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Chapter 3 - I

Use of "Overall Business Capabilities" in Merger Control

: Understanding the Behemoth Ecosystem

Megumi Tahira*

1 Advance of the Behemoths

The growth of digital platform (DPF) operators into giants has been driven by repeated business combinations of large and small companies (i.e. acts covered by Chapter 4 of the Antimonopoly Act, such as share acquisitions, concurrent directorships, shareholdings, mergers, company breakups, joint stock transfers, and business acquisitions). Of course, there is no competition law problem with acquisitions per se, or in the fact that DPF operators are repeatedly making such acquisitions. However, due to the absence of physical constraints in the digital world, business combinations by DPF operators can have a broad and significant anticompetitive effect on the competitive space. In such cases, competitors of the companies planning a business combination may be eliminated, or consumers of goods and services of the companies concerned may have to deal with pricing, quality, and other conditions that are less favorable than before the business combination, or may be unable to do business with the companies concerned at all.

Business combinations are actions taken by private entities, and intervention by the state should be kept to a minimum. If state intervention is necessary, it requires solid justification. But in reality, the mechanism by which the growth of DPFs has a competition-enhancing or competition-restricting effect on the competitive space is not clear.

In reviewing a business combination, it is crucial to identify scenarios (theories of harm) where the expansion of the DPFs might create a restrictive effect on competition. However, at present, regulatory frameworks have not yet been established across countries or regions. Under such circumstances, it is possible and useful to consider different systems for each country or region. It also seems that there is a need to systematically reconfigure the regulatory framework for business combinations in light of the characteristics of digital.

This chapter examines whether the impact of a DPF business combination on competition can be evaluated by utilizing the concept of overall business capabilities. Overall business capabilities refer to the capabilities,

* **Megumi TAHIRA**: Professor of Competition Law, Faculty of Law, Tokyo Metropolitan University.

such as raw material procurement capabilities and technological capabilities, of the companies involved after the business combination. The reviews should determine the likelihood of an anticompetitive effect, and specify the nature and scenario of such effect. This article considers whether business combination reviews could be refined by examining the improvement of DPFs' overall business capabilities in such a scenario.

The article begins with an overview of the current status and issues of business combination regulations in Japan (2). Next, we summarize how overall business capabilities are treated in the Business Combination Guidelines[1] and the cases to date in which overall business capabilities have been taken into consideration (3). On the basis of this analysis, we consider the possibility of using overall business capability in business combination regulations (4), and finish with a conclusion (5).

2 Regulations on Business Combinations under the Antimonopoly Act

(1) Outline of Business Combination Regulations

Chapter 4 of the Antimonopoly Act provides that business combinations that substantially restrict competition in a certain field of trade (share acquisition [Article 10 of the Antimonopoly Act; hereinafter this chapter refers to the same Act unless otherwise specified], concurrent directorships [Article 13], shareholdings [Article 14], mergers [Article 15], company breakups [Article 15-2], joint stock transfers [Article 15-3], business acquisitions, etc. [Article 16]) are prohibited. Business combinations that could affect the Japanese market are subject to business combination examination by the Fair Trade Commission (JFTC) if the sales revenue and voting rights ownership criteria of the companies involved are met.

The key criteria are "certain fields of trade" and "substantial restraint of competition." The JFTC defines the scope affected by the business combination (market definition), and then it assesses whether the business combination will result in a substantial restraint of competition in each of the defined trade areas.

"Certain fields of trade" are areas where competition takes place and are also referred to as markets. In relation to a business combination, the scope of goods and services and the geographical scope in which the business combination can have a competition-restricting effect are defined. The JFTC determines whether or not competition will be restricted basically from the perspective of substitutability for consumers and, if necessary, from the perspective of substitutability for suppliers (Business Combination Guidelines No. 2-1).

"Substantial restraint of competition" refers to "establishing, maintaining, or strengthening the state in which a certain entrepreneur or group of entrepreneurs can control the market at will by being, to some extent, free to influence price, quality, quantity, and various other terms and conditions after competition has decreased."[2] The scenario for the occurrence of anticompetitive effects under business combination regula-

1 Japan Fair Trade Commission, "Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination" May 31, 2004, last revised December 17, 2019.

