

Summary of the Revised Criteria for Merger Review

□ **Change of market concentration index ($CR_k \rightarrow HHI$) and re-establishment of safe harbor**

- In the revised criteria for merger review, the Herfindahl-Hirschman Index (HHI) was introduced to replace previously used CR_k , for the HHI is capable of reflecting market competition dynamics more accurately, and safe harbor was re-established.
- Safe harbor requirements for horizontal mergers
 - Post-merger HHI is ① less than 1,200, ② 1,200 or more and less than 2,500 or ③ 2,500 or more and the increment is less than 150.
- Safe harbor requirements for vertical and conglomerate mergers
 - ① HHI in the given area of trade where the concerned company is involved is less than 2,500 and the concerned company's market share is less than 25% or ② the concerned company ranks fourth and below in the market.

□ **Criteria for determination of anti-competitiveness of horizontal mergers**

- **Inclusion of unilateral effect (anti-competitive potential triggered unilaterally by merging companies)**
 - In case there is a possibility of unilateral anti-competitive behavior, such as unilateral price increases, by merging companies, the concerned merger has the potential to substantially restrict competition, which is determined in consideration of the following factors;
 - combined market share of merging companies, post-merger increment in market share, market share gap with rival enterprisers
 - demand substitutability between products of merging companies, possibility of consumers' shift from merging firms' products to competing enterprisers' products
 - difference in production capacity between merging companies and their rivals,

ease of increasing sales

- existence of large-scale buyer

◦ **Supplemented criteria for determination of coordination effect (possibility of concerted acts)**

- To supplement the previous criteria that used to be centered on “possibility of agreement on concerted actions” among competing enterprisers, the criteria was divided into “ease of concerted act” and “possibility of monitoring implementation and sanctioning violators,” each of which demonstrates factors for consideration.
- Factors for determination of “ease of concerted act”
 - whether rival companies can easily share information on market situation, market trading and individual enterprisers
 - whether products in the relevant market are highly similar
 - whether pricing or marketing methods or their results can easily be exposed to rival enterprisers
 - whether there are past records of unfair concerted acts in the relevant market or in the similar market
 - whether the nature of competitors, buyers or transaction method allows rival enterprisers to easily reach an agreement
- Factors for determination of “possibility of monitoring implementation and sanctioning violators”
 - whether the result of transaction between the supplier and the consumer can easily and accurately shared among rival enterprisers
 - whether there are large-scale buyers who account for a big share of product

demand through long-term contracts

- whether enterprisers, including merging firms, with the potential to engage in concerted acts have substantial spare production capacity

- The possibility of concerted act can be increased in the case of merging a company that has served as deterrence against cartel formation among rival firms.

- **Supplemented criteria for determination of the level of foreign competition introduced in the domestic market**

- With regards to introduction of foreign competition, the revised merger review criteria focuses on “potential foreign competition pressure.”

- The revised merger review criteria clearly states that anti-competitive potential can be reduced in case an increase in imports is possible soon after domestic prices are significantly raised as a result of a merger,

- and adds “changes in the share of imported goods”, “price differences between the domestic market and the overseas market” and “changes in the amount of imports following changes in profitability in the domestic market” as factors to be considered.

- Inclusion of “possibility of diverting goods for export to the domestic market” as a new requirement

- Anti-competitive potential can be lowered in case exports account for a large share of competing firms’ business and it is highly likely that those companies will divert their goods for export to the domestic market.

- **Criteria for determination of anti-competitiveness of vertical mergers**

- **Revision of market concentration requirements**

- While including market share as a factor of consideration for determination of

foreclosure effect, the market concentration criteria ($CR1 \geq 50\%$, $CR3 \geq 70\%$) was removed.

