論　説　〈1〉

Theoretical and Practical Challenges Concerning the Merger Regulation in Japan

Shuya HAYASHI*

Table of contents

* Associate Professor of Law, Nagoya University Graduate School of Law Furo-cho, Chikusa-ku, Nagoya 464-8601 JAPAN.
shuya.hayashi@law.nagoya-u.ac.jp

† This research was supported by Grant-in-Aid for Advanced Research Institute Research Project, Nagoya University. This research was also supported by Grant-in-Aid for Young Scientists B (21730052), The Ministry of Education, Culture, Sports, Science and Technology (MEXT) .

Introduction

With the global development of economies, M&A and other corporate activities have become considerably global in nature. Against the background of this international trend, what problems exist concerning the regulation of business combinations（hereinafter sometimes referred as to "merger regulation"）in Japan .[1] The identification of such problems is the theme this article

[1] In this article, "merger regulation" means the regulation of the Antimonopoly Act applied by the Japan Fair Trade Commission in the review of mergers, and the procedural rules governing such reviews. The Japanese merger regulation is generally called "Chapter 4 regulation." The Chapter 4 of Antimonopoly Act has provisions for each type of business concentration, such as acquisition or possession of stocks (Section 10), interlocking directorates (Sections 13 and 14), mergers (Section 15), acquisitions of businesses (Section 16), and so on. In this article, "merger" means, in principle, a merger, acquisition, joint venture, or any other form of business amalgamation, combination or transaction that falls within the scope and definitions of the Chapter 4 of the Antimonopoly Act. Hereinafter, "business combination" or "combination" means any types of combinations under the regulation of market concentration in the Chapter 4 of the Antimonopoly Act. This article does not deal with issues concerning the regulation of general concentration. In addition, "JFTC" stands for the Japan Fair Trade Commission; and "goods" means "goods and services." Due to the strictly limited space, references are limited to the minimum necessary documents and materials, and comparison with related laws is omitted.

[2] For a detail discussion of the merger regulation in Japan, see Shuya Hayashi, Merger Regulation in the Antimonopoly Law, 224 Nagoya University Journal of Law and Politics, 21 (2008).

addresses[2].

Due to limited space, this article will focus on identifying the problems concerning the merger regulation in Japan. The reason is simple. Unless the problems are understood and analyzed correctly according to the current situation in Japan, it is impossible to present solutions suited to the problems.

When an information society is developing due to the evolution of IT（Information Technologies）, the issue that has the greatest impact on the basic method for regulating business combinations is not the problem of substantial regulation standards but the procedural aspects. No special legal theory or regulatory standard exists nor should exist in the IT or high-tech industry. To be sure, as in the typical case of *Oracle*（*2004*）in US,[3] it has become difficult to evaluate the business combination of IT companies in terms of competition. However, this is a question of degree. The high-tech industry and the IT industry do not require an analytical framework that is different qualitatively from that in the past. It is sufficient to apply the existing analytical framework and methods. For example, the existence of network effects is frequently pointed out as a characteristic of the high-tech industry. However, such effects can also be produced between supplementary products in low-tech industries. In this sense, it is a question of degree. Network effects do not require any special principle of competition law.

This article focuses on four issues. The *first* issue is the practical response to the internationalization of business combinations that accompany the development of an global competition（**I**）. With the development of international competition, mergers between foreign companies are expected to frequently

[3] United States v. Oracle Corp., 331 F. Supp. 2d 1098 (2004). For details of this case, see Shuya Hayashi, Argument and Proof Methods in Corporate Merger Review and Lawsuits, in Kobe City University of Foreign Studies' Annals of Foreign Study No. 63 "Changing International Society and Law" (2005) (original in Japanese). This article has also been reproduced at the JFTC website.
http://www.jftc.go.jp/cprc/reprint/cprp3-j.pdf

impact domestic markets. When such mergers are carried out, have they been assessed appropriately from the practical viewpoint? This is the first issue.

Secondly, with regard to the regulation of business combinations in Japan so far, because the *ex-post* reporting system was adopted for the acquisition of shares unlike other main countries, there was no liability to report it to JFTC beforehand, with the result that it was difficult to cooperate with foreign competition authorities. In addition, with regard to standards for reporting, unlike other main countries, the total assets of the merging companies, their direct parent and subsidiary companies and the sales of the domestic sales offices of the foreign companies were used as thresholds.

It has been said that the ex-post reporting system was adopted for the acquisition of shares because the degree of combination is lower than organizational fusion like a merger and, if a problem arises under the Antimonopoly Act[4], it is relatively easy to eliminate the problem by issuing an order to sell the shares afterwards.

However, while the prior notification system has been adopted for mergers, divisions, and business transfers, the ex-post reporting system had been adopted for the acquisition of shares. When recent frequent revisions of the corporate laws have allowed various means of corporate reorganization, it is unreasonable that the time of notification of business combinations that have substantially the same effect differs depending on whether it is through the acquisition of shares or not. In addition, for example, if a company becomes a wholly-owned subsidiary through the acquisition of shares, it is highly likely that the delisting standards of the financial instruments exchange（former securities exchange）will be applied to the company, and it cannot be said that it is relatively easy to

[4] In this article, the “Antimonopoly Act” means “the Act Concerning the Prohibition of Private Monopoly and Maintenance of Fair Trade (Act No. 54 of 1947)”.

take measures afterwards, such as the sale of shares. Moreover, although the main foreign countries have adopted the prior notification system for the acquisition of shares, although two or more competition authorities should cooperate to investigate cases that require the joint examination of a business combination and, if there is any problem in terms of competition, coordinate among themselves about the problem, which is desirable for both the competition authorities and the merging companies, it may be difficult to carry out such cooperation if Japan continue to take the ex-post system. Moreover, cases may arise where a cease-and-desist order is issued as a result of a JFTC hearing, although foreign competition authorities have completed their review. Most of the main countries, such as the US and EU countries, have adopted the prior notification system. With regard to the main countries' notification systems concerning business combinations, the US has adopted the prior notification system based on the total assets or sales of the corporate group to which the combined (ultimate) company belongs. EU countries have adopted the prior notification system based on the sales of the corporate group to which the combined company belongs. In this way, many countries have adopted the prior consultation system. In many cases, the sales of the corporate group to which the combined company belongs are used as the criterion for notification. When the Antimonopoly Act was amended in 2009, the prior notification system was also introduced for the acquisition of shares. This is desirable from the viewpoint of ensuring international consistency (as shown in ***Table 1***, the JFTC has recently reviewed only a few cases of business combinations between foreign companies. And it is remarkable that almost all of these cases were *not* notified by the merging parties).

Table 1: Main cases of business combinations between foreign companies reviewed recently by the JFTC

FY	Notified or not	Name of case	Field of trade	Result
2005	×	Acquisition of the shares of Guidant Corporation (head office located in the US) by Johnson & Johnson (head office located in the US)	Twelve types of medical instruments, such as a PTCA catheter	Conditional approval
2006	○	Subsidization of Maxtor Corporation (head office located in the US) by Seagate Technology (head office located in the Cayman Islands)	HDD for companies and HDD for desktop PCs	Approval
2006	×	Acquisition of shares of Guidant Corporation (head office located in the US) by Boston Scientific Corporation (head office located in the US)	5 types of medical instruments, such as a PTCA balloon catheter	Approval
2006	×	Acquisition of shares of Westinghouse (head office located in the UK) by Toshiba (head office located in Japan)	Supply of plant related to boiling-water reactors	Approval
2008	×	Acquisition of shares of Rio Tinto (head offices located in Australia and the UK) by BHP Billiton (head offices located in Australia and the UK)	Iron ore and other resources	Review discontinued

Source : by the author

To cope with this problem, when the Act was amended in 2009[5], like other types of business combinations, such as mergers,

[5] The bill to amend the Antimonopoly Act and Premiums and Representations Act was submitted to the 169th ordinary session of the Diet on March 11, 2008. The bill was carried over to the 170th extraordinary session, but was abandoned thereafter. With the necessary revisions made for implementing it as soon as possible, the bill to amend the Antimonopoly Act was resubmitted to the 171st ordinary session of the Diet on February 27, 2009. The bill passed the House of Representatives on April 27, 2009, and the House of Councilors on June 3, 2009, and was approved on the same day. The amended Antimonopoly Act was promulgated on June 10, 2009.

the prior notification system was introduced for cases where a company belonging to a *corporate group* whose total domestic sales exceed twenty billion yen acquires 20% or more than 50% of the voting rights of a company whose total domestic sales exceed five billion yen, including the domestic sales of its subsidies（Article 10（2）and（10））[6]. For the revision of the criteria for notification in the Antimonopoly Act of 2009, see ***Table 2***, which is attached to the next page）[7].

