



An Airline Merger in Japan: A Case Study Revealing Principles of Japanese Merger Control

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Abstract. This paper is a case study of a Japanese merger control in the airline industry. The objective is to investigate the underlying principles of the Fair Trade Commission of Japan (JFTC) through a domestic merger on airlines, where reports are available. From applying a checklist arranged by Röller et al. (Working Paper No. 543, The Research Institute of Industrial Economics, 2000), the merger control policy of the JFTC is competition-oriented, systematic designed and transparent. But the direction of the policy is a kind of regulatory one.

Keywords: Japan, merger, efficiency, airlines

JEL classification: L41, L93, K21

1. Introduction

The international dimension of merger decisions has been prominent in a number of high-profile cases recently such as GE/Honeywell case, Boeing/McDonnell-Douglas case. In some cases, there are some conflicts among national antitrust agencies in their final decision. Therefore, the Antitrust Division, Federal Trade Commission and European Commission sought a set of “best practices” for coordinating future merger reviews on October 2002. So there are many articles for the merger control in international market such as Neven and Röller (2000) and Reynolds and Ordovery (2000). On the other hand, there are few studies of Japanese merger control enforcement. The reasons are (i) that nothing with eventful international conflicts happened until now, and (ii) that very few cases with controversy occurred so far. The Fair Trade Commission of Japan (JFTC) issued a significant interim decision regarding Japanese airline merger on March 15, 2002, and the JFTC delivered the following result of the case on April 26, 2002. This paper studies the JFTC’s releases deceptively and analyzes the result by using a checklist of international merger control arranged by Röller et al. (2000). A target of this paper is an airline merger case, Japan Airlines Co. Ltd. (JAL) (number two in a market) and Japan Airsystem Co. Ltd. (JAS) (number three in a market) through establishment of a joint holding company.

The main concern regarding this checklist is that the report by from Röller et al. (2000) is based on an analysis of the efficiency defense. This also applies to the checklist that was developed. As a result many other issues regarding the assessment of competitive effects are not included in the checklist. For example, the much debated substantive criteria of dominance vs. substantial lessening of competition is not in that checklist. Moreover, it does not appear that the JAL/JAS merger case was primarily focussed on

efficiency considerations. Instead, other issues—such as the competitive effects of the merger (entry, *etc.*)—have been central to the case. Notwithstanding, it is beneficial for us to analyze the JAL/JAS merger case by using the checklist in the following points; (i) the first comprehensive review of the Japanese merger control case from the international standard criterion and (ii) to clarify tentative theory (the competition-oriented policy) for the future work.

The rest of this paper is as follows. Section 2 researches Japanese merger control analysis so far. Sections 3 and 4 are breakdown of the interim report and final resolution of the JFTC's airline merger case. Section 5 is an analysis from a viewpoint of the checklist of merger control assessment. Section 6 is conclusion.

2. Japanese merger control

There are few studies of Japanese merger control enforcement neither theoretically nor empirically. Blonigen et al. (2000) deal with Japanese merger performance and implication indirectly, but they do not touch with competition aspect of mergers. Nakamura et al. (1995), Nakamura (2002) and Yeh and Hoshino (2002) handle with merger's effect for productivity or performance directly, however, their researches lack concept of merger control enforcement. Although Arai (2001) surveys antitrust developments regarding intellectual property rights, the research has no merger review. An empirical study of merger in the market is Odagiri and Hase (1989), which surveys the 243 sample of Japanese mergers and leads to some tendency of mergers. The only article of the Japanese merger enforcement policy is Watanabe and Tamai (2001), which explains the Japanese system, guidelines and a few cases. However all of these articles are not comprehensive analysis of Japanese merger control case. On a subject of airline merger, many articles are delivered already in the United States and European Union.¹

The background of the case is as follows: With the aim of building a business structure capable of coping with the challenge of global competition, JAL and JAS are contemplating the creation of a holding company to become the parent of the two airlines in October 2002. The primary purpose of the merger of the number two firm (JAL) with the number three firm (JAS) in a market is to increase the competitiveness of JAL/JAS *vis-à-vis* their main competitor All Nippon Airways (ANA).

The JFTC issued an interim report for business consolidation by JAL and JAS through establishment of a holding company on March, 2002. The report said that based on the explanations offered by the parties to the proposed scheme, it is likely to be a substantial restraint of competition within the area of domestic air passenger transportation business.