2 Toho Subaru Antitrust Case, Tokyo High Court Decision, December 7, 1953, Vol. 5, p. 118.

tions differs depending on the type of business combination. There are three types of business combinations: horizontal business combination (between competing businesses), vertical business combination (between businesses that have a trading relationship), and conglomerate business combination (neither horizontal or vertical). The question is whether the business combination will have a more profound competition-restricting effect on competing businesses and consumers than before the business combination. The JFTC examines whether there is a substantial restraint of competition by unilateral action or by concerted action, from the perspective of both the competition-promoting aspect and the competition-restricting aspect of the business combination. In doing so, it takes into consideration factors such as the status of the companies concerned and the situation of competitors, imports, and entry into the market.

Chapter 4 of the Antimonopoly Act prohibits business combinations that would substantially restrain competition in certain fields of trade, and business combinations are regulated in advance in principle. The JFTC predicts the post-business combination situation before the combination takes place. If competition concerns arise, the companies involved often propose the implementation of measures to eliminate the concerns. If the proposed remedies are sufficient to resolve the concerns and can be implemented with certainty, the business combination can proceed without substantially restricting competition in relevant markets.

(2) Characteristics of Business Combination by DPFs

The aforementioned regulatory framework is the same in business combination cases where the parties include DPFs. However, due to the unique nature of digital markets, in which there are almost no physical restrictions, there are some issues that must be taken into account when evaluating a business combination by DPFs. First, the anticompetitive effects that can result from a business combination may be widespread across markets due to the lack of physical constraints. DPFs play a role in connecting many users with various product and service providers. Two markets can be defined, one for each party (two-sided market). Considering an increase in the number of users in one market will have the indirect network effect of increasing not only the number of users in that market but also the number of users in the other market, the scope of the anticompetitive effect is not limited to a single market. This issue directly relates to the issue of market definition, but also relates to the substantive restraint of competition.

Second, the scenarios in which anticompetitive effects occur can be complex, and these scenarios have not yet been established. In traditional business combination reviews after market definition, business combinations are categorized according to the type of combination (horizontal, vertical, or conglomerate) and the anticompetitive effects are evaluated from unilateral and coordinated perspectives. However, in data-driven and digital markets, the distinction between horizontal, vertical, and conglomerate types may not be significant.[3] Although the potential impact on various markets is recognized, the specific scenarios in which anticompetitive effects occur have not been fully clarified. This issue directly relates to substantial restraint of competition, but it also relates to market definition.

3 Fumio Sensui, "Antimonopoly Act" (Yuhikaku, 2023), p. 128.

Third, the rapid changes in digital markets make it difficult to promptly and accurately grasp the actual situation. Business combination regulations are primarily preemptive, requiring regulators to predict the impact of a business combination before it occurs. For example, when a DPF business “buys out” a potentially highly competitive company, it might not meet the notification standards for business combination review. Furthermore, the markets affected by business combinations involving DPFs are often subject to rapid changes, making it difficult to accurately assess the possible anticompetitive effects during a business combination review. This issue also directly relates to substantial restraint of competition as well as market definition.

(3) Current Approach

(i) Innovating the Market Definition

The 2019 amendment to the Business Combination Guidelines introduced the possibility of defining markets based on the characteristics of digital services. Firstly, it addressed multi-sided markets typical of digital services, allowing for layered market definitions that encompass multiple sides of the market (Section 2-1). In cases where a certain trading field is defined for each consumer segment, where a platform mediates transactions between different consumer segments, and where indirect network effects are at work, the amendment indicated that a single certain trading field that encompasses each consumer segment may be defined in a multi-layered manner.

Secondly, it acknowledged competition based on quality rather than price, considering the substitutability of products from the perspective of consumers (Section 2-2). When the quality of a certain product in a certain region deteriorates, or when the cost borne by consumers to receive a certain product in a certain region increases, the extent to which consumers will switch their purchases to other products or regions are taken into consideration.

Thirdly, the amendment outlined factors to consider when determining the product scope and geographical scope of digital services (Section 2-2(1)). For product scope, it clearly states that consideration should be given to the content-related characteristics of the available services (such as the types and functions of the services available), the quality (such as sound and image quality, communication speed, and security level), and the convenience (such as the available languages and compatible devices). With regard to the geographical scope, it indicates that consideration should be given to the areas in which consumers can receive services from the supplier under the same conditions, content, and quality, as well as the extent to which the services are widespread.

