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## **NOTIFICATION ON M&A REVIEW GUIDELINES**

Enacted by Fair Trade Commission Notification No. 1998-6  
June 15, 1998

Amended by Fair Trade Commission Notification No. 1999-2  
April 15, 1999

We hereby designate these M&A Review Guidelines in accordance with Article 7 Section 5 of the Monopoly Regulation and Fair Trade Act (hereinafter, the "Act").

April 15, 1999  
Fair Trade Commission

### **I. Purpose**

The purpose of this Notification is to establish the guidelines to determine whether a business combination may substantially restrain competition in the relevant area of trade, whether the means of combination may fall under coercive means or any other unfair means, whether the combination will promote efficiency, and whether the act constitutes a combination with a nonviable firm.

### **II. Definitions**

For the purpose of this Notification -

1. "M&As subject to simplified review" means one of the following:

(1) If the combining entities are Specially Related Parties as defined under Article 11 (limited to those defined by Paragraph (1) or (2), and hereinafter "specially related party") of the Enforcement Decree of the Monopoly Regulation and Fair Trade Act (hereinafter, "the Decree").

(2) In the event of an M&A, a controlling relationship as referred to in Article 5 of the Notification, is not created between the companies concerned (referring to the Acquiring Party and the Acquired Party as described in Article II-4 and II-5 of the Notification; hereinafter, the same).

(3) Entities other than Large-Scale Corporation (including Specially Related Parties), in accordance to Article 12, Section 2 of the Decree, is involved in a conglomerate M&A.

(4) <Deleted>

2. "M&A subject to general review" pertains to all other M&As not subject to simplified review.

3. "Acquiring Party and others" include acquiring parties and others which have relationships described in Article 11 of the Decree with the acquiring parties (including Specially Related Parties as described in Subparagraph 3 of the same Article; hereinafter referred to as "Specially Related Parties and Others").

4. "Acquiring Party" includes a corporation acquiring or owning the shares concerned; a large-scale corporation whose officers or employees (hereinafter, "Officers and Staffs") concurrently assume the position of officers in the acquired corporation; an investing corporation which takes part in the incorporation of a new corporate entity (excluding participation in such incorporations as defined in Article 7, Paragraph 1, Subparagraph 5, Items (a) and (b) of the Act); in case of a merger, the remaining corporation after the merger; and in case of business transfer, the transferee of a business: Provided, however, that Specially Related Parties other than corporations acquiring or owning shares or participating in the incorporation of a new corporate entity shall be considered as the Acquiring Party.

5. "Acquired Party" includes the corporate entity which issued the shares concerned, in case of the acquisition or ownership of shares; a corporation which appointed officers from the Officers and Staffs of a large-scale enterprise, in the case of interlocking directorate; a newly established corporation, in the case of the incorporation of a new corporation; a corporate entity which ceases to exist as a result of consolidation, in the case of a merger; and the transferor of the business, in the case of business transfer.

6. "M&A which substantially restrains competition" or "Competition-restrictive M&A" refers to a merger which results in a reduced competition in a given area of trade so as to create or consolidate a state in which a certain company or a certain business group freely influences or is expected to freely influence the price, output and quality of a product, terms of trade, etc. and "competition-restrictiveness" or "to substantially restrain competition" refers to creating or substantially consolidating such a state.

7. "Horizontal M&A" refers to M&As between competing entities.

8. "Vertical M&A" refers to M&As between interrelated corporate entities in the process of production and distribution from the production of raw-materials to the production and sales of goods (including services; hereinafter, the same) (hereinafter, "interdependent corporations in terms of raw materials").

9. "Conglomerate M&A" refers to M&As other than Horizontal or Vertical M&A.

10. "Market Share" refers to the percentage allocated by the total amount of goods supplied to the total market for the relevant area of trade. Using the total sales amount of the business year immediately preceding the year of the M&A (if the total sales amount of the immediately preceding business year is unavailable, referring to the

total sales amount of its previous business year), Market Share shall be calculated as follows; provided, however, that if the total sales amount is difficult or inappropriate to calculate Market Share, the quantity or production capacity may be used:

$$\begin{array}{r} \text{product} \\ \text{Market} \end{array} \frac{\text{Company's total national sales amount of the concerned} \\ \text{(including the sales amount of imported goods)}}{\text{Share}} = \\ \text{-----} \\ \text{Total national sales amount of the concerned product (including} \\ \text{the sales amount of imported goods)}$$

### III. M&As Subject to Simplified Review

M&As subject to simplified review shall be deemed to lack the competition-restrictive characteristic and, in principle, the results of the review shall be notified within 15 days from the filing of due reporting documents after the examination of factual matters of the reported contents.