1 Borenstein (1990) confirms conclusions which are that market power leads to price increases explained by Werden et al. (1991) from analysis of Northwest/Republic airlines and TWA/Ozark mergers. Beutel and McBride (1992) analyze a market power by means of a residual demand approach for Northwest/Republic airlines case. The analysis of Neven and Röller (1996) or Clougherty (2002) are useful in the future works for the Japanese merger control policy review (see Section 6).

The parties responded some remedial measures on April, 2002. Based on the explanation and remedial measures presented by the parties and on promotion measures implemented by the Ministry of Land, Infrastructure and Transport, the JFTC concluded and issued that the proposed consolidation with remedial measures is unlikely to constitute a breach of Article 10 of the Antimonopoly Act² on April, 2002.

3. Analysis of JAL/JAS case

3.1. Examination from the viewpoint of Antimonopoly Act

3.1.1. Particular fields of trade

In this particular case, the JFTC's examination focussed on the domestic air passenger transport business area, the business area of transporting air passengers leaving from or arriving at Haneda Airport,³ the business area of transporting air passengers leaving from or arriving at Itami Airport⁴ and the area of specific domestic air routes (*i.e.* the routes operated by JAL and JAS concurrently). The examination did not focus on the areas of international air passenger transport business or of international air cargo transport business and domestic air cargo transport business, since more than one powerful competing air carrier in international transport businesses exists and domestic air cargo business is conducted in conjunction with air passenger transport business.

3.1.2 Expected effects on each area of trade

The consolidation pushes up the aggregate share of the two parties in each business area in terms of the number of passengers carried and the number of flights to a level which, if combined with the share of ANA, would account for nearly all the business conducted in the respective business areas.

With regard to specific domestic air routes, the proposed consolidation would result in monopoly or duopoly on nearly all the 32 air routes operated by the two airlines concurrently.

2 The Antimonopoly Act is an antitrust law in Japan. The official name is "Act Concerning Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of April 14, 1947)." Section 10 [Prohibition of particular stockholding by a company, filing requirement]:

(1) No company shall acquire or hold stock of any other companies where the effect of such acquisition or holding of stock may be substantially to restrain competition in any particular field of trade, or shall acquire or hold stock of other companies through unfair trade practices.

This is a type of U.S.-style standard, which is discussed at 5 (4).

3 Haneda Airport is main domestic airport of Tokyo area in Japan.

4 Itami Airport is main domestic airport of Osaka area in Japan.

3.2. *Impact on competition examined*

3.2.1. *Concerted fare-setting actions*

3.2.1.1. *Actual fare settings.* Concerted fare-setting actions, as described below, have already been practiced in the past by major airlines such as JAL, JAS and ANA (the big three). Should the big three become the big two as a result of the consolidation; it will become easier for them to resort to such concerted fare-setting actions.

The circumstances that facilitate such concerted fare-setting actions	The fares (including discounted fares) are publicized in advance and apply equally to all passengers; hence competing air carriers can easily ascertain the prices charged by their competitors and generally follow suit by setting similar fares.
Ordinary fares	The big three raised the level of the Ordinary Fares, a benchmark for all airfares by approximately 15% for air travel taking place on all air routes from April 2000. The new fares set by the big three are almost identical.
Discounted fares	Discounted Fares are set by the big three almost simultaneously, at almost the same price and with similar terms and conditions.
Concerted actions to match new airlines' fares	The big three are setting fares in concert in order to match the cheaper prices offered by the two brand-new airlines.

3.2.1.2. *Limitations on fare-setting actions at congested airports.* As the demand for departures and arrivals at congested airports surpasses the feasible number of takeoffs/landings of aircraft, the competent authorities are allocating a quota for the maximum permissible number of slots (the number of takeoffs/landings allowed) available to each airline (such allocated quotas are not to be reviewed until 2005). This means that airlines may decide on their route and the frequency of flights only within the framework of the allocated quota of slots, making it difficult for them to expand their business through competition. This is a factor that aggravates the airlines' behavior of setting fares in concert.

3.2.1.3. *What the parties allege in regard to fare-setting actions.* In regard to the concerted fare-setting actions described above, the parties allege that they have no alternative than to follow ANA in fare setting since it is ANA who has the power to control prices. According to the JFTC, however, the fact that the two new airlines, who are much smaller in size than JAL and JAS, are actually setting competitive prices, albeit only on certain specific air routes, there is no reason why it should be difficult for JAL and JAS to adopt competitive prices against ANA, contrary to what the parties allege.

