Merger Review in the 2020s: Do Digitalization and Globalization Change the Analysis?

By Toshiko Igarashi

(Japan Fair Trade Commission)[1]

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On November 7 and 8, 2018, ICN Merger Working Group held the fifteenth ICN Merger Workshop, in Tokyo, hosted by the Japan Fair Trade Commission. Over 200 participants, including agency officials and NGAs (Non-Governmental Advisors) from about 40 jurisdictions participated, and discussed the role and the challenges of merger review in the digitalized and globalized economy under the theme "Merger Review in the 2020s: Do Digitalization and Globalization Change the Analysis?"

2018 ICN Merger Workshop

The two-day workshop consisted of four plenary sessions and sixteen breakout sessions.[2] Plenary sessions addressed broader themes of how competition agencies are or should respond to changes in the digital and global economy, while breakout sessions addressed narrower topics within that theme.

The opening plenary session, Merger Review in the Digital Economy, presented an overview of the characteristics of mergers in the digital economy and the experiences of competition agencies. Panelists from the UK, Portugal, and Singapore discussed their experiences, following the introduction by the Canadian moderator. The UK panelist presented legal, analytical, and evidential challenges of reviewing merger in the digital economy. While the UK's "share of supply" jurisdictional test provided its competition agency with the ability of reviewing mergers such as *Facebook/Instagram*[3] and *Google/Waze,*[4] the agency also faced the analytical challenges such as measuring non-price effects and predicting future changes in the dynamic and fast-moving markets where the data and the network effects also play important roles. The Portuguese representative underscored that competition agencies should not be upset in addressing the challenges of digital mergers – the digital economy is not separate from the physical economy, and case-by-case and fact-based approaches are required. The Singaporean representative discussed the merger between two ride-hailing platforms,[5] characterizing it as "pay for exit," while noting the challenges presented by Singapore's voluntary notification regimes as well as difficult aspects of digital platform mergers, including market definition, price-cost analysis, and efficiencies.

The second plenary, Vertical Mergers, was inspired by the Merger Working Group's multi-year project on vertical mergers. Moderated by the UK, panelists from Canada, the EU, and Japan discussed theories of harm, evidence, economic analysis, assessment of efficiencies, and remedies. Foreclosure by the merging firms, both full foreclosure and partial foreclosure, and the risk of coordination through the sharing of sensitive information, are the main theories of harm pursued by these jurisdictions. One panelist noted that vertical mergers could enhance the barriers to entry, as the market would become less attractive for rivals to enter if the majority of the market is foreclosed, or the rivals would face higher risk of exposing their sensitive information to the merging party after the merger. Vertical mergers are expected to create efficiencies, however, these efficiencies are usually assumed and rarely examined by competition agencies, particularly in cases that are resolved during the initial phase merger review. The EU participant noted that efficiencies from elimination of double marginalization were considered in the Commission's review of the *Orange/Jazztel* merger.[6] Recognizing the potential for efficiencies, competition agencies often seek to protect these efficiencies by remedying competition concerns with behavioral remedies. One panelist did note that behavioral remedies may not solve the issue of incentives, and raised concerns about monitoring these remedies, so where practicable, structural measures are often preferred.

The panel also discussed conglomerate mergers, which can raise similar concerns about foreclosure. One panelist said that where there are competitive concerns about technical interoperability, behavioral measures can prove useful.

The next plenary, Challenges of Globalization for Merger Review addressed both procedural and analytical challenges, focusing on the issues of geographic market definition, communication with other reviewing agencies, and extraterritorial remedies. Panelists from the EU, Mexico, Russia and the US supported a fact-based, case-by-case approach of defining geographical markets based on the substitutability for consumers. Depending on the situation, local, national and global markets are possible. At the same time, panelists noted that broader markets (regional or global) are more frequent, in the wake of globalization, including market openness, digitalization, and a decrease of transportation costs. Multijurisdictional merger review, in particular with regional or global markets, also enhances the necessity of communications among competition authorities. The EU representative noted that they now cooperate with other competition authorities in more than half of their complex cases. Cooperation frameworks and communication channels are useful in initiating and establishing communication among competition authorities. Communications about remedies are essential, in particular, when extraterritorial remedies are considered. Panelists noted that while in some jurisdictions rules about the application of extraterritorial remedies are clear, it is difficult for others to enforce extraterritorial remedies when assets and activities of the parties at issue are outside of their territories.