### IV. M&As subject to General Review

In order to be considered under Article 7 (Restrictions on Business Combinations), Paragraph 1 of the Act, a controlling relation between the parties engaging in the business combination shall exist and M&As subject to general review shall be examined using the criteria of the controlling relation, competition-restrictiveness, etc. set forth herein.

### V. Criteria for Determining the Existence of Controlling Relation

In case of a merger or business transfer, the parties thereto shall be in a controlling relationship; in case of acquisition of stock, interlocking directorate or establishment of a new company, a controlling relationship shall be created when the Acquiring Party and others meet conditions set forth under the following 1 through 3 with regard to the Acquired Party.

1. Acquisition or ownership of shares (hereinafter, "Share Ownership")
  - A. The Acquiring Party and others' shareholding ratio of the Acquired Party is 50% or more.
  - B. Despite the shareholding ratio of the Acquiring Party and others is less than 50%, in the case of the followings:
    - (1) the Acquiring Party and others' have the largest shareholding ratio and,

considering the distribution of shares, are able to control the company by exercising shareholder's rights; or

- (2) the Acquired Party receives most of the primary raw materials from the Acquiring Party, and the Acquiring Party is in a market-dominant position with respect to the production of the primary raw materials.

## 2. Interlocking Directorate

- A. The number of directors at the Acquiring Party and others who have interlocking directorate of the Acquired Party (hereinafter, "Interlocking Director") exceeds one third of all directors at the Acquired Party, thus enabling the Acquiring Party and others to exercise substantial influence on the overall management of the Acquired Party.
- B. The interlocking director concurrently holds such position as the chairman of the board of directors at the Acquired Party, that grants the power to exercise substantial influence on the overall management of the company.

## 3. Participation in the incorporation of a new company

The existence of a controlling relationship between the parties of a business combination shall be determined according to the criteria for determining controlling relationship in case of share ownership.

## **VI. Criteria for a Given Area of Trade**

A given area of trade refers to the area where a competing relationship may be created, which may be defined according to the object of transaction, transaction territory, stage of transaction and party to transaction.

### 1. Object of Transaction (Product Market)

- A. "Given Area of Trade" refers to the aggregate of products to which major buyers of a specific product can switch, in response to a significant and nontransitory increase in the price of such product (including service; hereinafter, the same) in transaction.
- B. Whether specific products belong to the same area of trade is determined by the followings;
  - (1) Similarities in the function and the usage of products;
  - (2) Similarities in the price of products;
  - (3) Buyers' perception of products' substitutability and their related purchase pattern.

(4) Sellers' perception of products' substitutability and their related pattern of business decision-making.

(5) Korea Standard Industry Classification notified by the director of the National Statistical Office pursuant to the Statistics Act, Article 17 Paragraph 2 (Classification of Statistics Data).

## 2. Transaction Territory (Geographical Market)

A. A given area of trade refers to the entire geographic area to which major consumers in a specific area can practically switch for alternative sources of a specific product when there is a significant and non-transitory increase in the price of that product in the specific area while the price in all other geographic areas remain the same.

B. Whether given geographic areas fall under the same area of trade is determined based on the following factors.

(1) Characteristics of the product (perishability, changeability, breakage, etc. of the product) and the seller's business capabilities (production capacity, the scope of sales network, etc.)

(2) Buyers' perception of the possibility to shift to other geographic areas for sources of the product and their related behavioral patterns in shifting purchase areas.

(3) Sellers' perception of the possibility of their buyers' shifting to other geographic areas for sources of the product and their related managerial decision-making patterns.

(4) Ease of shifting purchase areas from the time, economical and legal aspects.

## 3. Stages of Transaction

A given area of trade may be defined according to stages of transaction such as manufacturing, wholesale and resale.

## 4. Parties to Transaction

In the case where there exists a particular buyer group according to products, geographic areas, or stages of transaction due to the characteristics of product buyers or the uniqueness of the product, a given area of trade may be defined according to the buyer groups.