3.2.2. *The degree of impact on competition if the big three becomes the big two*

Judging from the past pattern of specified flights discount fare-setting by the big three as described below, a reduction in the number of major carriers would cause considerable impact on competition. The relationship between the number of carriers serving each air route and the pattern of setting specified flights discount fares indicates that the proportion in which specified flights discount is applied to all flights becomes smaller as the number of carriers serving that particular route decreases. In addition, if the number of major carriers is reduced to two because of a consolidation, there will no longer be a chance for JAL to enter the routes operated by JAS and ANA or by JAS only, or for both JAL and JAS to enter the routes operated by ANA only.

3.2.3. *Limited competitive pressure from newcomers*

It is difficult for newcomers to enter the domestic air transport business in Japan due to the reasons outlined in 3.2.3.1.–3.2.3.4.. For the same reasons there is limited room for the two new airlines to expand their business and their stimulating effect on competition is confined to specific routes only. As the competitive pressure from the newcomers is so limited, they are unlikely to act as a deterrent to concerted fare-setting actions on the part of major airlines.

3.2.3.1. Difficulty in entering domestic air transport business. The entry into domestic air transport business by newcomers is hampered by the limited availability of airport facilities such as boarding bridges and passenger check-in counters and of aircraft maintenance capabilities. Furthermore, the entry of foreign airlines into this area is, in principle, prohibited under Civil Aeronautics Law. Under such circumstances it will be difficult to expect new carriers to provide a stimulating effect on competition.

3.2.3.2. Difficulty in entering the routes that use congested airports. At congested airports where the available number of slots is already limited, a certain number of slots are being reserved for the potential entry of new carriers in the future. However, this number is considerably small. Therefore, it is particularly difficult for newcomers to enter the routes that utilize congested airports.

3.2.3.3. The limited effects of new entries. Even if newcomers are admitted they would have to face the limited availability of airport facilities, the need to secure aircraft maintenance services and also, particularly at congested airports operation within the allocated number of slots. Although a certain number of slots are reserved for the potential entry of new carriers in the future, such a quota does not include allocations for the two new airlines.⁵ The two new airlines also face difficulties in constructing their own computer reservation system and mileage service. For these reasons, although they are yielding positive effects on competition on the particular routes they have entered, they

5 Skymark Airlines Co. Ltd. and Hokkaido International Airlines Co. Ltd. Both since 1998.

face difficulties in the further expansion of their business and the effects of their activities on other routes are still limited.

3.2.3.4. Overall business capabilities. By forming an extensive network including overseas routes, JAL and JAS would gain a competitive advantage over other air carriers including the two new airlines in providing services such as mileage service program, *etc.*

3.2.4. The significant disadvantage that the proposed consolidation would cause to general consumers

General consumers, who have no power to negotiate prices and therefore no choice but to accept the fares set by airlines, are likely to suffer considerable disadvantages if the concerted fare-setting actions by major airlines are made easier as a result of the consolidation.

3.3. Impact on travel industry

In view of the fact that a large part of air transport services is arranged through the intermediary of travel agencies, the JFTC showed a survey by means of hearings and questionnaires in order to seek the views of the travel industry regarding the possible impact of the proposed consolidation on tourism. The survey revealed that about a half of the travel agents surveyed feel that they will be affected by the consolidation in some way or other.

3.4. Conclusions of the interim report

The proposed consolidation, which reduces the big three to the big two and pushes up the shares of the parties substantially in the business areas, is likely to give the parties a power to control the market or make it easier for them to resort to concerted fare-setting actions. This gives rise to the apprehension that they may put up a common front with their major competitor, ANA. Considering that newcomers would provide only limited competitive pressure and are unlikely to act as a deterrent to the concerted fare-setting behavior on the part of major airlines, the proposed consolidation is likely to result in a substantial restraints of competition and the JFTC took steps to convey such areas of concern to the parties concerned and released the report on March 15, 2002.

4. Remedial measures and analysis

4.1. The remedial measures to be taken by the parties

The parties proposed consolidation responded to the JFTC's interim report with some remedial measures on April 23, 2002, as described in the following sections.⁶

4.1.1. Steps to promote new entry

4.1.1.1. Return of takeoff-and-landing slots. Effective October 2002, the parties would return to the Ministry of Land, Infrastructure and Transport nine turnaround slots out of the slots they currently hold at Haneda Airport. Furthermore, should the Ministry's "competition promotion slots" to be created with nine turnaround slots prove insufficient before the planned reallocation of slots in February 2005; the parties will return to the Ministry up to three additional turnaround slots at Haneda.