Competition is based not only on price, but also on quality, investment in new products or processes, research and design, and various other competitive tools. For the final plenary topic, Innovation and Non-Price Effects in Merger Review, panelists from Australia, EU, South Africa and the US, together with the Japanese moderator explored how agencies consider non-price effects, including innovation, such as the appropriate role of quantifying competition in quality dimensions and how agencies can consider the effects of mergers on incentives to invest in new products and processes. The panel opened with a discussion about the effect of mergers on innovation. In the US, the 2010 Horizontal Merger Guidelines take into consideration of the effects on innovation and non-price effects and there are ample examples in the pharmaceutical industry considering merger effects on pipeline products that lead to the loss of potential competition. It is more difficult to analyze the effects of mergers on the decrease of incentives for innovation, and in *Dow/Du Pont*[7] and *Bayer/Monsant*[8] cases, whether merging parties are both innovators or close competitors and whether incentive to innovate would be lost after the merger was examined by the European Commission. This type of investigation may be based more on internal documents than economic analysis. Panelists agreed that non-price effects of mergers are as important as price effects, but competition agencies face the challenges of analyzing them as data and tools are often limited, compared to the price effects. Non-price effects are difficult to quantify, which tends to make competition agencies rely on qualitative analysis such as the merging party's own evaluation of competitive effects and the views of third parties.

Merger Working Group Projects and Work Product

At the workshop, the Merger Working Group's work product and its ongoing and future project was also discussed. The Merger Working Group is one of the oldest working groups of the ICN and it has created various work products that are useful for competition agencies as well as

NGAs, such as Recommended Practices on procedure and analysis of merger review, the Merger Investigative Techniques Handbook, the Framework for Merger Review Cooperation, the Practical Guidance on International Cooperation, a merger remedies guide, etc.

These work products are regularly updated. For example, the Recommended Practices on merger notification thresholds and international cooperation were recently revised, and a new chapter on efficiencies was developed. This year, the Merger Working Group will (1) continue the Vertical Merger Project, following the member survey in 2017-2018; (2) update the reliable evidence chapter of the Merger Investigative Techniques Handbook, including to reflect changes to electronic submission and review of data; (3) new enforcement cooperation tools, based on the review of the existing tools such as model waivers and practical guide, and a member survey on the use of the Framework for Merger Review Cooperation; 4) Regional teleseminar series on retail mergers, following the teleseminar series on innovation in 2017-2018.

The Japan Fair Trade Commission, UK Competition and Markets Authority, and US Federal Trade Commission are currently leading the Merger Working Group as the Co-Chairs. Members and NGAs should contact the Merger Working Group Co-Chairs if they would like to get involved. Contact information is available here.

The Merger Working Group will develop further the discussions on digitalization and globalization at the ICN's Annual Conference in Cartagena, Colombia, in May 2019.

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[1] Toshiko Igarashi is the Senior Officer for Merger and Acquisitions at the Japan Fair Trade Commission (JFTC) and serves as the lead of the JFTC's ICN Merger Working Group Co-Chair team. This report is my own summary and any views expressed in this report do not represent those of any institution. All errors are mine.

[2] The agenda, presentation materials and links to videos of plenary sessions of the merger workshop are available at: https://www.jftc.go.jp/en/int_relations/icnmergerworkshop2018.html

[3] Anticipated acquisition by Facebook Inc of Instagram Inc.: https://assets.publishing.service.gov.uk/media/555de2e5ed915d7ae200003b/facebook.pdf

[4] Completed acquisition by Motorola Mobility Holding (Google, Inc.) of Waze Mobile Limited https://assets.publishing.service.gov.uk/media/555de2cfed915d7ae2000027/motorola.pdf

[5] Acquisition of Uber's Southeast Asian business by Grab and Uber's acquisition of a 27.5 per cent stake in Grab (https://www.cccs.gov.sg/public-register-and-consultation/public-consultation-items/uber-grab-merger)

[6] M.7421 ORANGE / JAZZTEL (http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7421)

[7] M.7932 DOW / DUPONT (http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_7932)

[8] M.8084 BAYER / MONSANTO (http://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=2_M_8084)