The *second* issue is to point out problems in the remedies in relation to the effectiveness of the regulation（**II**）. Unless the remedies are appropriate, they may be useless if problems under the Antimonopoly Act are pointed out. In connection with this problem, this article will select for discussion the problem of *ex-post review* of the merger regulation. Ex-post evaluation analysis of the review of business combination and the publication of the results are essential for the improvement of the transparency of merger

[6] Notification of share acquisition is mandatory only when the business combination exceeds a particular scale. The notification threshold in 2009 amendments was reviewed as follows. First, domestic turnover were adopted as the criteria for the basis for measurement. Then revisions were made of the standards for the scale of companies involved that a notification is required, in categories of share acquisitions, mergers, joint incorporation-type company splits, absorption-type splits, business transfers, etc. Especially, notification is required in a share acquisition where total domestic turnover of the corporate group to which the acquiring company belongs exceeds 20 billion yen and the combined amount of turnover of the share issuing company and its subsidiary(s) exceeds 5 billion yen. In a merger, notification is required when the total domestic turnover of the corporate group to which a merging company belongs exceeds 20 billion yen and the total domestic turnover of the corporate group to which another merging company belongs exceeds 5 billion yen. When all parties involved in a merger, company split, joint share transfer, or a business transfer, etc. belong to the same corporate group, those parties are exempted from the obligation to make the notification. It is note that “corporate group” refers to a group of corporations consisting of an ultimate parent group of the acquiring corporation and its subsidiaries.

[7] Revisions of the Notification and Reporting System stipulated in Chapter 4 of the Amended Antimonopoly Act are as follows; First, a prior notification system for share acquisitions was introduced. Second, the scope of notification thresholds for acquiring corporations, etc. was revised. Third, the scope of notification thresholds for foreign corporations was revised. Forth, the scope of notification thresholds for mergers, demergers or acquisitions of businesses was revised. Fifth, the scope of the exemption from notification of mergers, demergers or acquisitions of businesses was expanded. Sixth, substantive provisions and notification provisions for joint share transfers were introduced.

	Person liable for notification	Time of notification		Standard amount for notification		Treatment of foreign companies
Japan (2009 Amendments)	Company acquiring shares (Acquiring company)	Former	Ex-post	Acquiring company: Total assets (of the domestic parent and subsidiary companies), etc.	Acquired company: Total assets	For the acquired company, turnover of the domestic business offices
		Amended	Prior	Domestic turnover of corporate group	Total domestic turnover of the company and its subsidiaries	Same as left
	Merging companies	Former	Prior	Total assets (of the domestic parent and subsidiary companies)		Sales of the domestic business offices
		Amended		Domestic turnover of the corporate group		Same as left
US	Merging companies, etc.	Prior		Acquisition costs and corporate group's world turnover or total assets		Regarding turnover and total assets, limited to the US
EU	Company acquiring shares or merging companies	Prior		Corporate group's world and EU turnover, etc.		Same as left

Source : JFTC (translated by the author)

Table 2: Notification Standards in Japan, the US, and the EU

reviews. In addition, if problems in the review method found through the evaluation analysis of the review results are reflected in the actual reviews of business combinations, this will make it possible to carry out more accurate reviews, promptly responding to economic changes.

The *third* issue is the necessity of improvement on JFTC's system for business combination reviews (**III**). Improvement of the promptness and transparency has so far been required in relation to JFTC's business combination reviews. Responding to these requests, the JFTC has promoted the promptness and transparency of the review to some extent through the clarification of the prior consultation procedure (in December 2002), the revision of Guideline to Application of the Antimonopoly Act Concerning Review of Business Combination (the Business Combination Guidelines) (in May 2004), and the enrichment of the contents of cases published in compilations. However, the industrial communities have strongly demanded the improvement of the promptness and transparency of merger reviews. Responding to this, the Government also has demanded the continuation of measures for further developing the transparency and predictability of reviews and the qualitative improvement of the review method through various Cabinet decisions and others, such as "Basic Policies for Economic and Fiscal Management and Structural Reform 2006" (Cabinet decision on July 7, 2006), "Economic Growth Strategy Initiative" (established on July 6, 2006 by the Council for Comprehensive Financial and Economic Reform), and "Three-Year Plan for the Promotion of Regulatory Reform and the Opening Up of Government-Driven Markets for Entry into the Private Sector" (Cabinet decision on March 19, 2004; Cabinet decision on re-revision on March 31, 2006). The enrichment of the review system —especially, the enrichment of staff engaged in the investigation of business combinations— is essential for improving the promptness of reviews and the quality of the review method.

The *last* is the issue of the regulation of business combinations

with consideration for formal procedures（**IV**）. In the above-mentioned *Oracle* case related to the IT industry, the plaintiff and the defendant disputed face to face with each other concerning market definition and the scenario of the effect of restraining competition, and the court made a judgment in favor of the defendant. Only if there is an accumulation of such formal cases will it become possible to deepen the theory of market definition and the scenario of the effect of restraining competition, and the true value of economic analysis will be proved. Due to limited space, this article does not deal with further details of the significance and importance of economic analysis for business combination reviews.

With regard to the issue of the regulation of business combinations, the focus of the consideration has been shifting from substantive standards for market definition and the effect of restraining competition to problems in procedures and reviews.[8] The consideration of these problems is essential also for examining what the regulation of business combinations should be in industrialized society. Right from the beginning, there is no way of making use of substantive standards without the improvement of procedures and reviews. This article presents issues focusing on the regulation of business combinations in the future Japan.

[8] The focus of the discussions at the Merger Working Group of the International Competition Network (ICN) has been shifting to the problem of reviews and notification. The mission of the ICN Merger Working Group is to promote the adoption of best practices in the design and operation of merger review regimes in order to (i) enhance the effectiveness of each jurisdiction's merger review mechanisms (ii) facilitate procedural and substantive convergence and (iii) reduce the public and private time and cost of multijurisdictional merger reviews. In addition, the content of OECD's "Council Recommendation on Merger Review" (adopted on May 23, 2005) places importance on procedures and reviews rather than substantive aspects.

I. First issue: Notification Procedures and the Object of the Merger Regulation

1. International cooperation system for the regulation of business combinations

The establishment of an international cooperation system among competition authorities is essential for putting every international business combination influential in the Japanese market within the scope of business combination reviews. In Western developed countries, on October 30, 2002, the US Department of Justice Antitrust Division and Federal Trade Commission（FTC）and the Directorate General of the European Commission published "Best Practices" for the coordination of merger reviews in the future to present the cooperation system for merger reviews between the US and EU. These Best Practices specify a recommendation for the preparation of review schedules by the review staff and exchange of these among each other and a recommendation for consultations between senior officers of the US and EU antitrust authorities at stages that are important for each review. In addition, the OECD's "Council Recommendation on Merger Review"（2005）[9] specifies the following recommendation: "Member countries should, without compromising effective enforcement of domestic laws, seek to cooperate and to coordinate their reviews of transnational mergers in appropriate cases. When applying their merger laws, they should aim at the resolution of domestic competitive concerns arising from the particular merger under review and should endeavor to avoid inconsistencies with remedies sought in other reviewing jurisdictions." Moreover, it recommends that "Member countries are encouraged to facilitate effective cooperation and coordination of merger reviews, and to consider actions, including national legislation as well as bilateral and multilateral agreements or other instruments, by which they can eliminate or reduce impediments to cooperation and coordination"（I B1.2）."Johnson & Johnson's Acquisition of the Shares of Guidant Corporation"（December 9,

[9] 23 March 2005 - C(2005)34.

2005）is a rare case where the parallel investigation among Japan, the US, and the EU on a business combination between US companies succeeded. In addition, in order to ensure such successful cases continuously and under the legal system, the provisions concerning notification should be harmonized in the future and the JFTC should endeavor to construct a framework of international cooperation and coordination specialized in the regulation of business combinations.