4.1.1.2. Remedial measures in favor of new airlines regarding airport facilities. The parties would make available for new airlines such airport facilities as boarding bridges, gate parking spots and check-in counters which they currently hold for themselves, should the new airlines so desire.

4.1.1.3. Cooperation with new airlines by means of undertaking various services such as aircraft maintenance. If so desired by new airlines, the parties would actively provide such services as may be needed by the new airlines when entering air transport business or continuing with or expanding their operations, for example, aircraft maintenance services and airport ground services.

4.1.2. Measures concerning airfares etc.

4.1.2.1 Measures concerning airfares. Normal fares would be cut by 10% across the board on all the main routes operated by the parties and would not be raised during a period of at least 3 years. Specified flights discount fares and advance purchase discount fares would be granted for all flights on all the main routes operated by the parties in competition with another major airline and on the main routes on which the parties would

6 Additional competition promotion measures are envisaged by the Ministry of Land, Infrastructure and Transport. Reflecting the changing circumstances in the recent times and with the aim of improving the level of services provided to users through promotion of competition, the Ministry is now adopting the following additional competition promotion measures:

- (i) Measures adopted until February 2005.
- (ii) The overall review of takeoff-and-landing slots allocation scheduled in February 2005.
- (iii) Support given to new airlines in regard to the use of airport facilities.
- (iv) Support given to new airlines in regard to providing various services, such as aircraft maintenance.

become the sole carrier. The level of such discounts would be identical with that prevailing on the routes currently operated by three competing airlines.

4.1.2.2. Promotion of competition and enhancement in the level of services provided by means of an expanded route network. The parties would seek entry into or increase the frequency of flights on the routes where another major airline is the sole carrier or is predominant in the number of flights.

4.2. The analysis to the remedial measures

4.2.1. The enhanced likelihood of effective competition as a result of business expansion, etc. by new airlines

4.2.1.1. Evaluation of the return and reallocation of takeoff-and-landing slots. Regarding evaluation of situation prior to February 2005, whereas the new airlines who are operating with six slots already allocated to them are unable to increase the number of their flights any further in the present circumstances mentioned above, one is planning to increase the frequency of its services by nine more return flights prior to the review of takeoff-and-landing slots allocation by the Ministry of Land, Infrastructure and Transport scheduled in February 2005. The Ministry now makes such business expansion by the new airline concerned possible by the parties' remedial measure of returning nine slots at Haneda and by the creation of competition promotion slots. The creation of slots by the Ministry yields the nine additional slots necessary to meet the requirements of the expansion plan. Also, in view of the parties' willingness to give up an addition of three slots if the new airlines require more than nine slots, it is considered likely that the new airlines would be able to expand their business without difficulty until February 2005. It follows, therefore, that effective competition is likely to continue until February 2005, albeit on certain specific air routes only.

Regarding evaluation of situation posterior to February 2005, as to the takeoff-and-landing slots to be allotted from February 2005, the Ministry intends to implement an overall review of all the existing slots and further increase its competition promotion slots so as to enable new airlines to expand their operations on an equal competitive footing with major airlines. The existence of a new airline that has concrete plans to compete with major airlines in its bid for full-scale business development once the necessary number of slots is obtained, and the positive effects produced by the below mentioned measures related to airport facilities, indicate that the growth of such a new airline into a competitive carrier capable of effectively challenging major airlines, is a highly probable outcome.

4.2.1.2. Evaluation of measures regarding access to airport facilities by new airlines. The remedial measures proposed by the parties and the competition promotion measures envisaged by the Ministry, together with similar steps that may be taken by another major airline who is not a party to the proposed merger, would contribute to and

facilitate the business expansion, *etc.* of the new airlines by providing greater support related to airport facilities.

4.2.1.3. Evaluation of the cooperative measures undertaken through the provision of various services, such as cooperating aircraft maintenance, to benefit new airlines. The remedial measures, together with similar steps that may be taken by another major airline, would lead to various services such as aircraft maintenance being provided more readily, and would contribute to and facilitate the business expansion of the new airlines who would now find it easier to ask other carriers to undertake such services.

These measures are so interested that this situation is similar to the regulatory requirement for, for example, incumbent local telephone companies to offer “unbundled” components to prospective entrants.⁷ Various services such as aircraft maintenance are not regulated, and new airlines could cause harm to new airlines. In conclusion, it has not happened.