(ii) Innovating the Procedure

At the same time as the amendment of the Business Combination Guidelines in 2019, the corresponding policy[4] regarding the procedures for review of business combinations was also revised, expanding the scope of cases subject to review (Section 6). The revision addressed the characteristics of digital markets in

4 Japan Fair Trade Commission, “Policy Concerning Procedures of Review of Business Combinations” May 31, 2004, last revised December 17, 2019.

several key ways. First, business combination plans involving a large total acquisition value are now subject to review. For a business combination plan where only the amount related to the domestic sales, etc. of the acquired company does not meet the notification criteria (hereinafter "business combination plan that does not require notification"), if the total value of the acquisition is large and is expected to affect domestic consumers, that would now be included in the scope of business combination review.

Second, the revision presented guidelines for business combination plans for which consultation with the JFTC is recommended. If the total value of the acquisition is expected to exceed 40 billion Japanese yen and the business combination plan that does not require notification is expected to have an impact on Japanese consumers, it is recommended to consult with the JFTC.

The aforementioned efforts are intended to ensure that business combinations affecting the Japanese market are included in the review process and are recognized early by the JFTC, allowing for appropriate assessment and decision-making. In fact, M3's acquisition of shares in Nihon Ultmarc (FY2019 Case No. 8) and the merger of Google LLC and Fitbit (FY2020 Case No. 6) were both subject to review despite not meeting the sales notification criteria. In these cases, the companies concerned included DPF operators and the review was based on the assumption of possible indirect network effects as a characteristic of digital markets. Both cases concluded that the combination would not result in a substantial restraint of competition in the market, provided that certain problem-solving measures were implemented. Thus, various measures have been implemented to enable review of business combinations based on characteristics of digital markets.

(4) Marginal Cases

Although various efforts have been made in both the substantive and procedural aspects, some cases that could be considered marginal or outlier cases have emerged. The most notable examples are the business integration of (i) Z Holdings and LINE (FY2020 Case No. 10), and the integration of (ii) Microsoft Corporation and Activision Blizzard, Inc. (FY2022 Case No. 7).

(i) Z Holdings / LINE Case

In this case, the review was conducted based on digital characteristics in accordance with the decision-making framework newly presented by the revision of the Business Combination Guidelines in 2019, such as multi-sided markets, indirect network effects, and multihoming situations (see 3(2)(iii) below). A key aspect of this review was the examination of the code payment market (payment method using QR and barcodes). The impact of the integration of PayPay and LINE Pay on the code payment market was examined in detail. In examining whether there was a substantial restraint of competition, the JFTC considered digital characteristics such as the immaturity of the code payment market and the competitive advantage that the parties would gain from the accumulation of data.

The JFTC concluded that while the merger might not immediately restrain competition substantially, it cannot dispel the concern that the parties may be able to freely influence prices and other conditions to some extent depending on future market conditions and their actions after the integration, such as the handling of exclusive terms of transaction and the use of data. The companies proposed regular reports on trends in the code settlement market and the elimination of exclusive transaction conditions as measures to address these issues.

If the content of the problem-solving measures by the companies concerned is sufficient to dispel the concerns of the JFTC, both sides can be satisfied that there is no problem. However, this case can also be seen as an example in which measures to resolve a problem were taken without clarifying the specific scenario in which the anticompetitive effect would occur.

(ii) Microsoft/Activision Case

On October 15, 2023, Microsoft completed its acquisition of Activision Blizzard (hereinafter "Activision"), a leading US game developer. This was the largest acquisition ever made by Microsoft (approximately JPY10.3 trillion). Activision had popular titles such as Call of Duty. With the acquisition, Microsoft was expected to become a giant game maker alongside Sony and Tencent. Microsoft had announced the acquisition in January 2022. Competition authorities in various countries and regions were reviewing the acquisition after concerns were voiced that it would lead to the monopolization of popular titles.

In Japan, the JFTC concluded on March 28, 2023, that there were no antitrust issues, and the review was promptly completed.[5] The main issue in the business combination review was whether the acquisition of Activision, a major video game software company, by Microsoft, a major video game console manufacturer, would result in Activision's game software not being supplied to competing platforms. The review by the Japan Fair Trade Commission concluded that because there were many other popular software titles besides the games offered by Activision, the business combination would have minimal impact on the Japanese market.

One of the characteristics of the review by the JFTC was that the Japanese market was defined and the market position of Activision's Call of Duty differed from that of the global market. Traditionally, it has been recognized that a narrower definition of the market leads to more precise conclusions. However, in this case, although the game was very popular in the global market, it was not as popular in the Japanese market as it was in the US and Europe, and it was easier to reach a conclusion that there was no problem if the Japanese market was narrowly defined. Although the public statement emphasized "careful" review, it can also be read that narrowly defining the market is not always necessarily desirable.