With regard to the exchange of information with foreign authorities, some improvements were made by the Amended Antimonopoly Act of 2009. Article 43-2 of the 2009 amended Act provides that when information is supplied to foreign competition authorities, the following items must be confirmed:（1）information corresponding to the information supplied by the JFTC to the foreign competition authorities can be supplied by the foreign authorities to the JFTC. In other words, competent foreign competition authorities are able to provide JFTC with information equivalent to information provided by the JFTC. This is the principle of *reciprocity*;（2）the foreign country's law ensures the same degree of confidentiality as that ensured by Japan's law. This is the assurance of *confidentiality*; and（3）the foreign competition authorities do not use the information for any purpose other than as a contribution to their duties. In other words, Information provided by the JFTC will not be used by competent foreign competition authorities for any purpose other than that sought for their duties. This is the prohibition of use for other purposes. In addition, the 2009 amended Act provides that appropriate measures must be taken so that information supplied to foreign competition authorities cannot be used for criminal procedures conducted by foreign courts or judges. Appropriate measures will be taken to prevent provided information from being used for criminal procedures. This is the restriction on use for criminal procedures（4）.

Although these improvements are one step forward without doubt, this does not mean that all the problems have been solved.

First, this 2009 amendment only added a provision that gives grounds for the supply of information to foreign competition authorities, and clarified the requirements for the supply of information. Therefore, the addition of the provision has *not* expanded the current range of information that can be supplied. The introduction of this provision has not changed the framework of judgment about the need for supplying confidential information by considering each merger case from the viewpoint of whether the promotion of the public interest through the disclosure of the information exceeds the promotion of the public interest through the maintenance of confidentiality when the supply of the information is requested based on a prior report, support for supply, and *positive comity*.

2. Problem of limiting the object of the regulation to "corporations"

Although this problem has still not become serious until now, that Japan's regulation of business combination limits the object to "corporations" is a potentially serious problem. Unlike the other types of regulations under the Antimonopoly Act, the target is *not* "undertakings."[10] Although this has not attracted much attention, you can understand the potential importance of this problem if you imagine a merger between big law firms（lawyer partnerships are not "corporation"）that have recently been active against the background of the relaxation of the regulations on the legal services of the foreign law firms in Japan and the globalization of legal services themselves.[11] Cases regarded as problematic under the Antimonopoly Act may emerge, depending on market definition.[12] The same applies to auditing firms, medical institutions, educational institutions, and trade associations. These are not "corporations".

---

[10] For example, section 15 (1) (i) of the Antimonopoly Act sets out as follows; "No corporation shall effect a merger if any of the following items applies:
(i) Where the effect of the merger may be substantially to restrain competition in a particular field of trade;" (emphasis added).

[11] With regard to shareholding, because there is Article 14, it is possible to deal with the problem using the existing provision.

Business combination between hospitals（medical institutions）in particular is one of the most important targets for the regulation of business combinations.

It is noteworthy that, in the past, the Subcommittee on the Review of the Regulation of Business Combinations pointed out in the summary minutes of the fifth meeting（on January 8, 1997, JFTC）that "if undertakings other than corporations are obliged to submit a notification in some cases, it is possible to consider that "corporations" in Chapter IV should be changed to "undertakings."

II. Second Issue: Effectiveness of the Remedy and Ex-post Review of the Merger Regulation

1. Effectiveness of remedy

The third issue is the problem of the effectiveness of remedy and the ex-post review of the regulation of business combinations. Under the existing Act, a remedy has the following problem: a remedy has a certain legal effect when it is entered in a written notification（Article 15(6)(i), see ***Reference Material***, which is attached to the end of this article）. However,（1）because the legal effect only eliminates the restriction on the period of remedy, is the effect sufficient as a means for ensuring effectiveness?（2）are there some cases where it is difficult to make a clear judgment about "are not carried out" as specified in Article 15(6)(i)? In addition, one of the potential problems is the treatment of import promotion measures. In cases where competition pressure does not fully work because there are only domestic competitors, if the merged company's feasible import promotion measures result in lower import barriers and import promotion, they are effective as

[12] If lawyers' general services are regarded as a relevant market, given the market share and concentration, it is hard to think that a merger between lawyer partnerships violates the Antimonopoly Act, at least at present. However, because l-awyers' services have become more and more specialized, centering on services for external affairs, if lawyers' services accompanying the implementation of M&A were regarded as a (sub) market, the number of players in the market would be limited even if they were lawyers (partnerships).

remedies. Examples are shown in prior consultation cases, including the securing of distribution bases, the provision of technical support to export companies, and grade reduction. Recently, however, with the prices of materials rising sharply, there are the following problems: it is impossible to confirm whether the import promotion measures planned at the time of merger really function as import pressure; and importation does not function as a competition pressure as estimated at the time of the merger.

2. Ex-post review of the regulation of business combinations

When thinking in this way, ex-post review of the evaluation of import pressure is essential for the effective design of remedies in the future. After all, the purpose of a business combination review is to predict the situation of competition after the business combination and judge the effect of the business combination on market competition in advance. Because of this, with regard to the evaluation analysis of a business combination review, it is possible only after the fact to verify and evaluate whether the matters considered at the time of the review, such as import pressure in the future, and the recognition of the effect of competition promotion were proper or not and whether the recognition of the effectiveness of the remedy submitted by the merged company was proper or not. Such *ex-post* evaluation analysis and the publication of the results are essential for the improvement of the transparency of business combination reviews. Moreover, if problems and issues in the review method that have been brought out by the evaluation analysis of review findings are taken into consideration for the actual review of business combinations, this seems to make it possible to implement more accurate reviews that will immediately keep up with economic changes. In addition, because the evaluation analysis of review findings becomes an effective material for considering remedies effective for companies planning to conduct business combinations, the publication of the evaluation analysis also contributes to the improvement of the *predictability* of business combination reviews by undertakings.[13]

One of the methods for the ex-post inspection of import pressure is to make a comparison between the import ratio several years before the business combination and the import ratio several years after the business combination concerning the cases and items recognized as those on which import pressure can work after the business combination. First, as a result of such a comparison, it can be revealed that importation will not clearly exist after the business combination. In this case, although importation does not clearly exist after the business combination, potential import pressure may be working. Therefore, it will be necessary to identify qualitative factors to check whether potential import pressure is working or not. The second inspection result is that importation will be carried out at a certain volume after the business combination. If so, this will support the "robustness" of the evaluation of potential import pressure at the time of the business combination review to some extent. The third inspection result is that importation will clearly exist and the import pressure recognized at the time of the business combination will be working after the business combination ― for example, the import ratio will be increasing at a high level from before the business combination to that after it. This will also support the "robustness" of the evaluation of potential import pressure at the time of the business combination review. Of these inspection results, the first one is problematic. If importation does not clearly exist after the business combination and even potential import pressure does not work, this will indicate that the JFTC's

[13] In October 2005, the European Commission published a "Merger Remedies Study," which contains the evaluation analysis of business combination reviews. Regarding the significance of the analysis, Competition Commissioner Neelie Kroes states as follows: "The findings of this important study will influence our future action in the field of merger remedies. It demonstrates the Commission's commitment to evaluate critically and transparently its past policy and practice in order to draw lessons from it. We should only accept remedies that clearly and unambiguously eliminate the identified threats to competition" (Commission analysis of past merger remedies provides guidance for future cases. IP/05/1327 - 21.10.2005 in press release dated October 21, 2005 by the European Commission's Directorate-General for Competition). See also Ex-post Review of Merger Control Decisions - A study for the European Commission prepared by Lear - Laboratorio di economia, antitrust, regolamentazione (Dec. 2006) available at http://ec.europa.eu/competition/mergers/studies_reports/lear.pdf

judgment at the time of the business combination review is wrong. In this case, to check whether potential competition pressure is working or not, it will be necessary to inspect sufficient data on the following matters: (1) the existence of an import barrier under the legal system and the existence and degree of an import barrier to distribution; (2) the qualitative difference between domestic goods and imported goods and whether consumers are accustomed to using domestic goods; (3) the existence of a plan to increase the supply capacity greatly at a world level after the business combination, and the existence of a plan to establish or add plants according to the prediction of an increase in demand in Asia; and (4) the existence and degree of a trend toward shrinkage of the gap between domestic and foreign prices. These matters should be reviewed not optimistically but carefully based on minute market analysis and hearings[14] with the use of adequate data. If the results of the reviews of (1) to (4) are negative, this indicates that although the import ratio was low at the time of the business combination review and has also remained at a low level after the business combination, potential competition pressure from overseas also has not existed in reality. If such results are brought about, although the results themselves are unfortunate in that the judgment at the time of the business combination review has been proved to be wrong, they are valuable in that they can be used for business combination reviews in the future. The utilization of a fallacy in past judgment for future judgment is required for improving Japan's business combination reviews.