One of the reasons may be that the aircraft maintenance service or various services are sometimes independent division in terms of accounting in the larger airlines or a subsidiary. *Inter alias*, because of the cost reason, even the larger airlines often outsourced various services for overseas, such as TAECO (Taikoo Aircraft Engineering Co.) in Xiamen (China) or SASCO (ST Aviation Services Co.) in Singapore, in these days. The remedial measures are credible for the new airlines from the background of these potential competitors.

4.2.2. Measures related to airfares, etc.

The remedial measures such as (a) reducing normal fares, (b) increasing the number of specified flights discount fares and advance purchase discount fares, and (c) seeking entry into or increasing the frequency of flights on the routes where another major airline is currently a sole carrier or is predominant in the number of flights, proposed by the parties are considered worthy of positive evaluation as it outlines a means through which general consumers may benefit from the efficiency achieved by the integration.

4.3. Conclusion of the final resolution

For the foregoing reasons, the JFTC concluded and issued that the implementation of the proposed integration plan would not constitute a substantial restraint of competition within the area of domestic air transport business on April 26, 2002.

Furthermore, in order to ensure that the proposed remedial measures are effectively implemented, the JFTC issued to take measures of asking the parties to take the necessary steps prior to the integration where feasible, continuing to monitor progress and to be conscious of all the relevant issues, and keeping close contact with the Ministry of Land, Infrastructure and Transport with a view to promoting competition in this area.

⁷ As in the U.S. Telecom Act of 1996.

5. Assessment of the JFTC's decision

This is an epoch-making case of Japanese merger control enforcement policy history, which issued interim report pointed problems publicly with the first case so far. Therefore, this is informative case description to assess Japanese merger policy compare to international one.

The International Competition Network (ICN) Merger Working Group is discussing the analytical framework for merger control internationally. The final paper for ICN annual conference arranged by ICN Merger Working Group, Analytical Framework Sub-group listed issues of abstract questions such as "What is merger policy for?" "Which mergers should be reviewed?" "How should qualifying mergers be assessed?" and "How does the chosen analytical framework impact on remedies and procedure?" It is difficult for the national authorities to reach tangible results of analytical methods; however these questions are too broad to analyze a specialized case from a viewpoint of international criteria.

A checklist arranged by Röller et al. (2000) is one of the most capable criteria based on reviews of seven OECD countries' merger control systems. The aim of that article is to establish to design a new persuasive control system that takes efficiencies into account; thus the checklist is not conclusive issue. Nevertheless, the checklist shows all-round dimension of merger control to compare country by country. Therefore, it is conducive to assess the above explained airline merger case (the JAL/JAS case) of the Japanese merger control enforcement by using the checklist.

The linkage between economics and the research questions here is mainly two points. The first point is to be able to apply a theory to real world and to receive the feedback. It is always necessary to look back the applied an economic theory in policy matters to the real situation like Scheffman and Coleman (2002) and Katz (2002). The second point is to establish a tentative theory based on economic intuitive that is extracted from a real case study. As Borenstein (1990) mentioned the airline industry character is that market power results from airport dominance, the theory extracted from a real case study is quite valuable.

The checklist using this analysis constitutes of 19 items as below, each item is being applied for the JAL/JAS case of the JFTC's merger control. However some items (particularly efficiency related questions) are clipped shortly.

5.1. *Welfare standard*

Four standards have been discussed in the checklist: (i) total surplus standard, and (ii) consumer's surplus standard.

It seems that the JFTC uses consumer's surplus standard in the JAL/JAS case due to its price concerns. In addition to the concerns, the evaluation of slots, facilities and service provision is aware of effective competition with new airlines. This recognition would be assessed in not only consumer's surplus standard but also total surplus standard. It is hard to interpret the authority's standard of welfare from available materials, but the key

phrase stands by the main concerns of the authority. In this case, consumer's surplus standard is strongly supported from the phrase of that "(g)eneral consumers, who have no power to negotiate prices and therefore no choice but to accept the fares set by airlines, are likely to suffer considerable disadvantages. . .," in the interim report.

5.2. *International competitiveness*

In some jurisdictions, the international competitiveness of the domestic firms is considered an objective for the merger control.⁸

It has been difficult to persuade the JFTC to take international competitiveness into consideration under the Japanese statutory language. In case of the JAL/JAS case, the remedial measures include the undertaking of 10% price cut or promotion for new entrants, which will be damp measures in the parties' international competitiveness.