The differences between the Japanese market and the global market are clear from the details of this case. In the EU, the European Commission[6] approved the acquisition on May 15, 2023.

In the U.S., the Federal Trade Commission[7] (FTC) opposed major IT companies' approach to expansion through repeated acquisitions, and sought an injunction from the court to prevent Microsoft's acquisition of Activision. In July 2023, the FTC's petition was denied. On July 19, 2023, the FTC published a draft of business combination guidelines focused on major IT companies.[8] The guidelines emphasized stricter

5 Regarding the results of the review on the integration of Microsoft Corporation and Activision Blizzard Inc. (March 28, 2023). As a referenced opinion, Kenta Suzuki et al., "Review Result Regarding Integration of Microsoft Corporation and Activision Blizzard, Inc. (Business Combination Case Commentary)," Fair Trade No. 872 (2023), p. 56.

6 Case M.10646 – MICROSOFT / ACTIVISION BLIZZARD

7 In the Matter of Microsoft/Activision Blizzard

8 For information organized and examined in relation to business combinations by DPF operators, see Shuya Hayashi, "2023 Proposed Revision of the US Merger Guidelines and Digital Platform Regulation" in Emiko Chiba (ed.) "The Progress of Digital Society and the

regulation of vertical business combinations such as the acquisition in question, which could be seen as a strengthening of the regulatory approach to DPFs, though this case also exposed the limits to enforcement by competition authorities.

In the UK, on April 23, 2023, the Competition and Markets Authority (CMA) ruled to not approve the acquisition, citing fears of a growing monopoly in the UK cloud gaming market. In response, Microsoft announced in August 2023 that it would sell the rights to distribute Activision's popular online games for 15 years to Ubisoft, a major gaming company based in France. The CMA approved the acquisition after it conducted a reevaluation of Microsoft's proposed problem-solving measures and concluded that the cloud game distribution rights for popular titles would be removed from Microsoft's control and that this would maintain competition in the UK cloud game market.[9]

These cases illustrate the challenges faced by competition authorities in different countries and regions. Competition laws need to be examined for their impact on market competition in the relevant jurisdiction, and a unified conclusion is not always necessary since the market conditions vary in each location. However, it should be noted that evaluating the local market, and segmenting the market within the scheme of the competition law of the jurisdiction in question, may create the possibility and risk of failing to capture the reality of the growing DPFs.

(5) Issues

Currently, there is a shared understanding of the need for regulation and review based on the characteristics of digital markets. Various efforts have been made in terms of both substance and procedure. In fact, there have been some positive effects, such as the fact that some large cases have become subject to review as a result of the revision of the Business Combination Guidelines and related handling policies. However, these measures are still not fully adequate.

The main issue is that there are no means to determine whether a business combination will create a strong enough ecosystem connecting many users with many providers of products and services to substantially limit competition. Under existing business combination regulations, in cases where the companies involved include those engaged in a variety of businesses, it has been considered prudent to examine the business combination as a horizontal combination, as this has the most direct impact on competition. Similarly, they might break down markets into smaller segments before assessing the business combination as a whole, to ensure there are no issues within each segment. However, in the case of a business combination by a DPF business operator, such an approach would lead to a misjudgment of the essence of the business combination. In this regard, it is necessary to clarify the relationship between market definition and the requirement of a substantial restraint of competition. In market definition, there is a limit to the methods available to define the place of transaction for each consumer. In the substantial restraint of competition, the limitation lies in having to determine whether or not there is an anticompetitive effect in the absence of a clear scenario for the

Design of Law" (2023), p. 680.

9 CMA, Microsoft / Activision Blizzard merger inquiry

occurrence of such an effect in light of digital characteristics.

Furthermore, there has not been sufficient discussion on whether ex post facto intervention is possible when a substantial restraint of competition in a certain field of trade is recognized after a business combination has been executed. Business combination reviews are treated as informal cases, raising questions of whether ex post facto intervention is possible in the first place. It is not realistic to overturn a conclusion of business combination once executed based on business combination regulations. There is potential to regulate the business combination under private monopoly law (first sentence of Article 3, Antimonopoly Act), which requires "substantial restraint of competition in a certain field of trade," similar to the business combination regulations. However, it has been pointed out that, at present, business combinations themselves do not meet the criteria for private monopolization (which involves practices like dominance or exclusion), making this approach less practical.[10]

3 Overall Business Capabilities

(1) What are Overall Business Capabilities?