In short, to prevent remedies from becoming a mere name little by little, it is essential to carry out ex-post review for the design of the future system for remedies.[15]

---

[14] For example, it is possible to collect information about overseas prices and imported goods and ask users whether they have devised means to maintain their price bargaining power, such as using overseas prices as a bargaining tool for price negotiations.

It may be improper that ex-post inspection should be left to the JFTC. For example, in the US, the Government Accountability Office（GAO）sometimes publishes a detailed report to demand that the Federal Trade Commission（FTC）should improve its reviews of business combinations, stating that its reviews have not functioned well.[16] Receiving stimulation from this, the FTC makes opposing arguments, publishing detailed evaluation and analysis.[17] Such a mutual check function between government offices improves the competition authorities' reviews. In Japan, other government offices also make objections to the JFTC's reviews.[18] Such objections themselves should not be eliminated if they contribute to the further improvement of the JFTC's reviews in the future.[19] The academic communities also have ample room for contribute to ex-post review from an academic point of view.[20]

To improve the JFTC's business combination review capability to the level of Western competition authorities, to strengthen the transparency and predictability of business combination reviews, and

---

[15] In addition, in the Midterm Progress Schedule for the Economic Growth Strategy Initiative (established on July 6, 2006 by the Council for Comprehensive Financial and Economic Reform), it is stated that "highly transparent merger reviews should be realized by the evaluation analysis and publication of review findings and the use of economic analysis methods for reviews" by FY2008 at the latest. In this way, earlier implementation of the evaluation analysis and publication of the findings of merger reviews have been strongly demanded.

[16] For example, in May 2004, GAO published a report entitled "Effects of Mergers and Market Concentration in the US Petroleum Industry" (http://www.gao.gov/new.items/d0496.pdf). In the report, GAO suggested that gasoline prices increased in some markets in the US as a result of the insufficient functioning of the FTC's merger reviews in the petroleum industry.

[17] The FTC published a comprehensive report on the petroleum industry, "The Petroleum Industry: Mergers, Structural Change, and Antitrust Enforcement," in August 2004 to refute GAO's arguments.

[18] An example is the Ministry of Economy, Trade and Industry's activities concerning the Competition Policy Study Group. For the "Report of the Competition Policy Study Group," see the following: http://www.meti.go.jp/press/20060519004/20060519004.html.

[19] However, the Government and the ruling parties must not intervene in or apply political pressure to each review case.

[20] "Business Integration through the Establishment of a Holding Company for Japan Airlines and Japan Air System" (April 26, 2002) is suitable material for such ex-post evaluation.

to ensure the international consistency of business combination reviews, it is essential for Japan to carry out ex-post evaluation analysis and inspection.[21]

III. Third Issue: Improvement of the Merger Review System

1. Background to the problem

As described at the beginning, business combination reviews require the improvement of the contents of their publication. In the Short-Term Progress Schedule for the Economic Growth Strategy Initiative（established on July 6, 2006 by the Council for Comprehensive Financial and Economic Reform）, it is stated that "the contents of the publication of each case should be further improved, and the grounds for judgment and the way of thinking about the evaluation of import pressure and other matters under the Antimonopoly Act should be clearly indicated." In the "Three-Year Plan for the Promotion of Regulatory Reform and the Opening Up of Government-Driven Markets for Entry into the Private Sector"（Cabinet decision on March 19, 2004; Cabinet decision on re-revision on March 31, 2006）, it is stated that "for the improvement of the transparency of reviews, regarding as many cases as possible, whether a merger or the like is approved or not, the contents of the publication, including the reason for approval or disapproval, should be improved further unless there is any problem, excluding the parts concerning the undertakings' secrets."

In the same way, with regard to the use of the evaluation analysis and economic analysis of review findings, in the Midterm Progress Schedule for the Economic Growth Strategy Initiative（established on July 6, 2006, by the Council for Comprehensive

[21] JFTC tentatively initiated the ex-post review in 2007. See the following (only available in Japanese) http://www.jftc.go.jp/pressrelease/07.june/070622.html

Financial and Economic Reform), it is stated that "highly transparent reviews of business combinations should be realized through the evaluation analysis and publication of review findings and the use of economic analysis methods for reviews."

The improvement of the review system of the Mergers and Acquisitions Division in JFTC is essential for the promptness of business combination reviews, the enrichment of the review findings, and the refinement of the review method.

2. Measure for the improvement of the review system: increase in the number of business combination investigators

Firstly, the number of staff in charge of business combinations is lower than that in Western developed countries. In the US, for example, although a simple comparison is impossible because the number of staff is not fixed in the US as in Japan, the total number of staff of the Department of Justice and the FTC engaged in business combination reviews is a little less than 500. In addition, about 100 economists with PhD's are engaged in business combination reviews. In Japan, at the most, "about 30 staff members are engaged in reviews" (at the regular press meeting of the then Secretary-General Uesugi on June 8, 2005)[22]. The difference between both countries is obvious.[23]

Secondly, although an increase in the number of staff is essential, it is improper to merely increase the number of staff belonging to the Mergers and Acquisitions Division. Business combination reviews are actually conducted by business combination investigators (i.e., case handlers). The establishment and improvement of the business combination review system needs an increase in the number of business combination investigators. Generally, the division's duties include *administration* and *coordination*, and the staff members in charge of these duties are not engaged in business combination reviews. In this sense, not all the staff members of the Mergers and Acquisitions Division can take charge of business combination reviews. Moreover, with regard to the allocation of investigators, a considerable number of them have to be exclusively

engaged in large-scale cases where the combined company has a large share in a large market and novel cases that need new market analysis because there have been no or few business combinations in that industrial field. In addition, full-time investigators are also necessary for economic analysis. As a result, the number of business combination investigators allocated to other types of cases is limited. Although busyness in the actual duties differs depending to whether or not there are many cases that require detailed reviews, the actual situation still is that individual investigators are

[22] The number of officials in the General Secretariat of the JFTC is as follows (unit: persons). Out of 795 officials in 2008, there are 37 economists, 50 lawyers, 647 other professionals, and 61 support staff.

Fiscal Year	2000	2001	2002	2003	2004	2005	2006	2007	2008
Number of officials	564	571	607	643	672	706	737	765	795
Enforcement against anti-competitive practices	263	269	294	318	331	360	383	409	438
Merger review enforcement	22	22	28	30	32	32	35	36	36
Advocacy efforts	22	22	25	30	30	37	36	34	35

Source : JFTC

(Notes)
1. The number of officials engaged in enforcement against anticompetitive practices refers to the Investigation Bureau and Investigation Divisions of local offices.
2. The number of officials engaged in merger review enforcement refers to the Mergers and Acquisitions Division.
3. The number of officials devoted to advocacy efforts refers to the General Affairs Division of the Economic Affairs Bureau and the Coordination Division.

[23] Incidentally, the number of the US FTC's full-time employees was 1,019 and its budget was 205 million dollars in FY2005 (October 2004 to September 2005) (revenues from merger notification charges were appropriated to a part of the budget). In contrast, the number of staff of the JFTC's Secretariat-General was 765 (as of the end of FY2007). The budget of the Fair Trade Commission is as follows (unit: billion yen, %).

Fiscal Year	2000	2001	2002	2003	2004	2005	2006	2007	2008
Budget amount (¥billion)	5.9	6.04	6.16	7.85	7.82	8.13	8.34	8.42	8.68
Change over previous year (%)	2.1	2.3	2.0	2.2	△0.4	4.0	2.5	0.9	3.2
General Expenditures Budget: change over previous year (%)	2.6	1.2	△2.3	0.1	0.1	△0.7	△1.9	1.3	0.7

Source : JFTC

(Notes)
1. The General Expenditures Budget refers to the total budget of the Japanese government and is the amount of General Account Budget Expenditures less National Debt Service and Local Allocation Tax Grants.
2. The rate of increase for the JFTC budget of FY 2003 is compared to the post-reclassification budget (7.69 billion yen) in order to avoid the effects of an increase in personnel expenses, which required an independent calculation, in line with the JFTC's transfer to the Cabinet Office.

always busy enough just carrying out their own duties.

