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Japan revises merger notification guidance for digital economy

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Japan's competition watchdog has recommended that companies notify their tie-ups when the total value of the deal exceeds 40 billion yen (€339.3 million) and the merger is expected to affect Japanese consumers.

Even if a deal does not meet the current statutory thresholds, companies should provide relevant documents and engage in a merger review, Japan's Fair Trade Commission suggested on Friday. The watchdog said the revisions of its merger notification guidelines and policy were made due to the prevalence of deals in digital markets, among other reasons.

To determine whether a merger will affect Japanese consumers, the JFTC recommended that companies notify deals that meet any of three criteria: if the business or research and development headquarters is located in Japan; if the target company conducts sales activities directed at Japanese consumers; or if the company to be acquired has sales in Japan of more than 100 million yen (€848,880).

Kentaro Hirayama at Hirayama Law Offices in Tokyo said that this amendment "clearly indicates the JFTC's intention and ambition to take a look at mergers and acquisitions concerning platform businesses, which would also be in line with global trends". He said this approach to mergers mirrors recent amendments made by Korea's Fair Trade Commission.
Hirayama noted that any official change to the notification thresholds would require an amendment to the country's Antimonopoly Act, which would need to be approved by the Diet. Since these changes are just to the JFTC's policy for handling mergers, the watchdog cannot compel companies to notify their deals, he said.

Yusuke Takamiya at Mori Hamada & Matsumoto in Tokyo said that the changes to the guidance "includes various innovative aspects of merger review in accordance with the global tides". He highlighted the proposed "size of transaction test" and the request that parties consult with the JFTC when a deal has a local nexus.
"The number of the parties' voluntary consultations with the JFTC may increase significantly when the revision becomes effective," Takamiya said.

"Through this revision, the JFTC is expected to accumulate expertise for merger reviews in cutting-edge businesses, which include digital platform operators and pharmaceutical development companies."

Anderson Mori & Tomotsune partner Etsuko Hara and senior foreign counsel Vassili Moussis said the JFTC's changes "are a welcome clarification" of the stance that the enforcer "intends to take in certain proposed acquisitions that currently do not trigger the formal notifications thresholds".

While the JFTC has always had the authority to investigate a merger falling below the thresholds, it rarely used that power, they said.

The revision of the guidance "marks a significant development" for Japan and will likely lead to increased scrutiny of deals that previously would have escaped JFTC scrutiny, Hara and Moussis added.

"Aside from the proposed broad scope of intervention that the JFTC would have under the new guidelines, the JFTC also specifies that it may request internal documents, including materials prepared for board meetings, as well as internal analyses and e-mails that were used when deciding whether to proceed with the transaction," the Anderson Mori lawyers noted.

A window into the JFTC

The draft guidelines also set out how the JFTC will consider competitive effects concerning the digital economy. It touched on multi-sided markets, network effects, switching costs and big data, among other issues.

When platforms provide a "place" for their services in a "multi-sided market with multiple, different user segments", the watchdog said it will determine a market definition "for each user segment and then determine how the relevant business combination will affect competition in light of the characteristics of the multi-sided market".

The JFTC also said that platforms offering services to different user segments can cause strong indirect network effects. When they do, the agency said, there are cases where the particular market comprising the users of each segment "will be defined in an overlapping manner".

The watchdog said it will consider network effects and economies of scale when examining how mergers affect competition in different markets.

Further, the JFTC said that a horizontal merger might deserve scrutiny despite having a limited impact on competition under traditional Herfindahl-Hirschman Index metrics. Such cases include instances where the merging companies have "certain important assets for competition purposes such as data or intellectual property rights".

Network effects and data can also make it hard for users to switch or put competitive pressure on a company, the JFTC explained. When users of an internet-based service find it difficult to switch from one offering to another due to network effects or restraints on data transfer, "it is considered difficult for competitive pressure from users to work."

The JFTC has called for public comment on the draft guidance through 5 November. It did not disclose when it would publish a final version.