(i) Definition

According to the Business Combination Guidelines, overall business capabilities refer to the business capabilities of the companies concerned after the business combination, such as raw material procurement capabilities, technological capabilities, sales capabilities, credit capabilities, branding capabilities, and advertising capabilities. If a business combination is expected to significantly enhance the business capabilities of the companies concerned and make it difficult for competitors to be competitive, this is considered as one of competitive pressures (No. 4-2 (6)).

According to the JFTC, up until 2015 there had been business combination cases in which overall business capability were considered (see below for details). The concept of overall business capability has sometimes been described as a "generation-old"[11] concept and is unique to Japan, with no similar concept in other countries.

(ii) Treatment within Business Combination Guidelines

The earlier version of the Business Combination Guidelines recommended that overall business capabilities of the parties be taken into account in conglomerate business combinations. The Guidelines stated that "even when a conglomerate business combination increases the overall business capabilities of the parties involved, problems such as closed or exclusionary markets may arise. For example, the business capabilities of the parties involved after the combination, such as raw material procurement capabilities, technological capabilities, sales capabilities, creditworthiness, branding power, and advertising capabilities, may increase

10 Sensui, supra note (3), p. 82, points out the possibility that a business combination itself may constitute an exclusionary private monopoly by superimposing other anticompetitive acts or artificial acts, rather than a business combination itself.

11 Tadashi Shiraishi, "FY2015 Review of Business Combination Cases (Special Feature: Recent Trends in Business Combination Regulations)," Fair Trade 792 (2016), p. 13.

to significantly boost their competitiveness, making it difficult for competitors to take competitive actions, potentially leading to market closure or exclusivity issues."

Currently, overall business capabilities are dealt with in the Business Combination Guidelines. When determining whether there is a substantial restraint on competition, overall business capabilities are listed as one of the competitive pressures, along with imports and new market entry. It is stated that "if the overall business capabilities of the parties' groups, such as raw material procurement capabilities, technical capabilities, sales capabilities, creditworthiness, branding power, advertising capabilities, etc., increase after the business combination, and the competitiveness of the company after the business combination increases significantly, making it difficult for competitors to take competitive actions, this point will also be taken into consideration when determining the impact on competition" (No. 4-2(6)).

(2) Case Studies

The JFTC's website lists the following eight cases as examples where comprehensive business capabilities were considered in its published cases[12]: (a) Acquisition of Daihatsu Motor by Toyota Motor (FY1998 Case No. 1), (b) Merger of Nippon Oil Corporation and Mitsubishi Oil Corporation (FY1998 Case No. 7), (c) Acquisition of Nissan Motor by Renault (FY1999 Case No. 9), (d) Integration of Exxon Corporation and Mobil Corporation (FY1999 Case No. 10), (e) Integration of X business by Company A and Company B (FY1999 Case No. 14), (f) NTT Communications' acquisition of shares in Nihon Satellite Systems (FY2000 Case No. 6), (g) Yahoo's acquisition of shares in Ikyu (FY2015 Case No. 8), (h) FamilyMart and UNY Group Holdings' management integration (FY2015 Case No. 9).

These cases can be categorized as follows: (i) Cases where the increased overall business capabilities of the companies involved were the subject of consideration in a horizontal business combination; (ii) Cases where the overall business capabilities of a competitor were the subject of consideration as competitive pressure in a horizontal business combination; (iii) Cases where the increased overall business capabilities of the companies involved were the subject of consideration in a conglomerate business combination; and (iv) Cases where the increased overall business capabilities of the companies concerned were considered in other frameworks. In addition, although the JFTC might not use the term "overall business capabilities" per se, there are some cases in recent years in which the overall business capabilities of the companies concerned or the competing business operators are considered in substance, and these cases are summarized below.

(i) Cases where the overall business capabilities of the parties were taken into consideration in a horizontal business combination

In horizontal mergers, there are four early cases where the overall business capabilities of the parties involved were considered. These cases all involved companies with high overall business capabilities. They examined whether a horizontal business combination between competing businesses would further enhance the overall business capabilities of the companies involved. In the context of this article, it is noteworthy that

12 Japan Fair Trade Commission website, "Examples of Comprehensive Business Capability Considered in Published Cases" https://www.jftc.go.jp/dk/kiketsu/toukeishiryo/sougou/index.html (last viewed January 31, 2024).

the focus is on the improvement of overall business capabilities within the market under consideration, rather than across markets.