In this situation, for example, it is necessary to re-consider whether the Mergers and Acquisitions Division's full-scale evaluation analysis of review findings can be carried out only by present staff members who are perhaps already busy carrying out their daily duties.[24] The expansion of the staff is an immediate problem in a situation where it is necessary to develop the *transparency* and *predictability* of business combination reviews further and make efforts to improve the quality of the review method.

Thirdly, although it is too soon to decide whether the regulation is effective or not according to the number of staff members engaged in the review of business combinations, it still is a problem that only a few special economists are leading the economic analysis in the Mergers and Acquisitions Division. What is more, one of them was employed from the academic world of economics on condition that the term of service should be five years at the longest（the term of service is usually three years）.[25] Because the term of service is short, the knowledge and experience acquired through practice may become personal to the individual concerned and it is not necessarily easy to hand them over to a successor. Because the successor needs to acquire practical knowledge and experience from the beginning, there may arise a problem that human resources familiar with both economic theories

---

[24] Some budget measures were planned to be taken in FY2006 for the purpose of the "establishment of a system for evaluation analysis related to the review of business combinations." (Source: JFTC press release on December 25, 2006)

[25] The JFTC has adopted an intermediate (midway) recruitment system in addition to the system of recruitment with a limited term of service (it is theoretically possible to employ those who pass the Grade-I National Public Service Examination after acquiring a Ph.D). However, it is usually rare in Japan that specialists who have a permanent post at a university or the like (such as professors, associate professors, and full-time lecturers) quit their post, apply for the intermediate recruitment, and permanently work for the JFTC. Moreover, even if a small number of them make applications, it is difficult to find competent or suitable persons from among the applicants.

and practical affairs will not be developed easily. Moreover, there is a basic problem that it is actually difficult to find a person suitable as a successor from the private sector.[26]

However, it is not so difficult to find human resources familiar with economic theories and demonstrative analysis. The problem is rather that there are limited human resources with the interest and ability to use such academic knowledge for various practical operations. In addition, capable personnel may feel uneasy about the suspension of their research in their 30s, the period when they are most eager to undertake research, and about what to do after the expiration of the term of service. Although the competition authorities of Western countries such as US can play a role as a "revolving door" for the exchange of human resources, Japan's government offices and the private market for specialists have not matured enough to play such a role. If human resources are recruited from the academic world for a limited term of service, generally there is no guarantee that they can go back to their university. This may have become an impediment to the ambition of potential human resources and their recruitment by government offices.

Fourthly, from the viewpoint of the accumulation of technical knowledge, a change in the organizational structure of the Mergers and Acquisitions Division in April 2006 was one step forward. While the division was divided into some subdivisions according to the applicable law（type of business combination）in the past, it has now been divided according to the type of industry, such as chemistry, telecommunications, machinery, and manufacturing and so on.[27]

Lastly, it is doubtful whether the regulation of business

[26] In the above-mentioned press meeting, responding to a reporter's question, the Director-General Uesugi answered that "In the case of economics, it is very difficult to recruit human resources...I must say that recruitment has gone wrong."

combinations itself has drawn adequate interest and attention in the Secretariat-General of the JFTC as a whole. In Western developed countries, the department in charge of the regulation of business combinations is one of the so-called shining stars. Part of the background to this is that lawsuits are sometimes filed concerning large merger cases, unlike in Japan. In Japan, such cases are usually settled through prior consultations, a mere administrative service. Under this situation, it may be a bit difficult for people to take an interest in the regulation of business combinations.[28] What is more, if economic analysis gives priority to theories and techniques that can be understood only by some specialists and draw no interest from other staff members, the introduction of economic analysis may be of no practical use. It is necessary to proceed with discussions, watching the current situation in Japan. If the importance of the regulation of business combinations and the theoretical difficulty peculiar to the regulation are not well infiltrated into practical affairs, it seems essential to carry out advocacy activities and internal training at first. This requires the positive recruitment of external economists and lawyers as well as efforts to train internal specialists with the cooperation of the external specialists.[29]

---

[27] Each division is usually divided according to the type of industry in Western countries.

[28] To begin with, it is also doubtful whether the regulation of business combinations has been the object of interest in the academic communities of antitrust economics and economic law. Although it may be rash to make a judgment only from the academic world's special themes, the Japan Association of Economic Law had not chosen the regulation of market concentration as a special theme of its annual report for more than 20 years until "Reconsideration of the Regulation of Business Consi derations"was chosen as the special theme in 2003.

[29] In this regard, activities of the Competition Policy Research Center of JFTC are important. The Competition Policy Research Center (referred to as the "CPRC") enhances research activities as a result of collaboration between the JFTC staff and visiting researchers (16 persons at the end of December 2008) who are specialists in the area of economics or law in order to strengthen the theoretical and empirical basis for the implementation of the Antimonopoly Act and the planning of competition policies.

IV. Issues Concerning the 2005 Amended Antimonopoly Act and the Merger Regulation: the Use of the Amended Act with Consideration for Formal procedures and associated problems

1. Regulation of business combinations and ex-post hearing procedure

A great problem that remains unsolved concerning the regulation of business combinations in Japan is that the regulation of business combinations is dealt with not by formal procedures[30] but through prior consultations, an informal procedure. Because of this informal procedure, precedents have not been accumulated as standards for the regulation of business combinations, and the judgment process up to the review results has not been clarified. With regard to the opacity of the judgment process, the results of the approval or prohibition of mergers, including the reasons, were described and published in detail in the Prior Consultation Guidelines[31] published in December 2002.[32]

---

[30] Based on the provisions of Article 15, Article 15-2 and Article 16 of The Antimonopoly Act, mergers, demergers and business acquisitions of a certain size in Japan must be notified to the JFTC prior to the transactions and based on Article 10 of The Antimonopoly Act, stockholdings of a certain size had to be reported after the transactions before 2009 Amendments. The JFTC conducts reviews of notified or reported cases, and when it determines that a transaction may be to substantially restrain competition in a particular field of trade, the JFTC has the power to take measures, including the prohibition of the said transaction. Throughout 2008, for example, 65 company mergers were notified based on the provisions of Article 15, 22 demergers were notified based on the provisions of Article 15-2, 104 cases of business acquisitions were notified based on the provisions of Article 16 and 927 stockholdings were reported to the JFTC based on the provisions of Article 10 of The Antimonopoly Act. None of the stockholding, merger, demerger or business acquisition cases notified and reported from 2006 to 2008 were cases in which the JFTC took any legal measures.

Table: Number of reports concerning stockholdings, company mergers, demergers and business acquisitions

Year	2006	2007	2008
Stockholdings	917	1,055	927
Mergers	79	70	65
Demergers	18	31	22
Business acquisitions	146	105	104
Total	1,160	1,261	1,118

Source : JFTC

[31] JFTC, the "Policies for Prior Consultation on Merger Plan" (on December 11, 2002).

In such published cases, efforts were made to enrich the contents,[33]such as concretely describing how the matters considered during the reviews influenced competition.[34] However, there is a clear difference between legal actions and informal actions. If a hearing is held, the investigator develops an argument based on a lot of concrete evidence. Responding to this, the respondent produces evidence against the investigator's argument. After that, the hearing examiner made a（draft）decision. Moreover, the court may review the decision. Through the accumulation of these procedures, precedents are created and standards for merger regulation are established. If without such accumulation, "substantial restraint of competition," an extremely abstract requirement for illegality, will be hardly understood properly. In this way, the

[32] According to the JFTC's "Policies dealing with prior consultation regarding business combination plans (December 11, 2002, as amended as of March 28, 2007)", Prior consultation consists of two phases. As first, Phase I review will proceeds as follows; When prior consultation is applied, the FTC shall examine whether any additional materials are required for the commencement of review. As a general rule, within 20 days from the day on which materials showing the concrete contents of the business combination plans are submitted, in the event that it is determined that additional materials are not required, then the FTC shall provide notice of such, and in the event that it is deemed that additional materials are required, shall present a list of additional materials in writing. Next, Phase II review will proceeds as follows; "From the day on which notice is provided to the parties that additional materials are not required to be submitted as above noted or from the day that additional materials are submitted in the event that a list of additional materials was presented, the FTC shall commence review, and will, as a general rule, within 30 days, notice the parties to the effect that there are no issues relating to the Antimonopoly Act or to the effect that a further detailed review is required". See the Policies dealing with prior consultation regarding business combination plans section, 3(1) (3).

