

(iii) the latest annual business report of the filing corporation (including balance sheet and income statement);

(iv) the minutes of the filing corporation's res-

olution regarding the planned transaction; and

(v) a report indicating the financial status to which the filing corporation belongs.

In the case of a takeover bid, the documents that can create difficulties are (ii) and (iv).

In a typical takeover bid, there is generally no agreement between the filing corporation and the issuing corporation. If this is the case, a filing



About the author

Kentaro Kubo is an associate at Anderson Mori & Tomotsune. He has been engaged in a wide range of practice areas since he joined the firm in 2007. He has advised domestic and foreign clients on mergers and acquisitions, corporate law, competition law and financial regulations.

Contact information

Kentaro Kubo
Anderson Mori &
Tomotsune

Izumi Garden Tower, 6-1,
Roppongi 1-chome
Minato-ku, Tokyo 106-6036,
Japan
T: +81-3-6888-1000
E: inquiry@amt-law.com
W: www.amt-law.com

corporation needs to submit a certificate of its intention to carry out the takeover bid.

If a takeover bid has already been launched in Japan before the filing of notification with the JFTC, a press release of the takeover bid and the notification for the takeover bid required under the Financial Instruments and Exchange Act would be sufficient under the AMA as a certificate of the corporation's intention to carry out the takeover bid. For a takeover bid launched in a foreign country, a document that is equivalent to the above-mentioned documents and explicitly showing the intention of the filing corporation to carry out a takeover bid would suffice.

When notification has to be filed before the launch of a takeover bid, no such documents will be available. In such a case, it is necessary to prepare a certificate with the

“It would be useful to use the Consultation-Before-Notification process to check the documents to be attached”

signature of a representative of the filing corporation which summarises the planned takeover bid and the corporation's intention to carry out such takeover bid.

Moreover, in many cases of a takeover bid, it is difficult to obtain the minutes for the resolution approving the takeover bid before the notification of the JFTC, in which case, it is not possible to attach the minutes to the notification when at the time of filing. In such a case, it would be useful to use the consultation-before-notification process to consult with the JFTC as to how to deal with the situation.

As shown above, a merger filing in the case of a takeover bid involves various issues. It would be useful to use the consultation-before-notification process to consult with the JFTC as to how to deal with these issues.