The first time the JFTC used the term "overall business capabilities" to express concern about the occurrence of competition restricting effects was in the case of (a) Toyota Motor /Daihatsu Motor. There were concerns about the overall business capabilities of the companies concerned would increase in (a) the mini motorcar sales market and (b) the subcompact and mini passenger car sales market, respectively. However, the court concluded that there was no issue due to the existence of several leading competitors.

In the (c) Renault/Nissan Motor case, there were concerns about the improvement of the overall business capabilities of the companies involved in the passenger car sales market. However, the court concluded that there was no issue because the increase in market share resulting from the business combination was minimal and there was active competition in the passenger car sales market despite sluggish demand.

In the (d) Exxon/Mobil case, the companies concerned were major players with global operations were considered to have high overall business capabilities in the market for selling crude oil to domestic refineries and wholesalers, including crude oil extraction and production. However, since the existence of competition was recognized, it was judged that there was no problem.

In the (e) Company A/Company B case, it was pointed out that one of the parties was a manufacturer with high overall business capabilities. The companies concerned gave up integrating their businesses due to the review pointing out cost commonality and market oligopoly, as well as other competitive restraints such as a lack of import pressure and competitive pressure from users.

(ii) Cases where the overall business capabilities of the parties were examined in a conglomerate business combination

Cases considering the enhancement of the overall business capabilities of the companies involved in a conglomerate business combination began occurring after FY2000. Bundling (classified as "combined supply" under the Business Combination Guidelines at that time), in which a company leverages a dominant competitive position in one market to acquire a dominant position in another market, became an issue. This issue was addressed in the following two cases, with one involving measures to mitigate the risk of substantial competitive restraints.

In the (f) NTT Communications (NTT-C)/Japan Satellite Systems (JSAT) case, NTT-C, holding a dominant position in leased line services using terrestrial networks, planned to acquire shares in JSAT, which would hold two-thirds of the total satellites in the satellite communications field. This would make it easier to develop systems that combine NTT-C's terrestrial network and JSAT's satellite network, and there were concerns that this would enhance JSAT's overall business capabilities. As for other effects on competition, it was evaluated that after the share acquisition, the competitive unit for domestic dedicated services by satellite would be JSAT and two competing operators, and that competitive pressure from adjacent markets would increase to a certain degree.

The JFTC noted that the share acquisition might substantially restrict competition in the field of domestic dedicated services by satellite, since JSAT's overall business capabilities would be higher as a result of the share acquisition. It was determined that the acquisition would not constitute a substantial restraint of competition, subject to the implementation of four measures. The first was that transactions between NTT-C and JSAT should be conducted under fair and appropriate conditions, comparable to those of other satellite communications carriers; second, that no joint procurement of materials shall be made so that JSAT will not be able to leverage NTT-C's purchasing power; third, that no support shall be provided by NTT-C to JSAT to enable JSAT to improperly use NTT-C's sales force in conducting its sales activities; fourth, that no joint advertising between NTT-C and JSAT shall be conducted.

In the (h) FamilyMart/UNY case, FamilyMart was competitive in the convenience store business and UNY was competitive in the general retail business. Therefore, there were concerns that the companies concerned might leverage their competitive strength in one business to enhance its competitiveness, causing competitors in the other business to lose sales opportunities and creating market closure and exclusivity issues in the other business. In the JFTC examination, it was pointed out that, although competition in both the convenience store business and the general retail business is considered to be conducted on a store-by-store basis, it is highly likely that the improvement of the overall business capabilities of the companies through the integration will not be achieved on a store-by-store basis, but will be realized in a unified manner throughout Japan. Upon review, the JFTC dismissed these concerns on the basis that there were several leading competitors in both businesses.

(iii) Cases where the overall business capability of competing businesses were taken into consideration in a horizontal business combination

In the (b) Nippon Oil/Mitsubishi Oil case, in examining competitive pressure, it was noted that the leading competitors included Japanese subsidiaries of major global companies, which had high overall business capabilities including the ability to procure petroleum products. As competitive pressure was at work in addition to the existence of import pressure, it was determined that there was no problem.