- Not only the share of supply and purchase in the upstream market, but also the competition dynamics in the downstream market shall be taken into account under the revised merger review criteria.
- **Inclusion of criteria for determination of coordination effect (possibility of concerted acts)**
 - Competition can be substantially restricted if the possibility of concerted acts among rival enterprisers increases as a result of a vertical merger.
 - Factors for determination of coordination effect
 - whether collection of information on rival companies' pricing and business activities becomes easier after the merger
 - whether a merging party, which purchases raw materials, has had the power to deter cartel formation by raw materials providers
 - whether there are past records of unfair concerted acts
- **Others**
 - The "entry barrier raising effect," which used to be included in the existing merger review criteria under "other factors for consideration," is included as a factor for determination of foreclosure effect in the revised merger review criteria, for it is actually related to foreclosure effect.
 - The phrase "shall focus only on foreclosure effect" is erased from the existing criteria, and foreclosure effect is considered equally as the newly included "coordination effect" under the revised criteria.
- **Criteria for determination of anti-competitiveness of conglomerate mergers**
 - **Rationalization of the criteria for determination of potential anti-**

competitiveness

- Current criteria for merger review recognized potential anti-competitiveness only when four requirements were met, but it was changed so as to “consider” those four elements when judging potential anti-competitiveness.
- Current merger review criteria only considered the case where the acquiring company enters the relevant market of the acquired firm, but the revised criteria also considers the acquired firm’s entrance into the relevant market of the acquiring company as the terms “acquiring company” and “acquired company” were changed to “one and the other of the merging companies.”
- Among the four requirements, requirements of “large-scale company” and “substantial difference” were removed, instead of which the followings were added.
 - whether special conditions are required on the merging company when it tries to enter a certain area of trade where the other party of the merger belongs
 - whether there are strong potential entrants other than the merging company
- While including the market share requirements in the factors for consideration, current market concentration criteria ($CR1 \geq 50\%$, $CR3 \geq 70\%$) was excluded from the merger review criteria.

◦ Others

- The phrase “shall focus on the presence of potential anti-competitiveness” was erased, and the “entry barrier raising effect” and the “competitor exclusion effect,” which used to be stipulated as “other factors for consideration,” are now recognized as equally important factors for consideration.

□ Recognition of exceptions

- **Supplemented requirements for exception from the efficiency gain effect**

- As a supplement to the “explicitness” requirement, the revised merger review criteria additionally states that “efficiency gain effect must not be just a mere prediction or wish but a certainty that is provable.”
- Efficiency gain that would have been achieved without the concerned merger is not included.

◦ **Supplemented requirements for a failing company**

- As the so-called “three acts on bankruptcy” were integrated into the “Act on credit recovery and bankruptcy (enforced since April 2006),” related part was changed to “whether the company has applied for initiation of credit recovery or bankruptcy procedures.”
- The revised merger review criteria allow exceptions not only to failing “companies” but also to failing “business units.”

□ **Other revisions**

◦ **Addition of mergers subject to simplified review**

- ① participation in establishment of a PEF (private equity fund), ② merger of special purpose company (SPC) and ③ investment in temporary SPCs that is clearly made simply for the sake of investment

◦ **Changes to market share calculation criteria**

- A provisory clause was added to allow market share calculation period to be over one year or less than one year, and the market share calculation equation was changed to include “sales in a certain area of trade” instead of “sales in the domestic market.”

◦ **Supplemented criteria for determination of existence of governing relationship**

- When share ownership ratio is less than 50%, various elements, including stock

diversification ratio, relationship between shareholders, transaction relationship, concurrent holding of an executive position and affiliation relationship, are comprehensively considered to determine the actual governing relationship.

- When multiple enterprisers jointly acquire shares of another company, each enterpriser's share ownership ratio and purpose of share acquisition and the contract relationship among the concerned enterprisers are additionally taken into account.
 - As for concurrent holding of an executive position, the criteria for determination of governing relationship regarding share ownership can be applied, according to the revised merger review criteria.
- **Improvements to the definition of relevant market and the criteria for classification**
- Previously, "relevant market" had been defined as the area where there is the possibility of conversion of "key buyers" of a product and a region, but it was changed to the area where there is the possibility of conversion of "most of the buyers."
 - "Transaction stage" and "transaction partner," which used to be part of the criteria for classification of independent relevant markets, are now stipulated as factors to be considered when defining the subject of transaction (products market).
- **Elimination of the criteria for determination of mergers achieved through unfair means**
- As Article 7 (3) ("No person shall incorporate another company by a coercive or any other unfair method") was removed when the Monopoly Regulation and Fair Trade Act (Law No. 8631) was partially amended, the criteria for determination of mergers achieved through unfair means were also erased from the merger review criteria.