[33] According to the Policies, in principle, an answer concerning the time schedule for prior consultation shall be provided within 30 days of the submission of materials and, if additional materials are necessary, an answer shall be provided within 90 days of the submission. In addition, because the published description of prior consultation was very simple in the past, the clarity and predictability of the review standards were problematic. Main prior consultation cases are published through JF TC's annual reports and JFTC's website. Until 1993, however, descriptions were simple and problems under the Antimonopoly Act frequently failed to be fully pointed out, even when remedies were taken. Since 1996, cases where remedies are abandoned have also been published, and the descriptions of cases have become detailed. Especially since the publication of the above-mentioned Polices for Prior Consultation on Merger Plan in 2002, prior consultation cases that undergo detailed reviews have been published in principle, and how markets are defined and what problems are pointed out have been described in detail.

problem of informal treatment has remained unsolved.

If discussions are made with consideration for formal procedures, a problem arises as to what effect the procedures specified in the 2005 amended Act have on combination cases. It is expected that some business combination cases will be disputed by formal procedures also in Japan. It is useful to consider whether the 2005 amended Act, which came into force in January 2006, is or can be "easy-to-use" for the JFTC and combining companies, taking into consideration formal procedures. Given the current situation of the regulation of business combinations, where almost all cases are dealt with through prior consultations, the simulation of the future regulation of business combinations with consideration for the formal procedures specified in the 2005 amended Act is essential for adjusting the regulation according to the formal legal procedures. In addition, because the globalization of corporate activities makes market definition and the analysis of anticompetitive effects more and more complicated and advanced, it is clear that the application of prior consultation to all cases has limitations. In Japan, it is essential to consider the regulation of business combinations with consideration for the establishment of formal procedures.

As a result of the 2005 amendment to the Antimonopoly Act,

---

[34] "Evaluation of JFTC Policies in FY2005" (press release material on July 13, 2005) shows interesting data concerning the average number of pages for each publication after the publication of the Prior Consultation Guidelines. The average number of pages increased by 1.3 from 5.7 in FY2003 to 7.0 in FY2004 (up by 22.8%). Although the Evaluation states that an increase in the number of pages does not necessarily lead to the improvement of the transparency of business combination review, it also considers that it is possible to judge that an increase in the number of pages indicates an increase in the volume of information effective for improving undertakings' predictability. In addition, the Evaluation points out that the number of prior consultations (paper reviews and detailed reviews) decreased by about 23.9% from 71 in FY2003 to 54 in FY2004, and the decreasing rate exceeds that of the total number of received notifications (a decrease of 17.6% from 1,258 to 1,037). The Evaluation states that this makes it possible to infer the improvement in predictability for undertakings and can be regarded as a certain indicator of the effectiveness of the enrichment of published cases. The same analysis is shown in "Evalua tion of JFTC Policies in FY2006" (press release material on July 21, 2006).

the recommendation system was abolished and the cease-and-desist order became an formal administrative disposition that comes into force just after the issuance of the order. In addition, the hearing procedures were changed into and *ex-post review* of an already conducted administrative disposition（cease-and-desist order）.

It is possible to conceive two cases that require formal procedures: （1） the JFTC points out a problem under the Antimonopoly Act at the stage of prior consultation and, depending on the circumstances, the combining companies voluntarily submit a remedy for the problem, but the remedy does not satisfy the JFTC, with the result that negotiations break down and the merging companies go ahead and give prior notification;[35] and （2） the combining companies suddenly give a prior notification without seeking prior consultation. In either of these cases, if the JFTC considers that the combination plan violates the Antimonopoly Act, the JFTC will issue a cease-and-desist order（Article 17-2 of the 2005 amended Act） and, depending on the circumstances, file a motion for an urgent temporary injunction order with a court（Article 70-13 of the 2005 amended Act）.

Some may criticize that consideration as to what measures the JFTC and the merged company should take if formal procedures are applied, as described herein, is meaningless because negotiations are usually conducted about remedies at the stage of prior consultation in reality. However, because prior consultation is not compulsory, it is possible to make a notification according to the Act without prior consultation. Even if prior consultation is conducted, a problem may be pointed out during the detailed review, and the remedy that the combining companies present at

[35] Also in the Yawata-Fuji merger case, which violates Article 15 (1) of the Antimonopoly Act (consent decision on October 30, 1969; JFTC Decisions Reporter Vol. 16, p. 46), the only formal merger case in Japan, prior consultation was discontinued and the merger notification was accepted, with the result that formal procedures were applied. Finally, the case was settled in the form of a consent decision.

that stage may not be accepted by the JFTC, with the result that the negotiations may "break down." In this case also, because there is no obligation to follow the prior consultation, if the combining companies are dissatisfied with the result, the companies can make a notification to start a , "do-or-die resistance" (that is, bringing the dispute to a tribunal hearing).

Under the 2005 amended Act, if the addressee of a cease-and-desist order disputes it at a tribunal hearing, it is expected that the respondent will dispute the *text* (conclusion of law) of the original disposition on the assumption that the fact is the same as that existing at the time of the issuance of the order. For example, suppose that the *text* of the cease-and-desist order states "Must not carry out the merger." Responding to this, the respondent asserts and proves that it is not necessary for remedy that the entire prohibition of the merger will be undertaken but the order to carry out only a partial remedy, such as partial transfer of the business, is sufficient in order to remove anticompetitive effect from the merger. If the assertion and proof are successful, the JFTC may render a decision to the effect that the original disposition should be partially changed (Article 66(3) of the 2005 amended Act).

What will happen if the respondent withdraws the tribunal hearing request (Article 52(4))? What will happen if the respondent withdraws it to take a new remedy that is sufficient to eliminate the business combination's "substantial restraint of comp etition" and then makes a re-notification of a combination plan that incorporates the new remedy? However, because the original disposition is finalized if the hearing request is withdrawn (Article 52(5)), it is problematic that this approach can be adopted to begin with. One of the ideas to deal with this problem is that, to deny the legal effect of the original disposition, a hearing decision should be made to cancel the cease-and-desist order on the grounds that the maintenance of the order is improper "due to economic changes and other reasons" according to Article 70-12 (2).

2. What the "*text*（*form of conclusion*）" of a cease-and-desist order should be under the regulation of business combinations

Taking into consideration formal legal procedures for the regulation of business combinations, the next problem is what the text of a cease-and-desist order should be. This is because the degree of enforcement of the regulation of business combinations depends on the institutional design of the text. I will examine what the "text" i.e. *form of conclusion* of a cease-and-desist order should be, taking into consideration a merger only（Article 15）. The following four forms of *text* can be considered.

（1）The merger is permitted on condition that a certain measure should be taken;[36]
（2）Must not carry out the merger if a certain measure is not taken;
（3）Take a certain measure; *or*
（4）Must not carry out the merger.

Clearly,（1）is not allowed. Because（1）is only a *permission* and not an *order* under administrative law,（1）is inconsistent with the purpose of the order.（4）was used for the Yawata-Fuji merger case（1969）. In the case, the recommendation stated that the *text* is "Do not carry out the merger based on the merger contract concluded on March 6, 1969." The same form was used not for a merger（Article 15）but for a business acquisition（Article 16）. In the Toho-Subaru case, a case of a hearing decision on a business acquisition,[37] the *text* states as follows: "The respondent shall not rent two theaters, Subaru-za and Orion-za located at 1-5 Yuraku-cho, Chiyoda-ku, Tokyo according to the "Draft Contract on the Joint Management of the Theaters," which was concluded with Subaru Enterprise Co., Ltd. on January 26, 1950." Given the JFT

[36] For example, the partial transfer of Higashida No. 6 Blast Furnace is the content of the text in the Yawata-Fuji merger case.
[37] Hearing decision on September 29, 1950; JFTC Decisions Reporter Vol. 2, p. 146

C's use of the Act so far, (4) seems to be a proper *text*.