(iv) Cases where the overall business capability of the parties were taken into consideration in other frameworks

A case where the enhancement of the overall business capabilities of the companies involved was considered in a framework different from the usual type of business combination is the case of (g) Yahoo Japan/Ikyu. In this case, there was concern that the acquisition of shares would enable Yahoo to utilize consumer purchase behavior data acquired through its internet advertising business to enhance Ikyu's capabilities in the online travel and restaurant reservation services. However, it was pointed out that although Yahoo was in a position to use such information in conducting its online travel reservation service and online restaurant reservation service businesses, there were several competitors in each of these markets that had a higher market share. Furthermore, other competitors could also obtain information on consumers' purchasing behavior through various methods, leading to the conclusion that there were no significant concerns.

This case is notable as the share acquisition was examined separately as "other considerations" after being examined as both horizontal and vertical types of business combinations respectively. It appears that the JFTC's decision reflects its awareness of the need to consider issues beyond the framework of types of business combinations. It was also a pioneering case in which the occurrence of anticompetitive effects due to the accumulation and usage of data was examined in a business combination of a platform business operator.

(v) Recent Cases

Although the term “comprehensive business capabilities” is not used, there are four cases in which comprehensive business capabilities are considered in practice: (a) Sompo Japan Nipponkoa Holdings’ acquisition of Message Shares (FY2015 Case No. 11), (b) Sumitomo Mitsui Financial Group and Sumitomo Mitsui Card’s acquisition of CCCMK Holdings shares (FY2022 Case No. 9), as well as the aforementioned (c) Z Holdings/LINE case and (d) Microsoft/Activision case.

In the (a) Sompo Japan Nipponkoa/Message case, Message provided services nationwide, while Sompo Japan Nipponkoa's operational area was limited, with a small market share. It was considered unlikely that the acquisition of the shares would significantly improve the technical capabilities, credibility, or branding power of the companies and increase their overall business capabilities in the home-visit care business and in-home care support business.

In the (b) Sumitomo Mitsui Financial/Sumitomo Mitsui Card/CCCMK case, there were concerns of market closure and exclusivity in either or both of the trading areas of the consumer shared reward point business and the credit card business, potentially arising from integrating shared points and credit card-linked points. If the integration of points was realized in terms of both the granting and use of shared points and credit card-linked points, there was concern that the customer bases of both parties would be integrated, strengthening their business capabilities.

In this case, the focus was on entry pressure. The existence of indirect network effects in the shared points business was assumed in the consideration. As a code payment operator with overall business capabilities was planning to enter the shared points business, entry pressure was recognized and it was determined that there was no problem. A notable feature of this case is the consideration of market characteristics driven by indirect network effects.

In the (c) Z Holdings/LINE case, the possibility of anticompetitive effects due to the accumulation of data was considered. The digital advertising business and specific digital advertising intermediary business conducted by the parties made use of data such as consumer search history and information on purchasing behavior obtained through other business activities such as the search business and e-commerce business of the parties. In this regard, the JFTC examined the likelihood that after the business combination, the parties would be able to improve their business capabilities by using information (such as gender and phone number) related to the common IDs of the platform services provided by each of the parties and data obtained through other business activities in the digital advertising business and the specified digital advertising intermediary business.

The accumulation of data was examined in accordance with the following indicators presented by the Business Combination Guidelines: (i) type of data; (ii) amount and scope of data; (iii) frequency of data collection; and (iv) relevance of data. Regarding (ii) in particular, since there is a large number of Yahoo! JAPAN and LINE users in Japan, there was potential to significantly enhance business capabilities by accumulating information related to these common IDs.

However, there were multiple leading businesses in addition to the parties concerned in the digital advertising business and the specific digital advertising intermediary business. It was considered that the parties had not yet reached the point where they could use the data of other businesses they possessed to its advantage to the extent that such use would have a significant impact on competition in the digital advertising business and the specific digital advertising intermediary business.

In the (d) Microsoft/Activision case, the potential for sharing confidential information between the competing businesses was examined. There were concerns that Microsoft may use information disclosed by game developers and publishers to consider the development of products that compete with the new business of a competitor in the game development/publishing business, thereby putting the competitor in a competitively disadvantageous position.

However, the JFTC found that the information concerned included no unique data, and also recognized the existence of competitive pressure from adjacent markets. It concluded that the business capabilities of the parties would not improve to the extent that competitive pressure would become ineffective. No market closure or exclusivity would arise from sharing confidential information and thus there was no problem.