## **VII. Criteria for Competition-Restrictiveness**

Competition-restrictiveness of M&As shall be determined based on the relationship between the Acquiring Party and others and the Acquired Party, classified according to their types as horizontal M&As, vertical M&As, conglomerate M&As, etc.

## 1. Horizontal M&As

Whether a horizontal combination substantially restricts competition is judged by the comprehensive consideration of market concentration before and after the business combination, the degree of foreign competition introduced and international competition situation, possibility of entry, possibility of collusion between competing businesses, and existence of similar goods and adjacent markets.

### A. Market Concentration

#### (1) Degree of Market Concentration

(a) Competition may be substantially restricted if the combined market share of the Acquiring Party and others and the Acquired Party is -

50% or more

among the top three and the combined market share of the top three companies is 70% or more; provided, however, that the following cases may not substantially restrict competition:

- i) The combined market share of the Acquiring party and others and Acquired Party ranks second with less than 30% and there is a significant gap with the first.
- ii) The combined market share of the Acquiring Party and others and Acquired Party ranks third and there is a significant gap between the first and the second or the second and the third.
- iii) There is a fourth company in the market and there is no significant gap between the market shares of the first and the second, the second and the third, the third and the fourth.

(b) A "significant gap" in (a)- means that in general cases, the combined market share of the Acquiring Party and others and the Acquired Party is less than 75% of the market share of the immediately preceding company.

(c) Even in case of (a), competition may not be substantially restricted if the increase in market share is minimal. Minimal increase means that the increase in market share as a result of the merger is less than 5%.

(d) Notwithstanding (1), competition may not be substantially restricted when a bulk

purchaser exists in the given area of trade. (Excluding the cases in which a bulk purchaser belongs to the same business group as the Acquiring Party or in which the Acquiring Party is a large-scale enterprise and the bulk purchaser is not.) A "bulk purchaser" as stated herein refers to the situation that the ratio of the purchase amount of the concerned company (including Specially-related parties) to the total amount (meaning total domestic sales amount including import sales amount of the given product) corresponds to the market share set forth in (1) above.

## (2) Changes in Market Concentration

Trend of changes in the degree of market concentration during the last few years shall be considered when evaluating the degree of market concentration. In the case of a trend towards a considerable increase in market concentration during the last few years, business combinations by businesses with high market shares may increase the possibility of substantially restricting competition. In such case, factors including development of new technology, patent rights and others that may cause changes henceforth shall be considered.

## B. The Level of Foreign Competition in the Market and the Status of International Competition.

(1) In a market where import is easy or imports take up increasingly greater percentage, it may decrease the possibility of business combination substantially restricting competition. In such case, the following factors shall be considered to assess the possibility of market entry by foreign competitors:

- (a) International price and the status of supply and demand of the product;
- (b) The extent of domestic market opening and the current status of foreign investment;
- (c) The existence of a formidable international competitor;
- (d) Customs tariffs and plans to lower customs tariffs; and
- (e) Other non-tariff barriers.

(2) In the case where the amount of export takes up considerably large portion of sales turnover and substantial competition exists in the international market, business combination is less likely to substantially restrict competition.

## C. Likelihood of New Entries

(1) If new entries in the concerned market can be made easily in the near future, the number of competitors reduced by a business combination is likely to rise and therefore, the merger is less likely to substantially restrict competition.

(2) The following factors are considered when assessing the likelihood of new entries:

- (a) presence/absence of legal or institutional barriers to entry
- (b) the size of minimum capital required
- (c) production technology requirements including patents and other intellectual property rights.
- (d) conditions of location
- (e) conditions of purchase of raw material
- (f) the distribution network of competitors and the cost of establishing sales network
- (g) the level of product differentiation

(3) New entries into a given market are deemed easy if there is a company which falls under one of the following categories:

- (a) A company which has publicly announced its intent, plans, etc. to invest and participate in the market.
- (b) A company which is deemed likely to participate in the market in the near future without a significant burden of cost of entry or exit in response to a meaningful and nontransitory increase in price in the market, such as being able to enter in the concerned market without a significant modification to its existing production facilities.