With regard to (3), in this merger case, even if there are only a few violating items, and the concrete measures presented by the merging companies (acquisitions of shares, partial acquisitions of business, etc.) eliminate all the violating facts, a problem arises as to whether it is proper to order these measures in the form of a cease-and-desist order.

Although what has become a problem in this case is whether or not the merger is illegal due to its substantial restraint of competition, this form of *text* (3) states nothing about the merger itself. Whether or not the merger procedure should be completed at least is a problem before merger registration, but (3) gives no answer concerning this. The text of a cease-and-desist order should clarify as an administrative disposition whether to suspend the progress of the merger procedure. However, with regard to shareholdings (Article 10) and interlocking directorates (Article 13), because the focus of the problem is the disposal of the shares or the resignation of the director, it can be ordered through the *text* (*3*) as a matter of course.[38]

What about the form of the *text* (2)? The purpose of (2) is to order the prohibition of the merger, attaching a supplementary provision. There is a problem as to whether the attachment of such a supplementary provision should be interpreted as permissible. Although opinions are divided about the form of the *text* (2), I think it proper to interpret this as impermissible. This is because a cease-and-desist order is not a discretionary disposition but an administrative disposition bound by Articles 17-2 and 49 of the Act[39]

[38] In the Hiroshima Electric Railway consent decision case (July 17, 1973; JFTC Decisions Reporter Vol. 20, p.62), the *text* stated orders to the effect that "The respondent, Hiroshima Electric Railway, must dispose of 85,000 shares among its own 110,000 shares of Hiroshima Bus Co., Ltd. within seven days from the day when the hearing decision comes into force" and "Respondents, Akira Horie, Shoji Ishimatsu, Haruo Okano, and Wataru Tanaka, must resign the post of director of Hiroshima Bus Co., Ltd. within 20 days from the day when the hearing decision comes into force."

and the *text* of a cease-and-desist order should be designed as a legally-guaranteed self-enforcing administrative disposition. Although both articles provide for "necessary measures," this can be considered to be limited to the scope of binding discretion.

Therefore,（4）seems to be the most proper form of *text*.

3. Position of prior procedures in the regulation of business combinations

The 2005 amended Act provides that an opportunity of expressing opinions should be given before the issuance of a cease-and-desist order（Article 49(3) of the 2005 amended Act. Hereinafter, when this article refer to the article number, it means that of the 2005 amended Act and rules.）. With regard to this prior procedure, the Article only provides for "an opportunity to express his or her opinions and to submit evidence" and gives the same level of guarantee as the "Granting of an opportunity for explanat ion" provided for by Article 13(1)(ii) of the Administrative Procedure Law. This is different from the "Hearings" procedure provided for in Article 13(1)(i) of the Administrative Procedure Law in that the merging companies only have an opportunity to present an opinion about remedies.

If, at the stage of prior procedures, only an opportunity to present opinions is given, but no negotiations are held, a doubt may arise that the merging companies' protection right may not be guaranteed and a flexible solution through a hearing before the order concerning business combination will be impeded.

However, perhaps this will not happen. For example, suppose that, at the stage of prior consultation, the JFTC points out a

[39] According to a common view concerning administrative law, conditions can be attached to administrative acts only in the following cases: (1) when the Act itself provides that conditions may be attached; and (2) any law or regulation allows an administrative agency's discretion as to whether to carry out an administrative act or what act should be carried out in what case.

problem in a combination plan and negotiates with the merging companies about remedies, but the negotiations break down or reach a dead end. Notwithstanding this, if a combination plan to the same effect is submitted, the JFTC will review the plan again and issue a cease-and-desist order to seek the prohibition of implementation of the plan as a matter of course. At the stage of this prior procedure, the addressee presents a good remedy. If the JFTC judges that the remedy can solve the problem under the Antimonopoly Act, because it become unnecessary for the JFTC to issue a cease-and-desist order, the JFTC can prevent the order from becoming effective by not serving a transcription of the cease-and-desist order（Article 42(2)).[40]

If you ask whether this is possible to begin with, the answer is yes. If, when the merging companies express an opinion beforehand, it states that it will take a remedy, and it is recognized that the effect of restraining competition has disappeared because of the remedy, it will be unnecessary to issue a cease-and-desist order. As for the JFTC, if it does not fully examine the remedy and a dispute arises in a hearing about the JFTC's failure to accept the remedy and the issuance of a cease-and-desist order to prohibit the business combination itself, with the result that the original disposition should be changed under Article 66(3) because the merging companies' argument has validity, the JFTC may be regarded as having made a mistake in judging the remedy. To avoid such a risk, the JFTC is expected to at least fully examine the remedy presented at the time of the explanation at the prior procedure.

In this way, depending on how to use the prior procedures practically, the merging companies may more easily use the procedure to avoid a cease-and-desist order by the use of the

[40] Because, at the time of the explanation procedure before the issuance of the cease-and-desist order (disadvantageous disposition), the administrative disposition (disadvantageous disposition) is, of course, still not carried out and does not become effective legally, the legal effect of the order still does not exist.

opportunity for explanation under the new Act than the existing procedure under which the companies bring the case to hearing procedures, present a remedy, and assume the risk of receiving a consent decision. Because a consent decision requires the respondent's acknowledgment of the existence of its own violation of the Antimonopoly Act（Article 53-3 of the former Act）, the merging companies cannot avoid the disgrace of violating the Antimonopoly Act.[41] On the other hand, prior explanation is a closed procedure, and if the JFTC agrees, the JFTC merely does not serve a transcription of the cease-and-desist order（Article 49-2 of the 2005 amended Act）. Because the cease-and-desist order does not take effect unless a transcription is served（that is, administrative acts do not become effective as a disadvantageous disposition）, the violation of the Antimonopoly Act will not be recognized publicly.

Section 25 of the Rules on Administrative Investigations by the Fair Trade Commission（October 2005）[42] provides that if the addressee makes a motion, the JFTC must explain（1）tentative content of the cease-and-desist order and（2）the facts found by the Commission and the application of law thereto at the stage of the prior procedures "without fail." With regard to the regulation of business combinations, it can be expected to some extent that the combining companies can negotiate with the JFTC about the original combination plan in a form that is as similar to the hearing procedures as possible by immediately exercising the "right to seek

[41] Although the JFTC's finding of the existence of a violating act is not a requirement like a hearing decision (Article 54(1) of the existing Act), the respondent's expression of acknowledgment of the existence of the violating act is a requirement. In this sense, the violation of the Antimonopoly Act becomes publicly known through the respondent's acknowledgment.

[42] Fair Trade Commission Rule No.5 of 2005.

[43] In the case of a tribunal hearing, it is possible to file a motion for the issuance of an order to produce documents concerning the evidence held by the investigator (Article 52). The investigator individually and concretely makes a judgment, taking into consideration the necessity and reasonability of the production of the documents. In the prior procedures also, the addressee can make a refutation after gaining detailed information on the investigator's judgment as much as possible, positively using the motion for an explanation provided for by Section 25 of the new Rules on Administrative Investigations.

an explanation" through the use of the prior explanation procedure.[43] Assume the following case: when a problem is pointed out at the stage of prior consultation, the merging companies cannot come up with a good idea; although they plan to bring the dispute to tribunal hearing procedures, they come up with a good remedy at the stage of the prior procedure for a draft order and try to hold negotiations about a change in the merger plan as a prior procedure. In this case, the merging companies need not take a roundabout method whereby they suspend the merger plan according to the order and, after receiving approval from the JFTC through prior consultation, submit a notification incorporating the remedy to receive approval for the changed merger plan. As described above, it is practical to hold negotiations about the change of the original merger plan at the stage of prior consultation and submit a notification incorporating the remedy presented during the negotiations to receive approval for the changed merger plan.