4 Usability of Overall Business Capabilities

(1) Overall Business Capabilities in Individual Cases

Cases of business combinations in which the overall business capabilities of the companies involved were considered have been observed since 1998. In cases where the enhancement of the parties' overall business capabilities was considered, there were examples of both horizontal and conglomerate business combinations. In the latter, there were cases such as the NTT-C/JSAT case, in which issues under the Competition Law were found, leading to imposition of measures to resolve the problem. However, in essence, these cases involved issues related to bundling supplies.

The following points are features of horizontal business combination cases. First, even when comprehensive business capabilities are considered, the target market for such consideration remains limited. From the earliest cases to the most recent, while the enhancement of the overall business capabilities of the parties has been considered, it appears that such consideration has been limited to the context of the market in question. Even in recent cases of business combinations involving DPFs, there is no reference to the enhancement of overall business capabilities across multiple markets.

Significant progress has been made in discussions on market definition in business combination regulations, and economic analysis is now actively incorporated in business combination reviews, making it possible to examine markets in a more detailed manner. With regard to market segmentation and examination of substantial restraint of competition, the facts and examination details presented in the published text of recent cases have become more detailed compared to the published text of the original cases, and there is now a shared understanding that market definition is more critical. This trend appears to be moving in the opposite direction of cross-market considerations.

Secondly, the Yahoo/Ikyu case pioneered the consideration of potential competition restrictions due to the use of data as overall business capabilities. In this case, the substantial restraint of competition through the use of data was considered separately from the horizontal and vertical frameworks. The current Business Combination Guidelines clarify the framework for assessing data importance by presenting four factors for evaluating the materiality of data. In the Z Holdings/LINE case, data materiality was judged in accordance with the four factors, demonstrating how they can inform judgments made in individual cases. However, it remains unclear what specific information and data will have an anticompetitive effect on which markets. Both the Yahoo Japan/Ikyu case and the Z Holdings/LINE case concluded that the companies concerned did not act in a competition-restricting manner even though they were in a position to utilize data, and the scenario in which the use of data has an anticompetitive effect remains an ongoing challenge.

(2) Significance and Issues of Considering Overall Business Capabilities

The significance of considering overall business capabilities is as follows. First, in determining whether a business combination has the effect of restricting competition, the evaluation of overall business capabilities fits with the interpretation of a substantial restraint of competition. Market definition is necessary to determine whether there is a substantial restraint of competition, but is not an end in itself. Therefore, consideration of overall business capabilities should be conducted in relation to the substantial restraint of competition.

Second, the use of the concept of overall business capabilities will enable judgments to be made in accordance with the actual conditions of the business combination. Current business combination review focus on categorizing the parties' businesses as horizontal, vertical, or conglomerate, with horizontal business combinations as the main focus. Then, as mentioned earlier, the market is segmented and defined, and the logic is that if there are no problems in individual markets, then there is no problem with the business combination as a whole. Of course, there are some cases in which it is appropriate to take such an approach, but in the case of business combinations by DPFs, this may result in the examination and appropriate judgment not being made in accordance with the actual situation. Considering overall business capabilities can enable an evaluation of the entire ecosystem.

Third, the use of overall business capabilities enables judgments that take into account the purpose of the business combination. The purpose of the business combination does not affect the determination of whether or not there is an anticompetitive effect. However, DPFs often aim to exert their own competitive power more broadly through a business combination rather than individual market business strategies. In such cases, considering the overall business capabilities of the DPF would allow examination of the business combination based on the purpose of the business combination, leading to a more realistic review.

5 Conclusion

This article has examined the possibility of utilizing overall business capabilities to accurately capture the impact of a Behemoth's advances realized through business combination. The conclusion is that there is a certain significance in actively examining overall business capabilities in relation to the interpretation of the substantial restriction of competition and also in relation to the purpose of the business combination. The 2019 revision of the Business Combination Guidelines aimed to present a regulatory framework for business combinations suited to the digital age. However, the fact that consideration is not given from the perspective of overall business capabilities seems to have resulted in a discrepancy between the Guidelines and the actual situation. It is necessary and useful to actively consider overall business capabilities in cases where doing so is considered necessary due to the characteristics of the market.

The content of overall business capability may ultimately depend on the circumstances and conditions in each individual case. To ensure the transparency and predictability of business combination regulations, it is essential that overall business capabilities are not used as a black box. As the review of individual cases becomes more sophisticated, we hope that this refinement will be demonstrated in published statements. This article did not go as far as to present specific factors to be considered and methods of consideration, but we will continue to closely monitor trends in the regulation of business combinations by DPFs and consider how overall business capabilities should be taken into account.