#### D. Possibility of Collusion by Competitors

A merger is likely to substantially restrict competition if the decrease in the number of competitors as a result of the merger creates a situation conducive to explicit or implicit collusion on price, output or terms of trade. Whether the collusion by competitors becomes easy will be assessed by the followings:

- (1) whether the price of the products sold in the relevant product market has been markedly higher than the average price of similar products not included in the relevant market.
- (2) whether enterprises in competing relations have maintained a stable market share for the past several years in the market where the demand for the product transacted in the relevant area of trade is inelastic.
- (3) whether there is high homogeneity among products supplied by enterprises in competing relations and whether the terms of production and sale of competitors are similar.
- (4) whether the information on the business activities of competitors is easily accessible.

(5) whether there have been cases of undue concerted acts in the past.

#### E. Existence of Similar Goods and Adjacent Markets

- (1) When a product is deemed similar to the product in function and use but constitutes a different product market due to difference in price or other factors, the similar products's effect on the relevant market such as possibility of production technology development and the similarity of sales channels shall be considered.
- (2) When markets are deemed to be separated according to their geographic locations, the effects of surrounding geographic markets including the size of participants in those markets, the geographical proximity among the markets and means of transportation and the possibility of development of transportation technology shall be considered.

## 2. Vertical M&As

In determining whether a vertical business combination substantially restricts competition, the following factors shall be comprehensively taken into consideration with a particular focus on the market blocking effect.

#### A. Market Blocking Effect

- (1) If a corporation pertains to any of the following, the corporation could substantially restrict competition by foreclosing the purchase or sales channels of its competitors.
  - (a) The market share of a raw material supplier (including specially related parties, etc. in case of an acquiring party) falls under Article 1-A-(1)-(a).
  - (b) The ratio of the total amount of purchase by the buyer of raw materials (including Specially Related Parties, etc. in case of an acquiring party) to the total domestic supply amount satisfies the criteria set forth in Article 1-A-(1)-(a).
- (2) In addition to the market share of the concerned company, the following factors shall be taken into account in determining the likelihood of market blocking effect as a result of the merger:
  - (a) The purpose of the business combination
  - (b) The possibility of securing substituting channels for supply and sales including those for import and export by competitors.
  - (c) The extent of vertical integration of competitors.
  - (d) The growth prospect of the relevant market and the concerned company's business plans such as plans for facility expansion.

(e) Likelihood of collusion to eliminate competitors.

(f) Situation of and effect on the product market in raw material-dependent relations with the concerned product and the market which produces the end product.

#### B. Other Considerations

If vertical combinations take place between large-scale corporations or take place widely through continuous stages, thus increasing the entry barrier to the point of making it hard for competitors to enter the market, such as increasing the size of minimum capital required for market entry, they are highly likely to substantially restrict competition.

### 3. Conglomerate M&As

In determining whether a conglomerate business combination substantially restricts competition in a given area of trade by eliminating potential competition, the following conditions shall be comprehensively taken into account, with a particular focus on whether it undermines potential competition.

#### A. Hindrance of potential competition

A conglomerate business combination is deemed to substantially restrict competition in a given area of trade by hindering potential competition if it satisfies all of the following conditions.

(1) The acquiring Party is a large-scale corporation

(2) The acquiring party is a potential entrant to the market and meets one of the following criteria:

(a) It is judged that had it not been for the concerned combination, because of producing products with similar production technology, distribution channels and stages of purchase, etc. the acquiring company would have entered into the given area of trade using other means with less competition-restrictive effects.

(b) It is deemed that the existence of the acquiring party and others, which have the possibility to enter the given area of trade, is deterring the enterprises in the given area of trade from exercising market dominance.

(3) The market share of the acquired party meets the criteria set forth in Article 1-A-(1)-(a).

(4) There are significant gaps between the acquiring party and most of the competitors of the acquired company in terms of size and capital, etc.

#### B. Other Considerations

- (1) A business combination is likely to substantially restrict competition if it results in a significant enhancement of the overall business capabilities of the firms concerned such as technology, sales power and the ability to mobilize capital and procure raw materials, to the point of eliminating competitors based on factors other than price and quality.
- (2) A business combination is likely to substantially restrict competition if the concerned combination increases the barriers to entry, for example, by raising the minimum required capital to enter the market to the extent that it is difficult for other potential competitors to enter the market.

## **VIII. Criteria for Determining the Effect of Enhancing Efficiency or Non-viable Enterprises**

### **1. Assessment of the Effect of Enhancing Efficiency**

A. The "effect of enhancing efficiency" resulting from business combination as defined in Article 7, Paragraph 2, Subparagraph 1 of the Act refers to the enhanced efficiency in the areas of production, sales and R&D or the effect of enhanced efficiency on the national economy as a whole, which shall be determined based on the followings. In such cases, it shall be clear that the efficiency-enhancing effect takes place in the near future.