Depending on how to use the prior procedures, the JFTC may be able to make the prior procedures "convenient" for themselves. If used well, the explanation procedure under the 2005 amended Act may have a similar effect to that of the US FTC's settlement（consent order）negotiations before the decision to commence a hearing.[44] The FTC's consent order procedure before the decision to commence a hearing is often used for the regulation of business combinations. The merging companies have the following advantages:（1）they can avoid paying the costs accompanying tribunal hearing procedures, receiving an impact on their business, and worsening their reputation; and（2）they can clarify that the purpose of the consent order is not to recognize the fact of

[44] If there is a reason for believing that a violating act is carried out, FTC will issue a complaint and a draft order to the suspect. If the suspect chooses to agree with FTC to settle the case, the suspect will sign a consent agreement, consent to the contents of the draft order, and waive all the rights related to judicial review. If FTC approve this consent plan, it will issue a consent order after the expiration of a public comment period of usually 30 days.

[45] The purpose of a consent order is not to recognize a violation act legally. Therefore, if a lawsuit for damages is filed concerning the same case afterward, the consent order has no effect of assumption about facts and illegality.

violation but to settle with the FTC.[45] The FTC negotiates with the companies based on the draft decision to commence a hearing. Because of this, the essential aspect of this consent order is that it can draw out a strong remedy from the companies, applying a kind of "pressure" to the effect that if the settlement negotiations break down, the FTC will issue a preliminary injunction and bring the case to a hearing. This may apply also to the explanation procedure in JFTC. Depending on how the explanation procedure is used concerning the draft cease-and-desist order, the JFTC may draw out a strong remedy from the merging companies. That is, because the companies will attend the explanation procedure, assuming that the transcription of an order will be served if negotiations break down, it can be expected that they will present a remedy during the explanation procedure.[46]

However, the improvement of the prior statement procedures has its limitations. The prior procedures have no neutral and independent person who proceeds with the procedures like a hearing examiner. There is an undeniable difference between the opinion statement procedures and the tribunal hearing procedures. Because a tribunal hearing has strict procedures for hearing opinions, it is different from the prior procedures for making explanations.

The function to find facts about cases related to the Antimonopoly Act is one of the most important functions to be performed by the JFTC as a special agency. The existence of the provision for substantial evidence rule (Article 80) can be understood in this context. In addition, it should be understood in this context that the JFTC, an independent collegial administrative agency, consists of academic or practical experts in law or economics (Article 29(2)).

[46] However, if the JFTC answers in the prior consultation that there is a problem under the Antimonopoly Act, but the merging companies go ahead with the business combination, the effect pointed out herein is hard to expect. If a prior notification starts an investigation without prior consultation, the effect may be produced.

Because there are only summary provisions concerning the regulation of business combinations and it is difficult to make a judgment based on the competition effect requirements, the interpretation of the requirements and the finding of facts concerning the requirements require complicated and technical judgment, including economic analysis. The result of this judgment may become opposite according to the person or viewpoint. Because the proof of the competitive effect requirements is important for the regulation of business combinations, it is usual for the merging companies to dispute the defective grounds for the investigator's interpretation of requirements and insufficient evidence for the investigator's finding of facts concerning requirements. Because of this, it is strongly demanded and desirable that the examination and finding of facts should be carried out through the tribunal hearing procedures conducted mainly by the hearing examiner as a neutral and independent body. In this sense, the regulation of business combinations is a field where the JFTC's technical fact-finding function is required most (in other words, JFTC can display the function most). Even if the prior procedures are greatly improved, they are closed procedures, unlike the tribunal hearing procedures and only have a bilateral structure without a person who neutrally proceeds with the procedures and independently make a judgment.[47] For example, if the addressee seems to persuasively prove the definition of a particular field of trade (from the objective viewpoint of third parties), unless the investigator changes his attitude of persistence in his opinion, the addressee's efforts at refutation will come to nothing because there is no neutral and independent judge. In addition, if it is difficult to judge whether the remedy plan presented newly by the addressee can eliminate the "substantial restraint of competition" (if it is possible both to judge that it can eliminate the restraint and to judge that it is insufficient to eliminate it), a doubt remains that the JFTC may make no disposition, judging that the remedy can eliminate the restraint, for

[47] If the prior procedures are improved, a problem may arise that the companies may have to perform the JFTC's procedures twice: explanation in the prior procedures and argument and proof in the ex-post tribunal hearing procedures.

the closed prior procedures make this possible.

With regard to the position that it can be expected that the prior procedures will become a place for explanation and refutation between the JFTC and the combining companies, there is a concern that the prior procedures may become a hotbed of opaque and closed negotiations between the parties, because the prior procedures are closed. This concern seems to apply especially to the regulation of business combinations. The regulation of business combinations often focuses on the effectiveness of remedies. Although I hope my concern will prove groundless, some kinds of *agreement* on a remedy that lacks effectiveness, fullness, and appropriateness may be concluded through negotiations between the parties.

In addition, the disclosure of the evidence and materials held by the JFTC is not legally required, and the addressee of the order is not given a position that enables the addressee to legally request the inspection of JFTC's materials. Although this situation is understandable when considering cartel and bid rigging cases in which a large number of parties participate, it is accordingly inevitable for the addressee's procedural guarantee to retrogress. Section 25 of the Rules on Administrative Investigations gives a certain consideration to securing the protection right before the cease-and-desist order — in particular, the problem of the disclosure of the JFTC's information to the addressee -, but this does not reach the level of hearing procedures. I cannot help but think that the 2005 amended Act's making of the hearing procedures *ex-post* and shifting emphasis from hearing procedures to investigation procedures is important not only as a procedural problem but also for *a raison d'être* of the JFTC. If a kind of "convenience" of the 2005 amended Act in business combination cases enables opaque negotiations during the prior procedures, with the result that tribnal hearing procedures are avoided, the situation will be no better than before. Because these problems are related to all the investigation and hearing procedures specified in the 2005 amended Act,

consideration of these problems will be unavoidable when examining what the regulation of business combinations should be with consideration for formal procedures.

Conclusion

As for the conclusions to be drawn from this article, although the JFTC seems to have begun consideration of the *first* and *second* issues, the JFTC should develop the considerations and arrange and publish the results. With regard to the *third* issue, in view of the importance of the regulation of business combinations, the Government should continue to take the necessary budget measures. The regulation of business combinations seems to be too great a load for the current number of staff. Being always aware of this load, the JFTC should make further efforts to ensure that the review method is more precise and improve the promptness and transparency of reviews. With regard to the *fourth* issue, the JFTC should not be content with the current regulation method and, if it suspects that a company is violating the Antimonopoly Act, the JFTC should not hesitate to take legal action, depending on the situation. In addition, the JFTC should prepare for legally contemplated discussions from now on, since the JFTC hardly has any experience in the formal procedures for business combinations.

The development and globalization of business combinations has raised the challenge of establishing new competition policies that keep up with the development of the industrialized economy and society and changes in corporate behavior. Because of this, now is the time to consider and discuss what constitutes the effective regulation of business combinations.

"Merger review should be effective, efficient, and timely".[48] I was urged to write this article due to my concern about the current situation of the regulation of business combinations in Japan. At the

[48] OECD, "Council Recommendation on Merger Review" (2005) section I A 1.

same time, this article has expectations for continuous improvement in the regulation of business combinations in the future.

〔Reference Material〕

Article 15 of the Antimonopoly Act（*excerption*）

（６）The Fair Trade Commission shall, where it intends to order necessary measures regarding the relevant merger pursuant to the provisions of paragraph 1 of article 17-2, notify the merging corporations pursuant to the provisions of paragraph 5 of Article 49 before the expiration of the thirty-day waiting period provided for in the main clause of the preceding paragraph, or of any shortened period pursuant to the provisions of the proviso thereof（in case that the Fair Trade Commission requested at least one corporation among the merging corporations to submit necessary reports, information, or materials（hereinafter in this paragraph "Reports, etc."）pursuant to the provisions of the Rules of the Fair Trade Commission during the relevant period, the period up to the date on which one hundred-twenty days from the date of acceptance of the notification stipulated in the preceding paragraph have passed, or the date on which ninety days from the date of acceptance of all the Reports, etc. have passed, whichever is later）; provided, however, that the this shall not apply to such cases falling under any of the following items:

（i）Matters considered important in light of the provisions of paragraph 1 are not carried out by the deadline stipulated in the plan regarding the merger notified pursuant to the provissions of paragraph 2（including the cases where it is applied mutatis mutandis pursuant to paragraph 3 after deemed replacement; the same shall apply in the following item）;（*emphasis added*）

（*The rest is omitted*）