(1) The effect of enhancing efficiency in the areas of production, sales and R&D shall be assessed by taking the following into consideration.

(a) whether the production cost can be cut through the economy of scales, integration of production facilities, rationalization of production process, etc.

(b) whether the sales cost can be lowered or sales or exports can be boosted by integrating or sharing sales network.

(c) whether sales or exports can be boosted by sharing market information.

(d) whether logistics cost can be cut by sharing transportation and storage facilities.

(e) whether production-related technology and research abilities can be improved by complementing each other's technology, or sharing or effectively utilizing skillful workforce, organization and capital.

(f) whether other expenses can be significantly reduced.

(2) The effect of enhancing efficiency on the national economy as a whole shall be assessed by taking the followings into consideration.

(a) whether it makes a significant contribution to job creation.

(b) whether it makes a significant contribution to the development of regional

economies.

- (c) whether it makes a significant contribution to the development of forward and backward-related markets.
- (d) whether it makes a significant contribution to the stabilization of the nation's economy by means of a stable supply of energy, etc.
- (e) whether it makes a significant contribution to the improvement of environmental pollution.

B. The effect of enhancing efficiency shall be difficult to achieve using methods other than the said business combination, which shall be determined under the following criteria:

- (1) It shall be difficult to attain enhanced efficiency through the expansion of facilities, development of technology or methods other than business combination;
- (2) Cost reduction shall not be realized by using competition-restrictive methods including the decrease in production volume, lowered quality of service, etc.

C. In order to grant exemptions in business combination, the effect of enhanced efficiency as defined under A shall be greater than the competition-restrictive effects of the business combination.

## 2. Criteria for Determining Non-viable Corporations

A. The term "non-viable company" set forth in Article 7, Paragraph 2, Subparagraph 2 of the Act refers to companies that are in default due to exacerbated financial position or are deemed to become default in the near future. In judging non-viable companies, the followings shall be taken into account.

- (1) Whether the company's total shareholder's equity in its balance sheet is less than the paid-in capital for a considerable period of time;
- (2) Whether the company's operating income is less than interest expense for a considerable time and the company is recording ordinary loss during that period of time;
- (3) Whether the company filed for bankruptcy prescribed under Article 122(1) or Article 123(1) of the Bankruptcy Act;
- (4) Whether the company filed for the commencement of composition prescribed under Article 13 of the Composition Act;
- (5) Whether the company filed for commencement of liquidation procedure under Article 30 of the Corporation Liquidation Act; and
- (6) Whether the company is under the management of its creditor financial institution,

because the concerned company entered into a contract to delegate management to the financial institution in order to dispose of bad bonds.

B. To grant an exception in business combination, the following conditions shall be met even when a company is deemed non-viable.

(1) When it is difficult to use the company's production facilities, etc. on a continuous basis in the concerned market by no other means than business combination;

(2) When it is hard to come by a business combination that is less likely to restrict competition than the concerned business combination.

### **IX. Criteria for Determining Business Combination through Unfair Methods**

Business combinations by means of compulsion or any other unfair methods prohibited pursuant to Article 7, Paragraph 3 of the Act refers to combinations through methods or procedures which clearly violate other laws or are substantially unfair.

A business combination shall be considered a business combination through unfair means when -

- A. The business combination is achieved by dealing a blow to another party to the combination or informing the party that it can deal a blow thereto, using its or another person's position which enables it to influence the business of the party.
- B. The business combination is achieved by dealing a blow to the operation of another party to the combination, after undermining its credibility by unfairly luring its customers, circulating false information or using other unfair methods.
- C. The business combination is achieved through the violation of the obligation to public disclosure stipulated in the Securities and Exchange Act or stealing of another's name.
- D. The business combination is achieved by coercing, threatening, deceiving, or unduly luring away the shareholders of another party to the combination.
- E. The business combination is achieved through offering of bribes to officers of the other party to the combination or to government officials, etc.
- F. The business combination is achieved on an unduly favorable terms to a party to the combination by fabricating accounting documents and others.

### **ADDENDUM**

This notification shall take effect on the notification date.

Starting the notification date, the Notification on M&A Review Guidelines of the Fair

Trade Commission (September 2, 1981) shall be abolished.