Why was not the international competitiveness considered? First, JAL/JAS argued that it was necessary to integrate them for the purpose of survival under the global competition of the world's mega-carriers. They did not, however, allege that the international competitiveness made cost advantages or consumer's conveniences. The JAL/JAS stated only the necessity of "the trends of world integration."⁹ This allegation looks like or seems to be that their desire to have international competitiveness is not to get cost efficiency from the international competitiveness but to have a dominant position itself (or only emulation of ANA). Therefore the JFTC did not refer the allegation of the international competitiveness as a merit of the merger. Instead of that, the JFTC played up the general consumers' disadvantage from the consolidation.¹⁰

5.3. *Mode of competition*

Competition authorities consider information about the mode of competition in the market such as "unilateral effects" and "co-ordinated effects"; Bertrand model and Cournot model.

The JFTC considers both "unilateral effects" and "co-ordinated effects" through Bertrand model based on actual competitive condition in airline industry (complementary to Cournot model). In particular, concerning coordination effect, the JFTC pointed out in the interim report that "(t)he proposed consolidation, . . . , is likely to give the parties a power to control the market or make it easier for them to resort to concerted fare-setting actions."

If the language of the Japanese statute is similar to the EU language, such as "create or strengthen a dominant position" standard, then the merger may have been challenged

8 See Gal (2003), pp. 201–202.

9 The opinion of JAL http://www.jal.jp/corporation/key07/key_1.html (in Japanese)

10 See 3(2) (iv), p. 11.

under a theory of “collective dominance” which would be consistent with the fear of increased likelihood of price coordination in the more concentrated post-merger industry. Although the language of the Japanese statute is a type of US-style, this point is to be addressed.¹¹

Concerning this point, one well-known economic idea, such as larger second-ranked firms can significantly lower leaders’ margins,¹² is behind the JFTC’s decision. It is reflected in the positive evaluation for JAL/JAS’s measures related to airfares, 4(2) (ii) (seeking entry into or increasing the frequency of flights on the routes where another major airline is currently a sole carrier or is predominant in the number of flights).

5.4. *Efficiencies as an offense (anticompetitive effect)*

Cost savings can have negative side effects. If two firms merge and lower their variable costs, they become a tougher competitor. If the cost reduction is big enough, the competitors are driven out of the market, or that new entry is blocked. This thinking is a striking difference between the United States and European Union’s antitrust practice.¹³

This type of efficiencies as an offence were not discussed in this JAL/JAS case explicitly. Alternatively, the JFTC examines overall aspect of the JAL/JAS case from the viewpoints of impact on competition. In this examination, on the assumption of cost savings the access of facilities and business contestability of new airlines are considered. In particular, the analysis of congested airport shows that the limitation of competition in the interim report is resolved in variety ways of competition after the remedy of return of takeoff-and-landing slots, facilities favor, and services undertaking. Primarily, the purpose of this consolidation of JAL/JSA is to obtain cost competitiveness to ANA. Thus the efficiencies as an offence are not so highly visible.

5.5. *Pass-on (pro-competitive effect)*

Competition authorities need to assess not only the existence and magnitude of efficiencies but also the extent to which the cost savings are passed on to consumers.

The JFTC carefully examines pass-on effect and this is one of the crucial points to reach the final resolution. The result is that normal fares would be cut by 10% (and the parties would seek entry into the frequency of flights on another sole carrier routes).

The fact that the JFTC considered the pass-on effect important is itself one of the evidence that the agency leans toward a consumer surplus rather than total surplus standard.

11 See footnote 2.

12 Kwoka and Ravenscraft (1986).

13 See Patterson and Shapiro.

5.6. *Standard of proof*

There are a lot of standards of proof for future efficiencies such as “clear and convincing evidence,” “credible,” “clearly demonstrated.”

Based on the explanation and information presented by the parties with regard to the consultation, the JFTC adopts a standard of the enhanced likelihood of effective competition. In addition, the JFTC states that the authority continues to monitor the progress and keeps close contact with the Ministry of Land, Infrastructure and Transport with a view to promoting competition.

5.7. *Full versus partial defense*

Some competition authorities have chosen to explicitly state which types of efficiencies that are less likely to be considered.

It seems that the JFTC takes efficiencies resulting from rationalization by the merger including economies of scale, scope, and synergy, totally, in the JAL/JAS case.¹⁴

5.8. *Merger guidelines/notice*

Several competition agencies have chosen to publish the way they analyze mergers including the way efficiencies are considered, but some has published Notices.

The JFTC issues several guidelines such as “Guidelines for Interpretation on the Stipulation that ‘The Effect May Be Substantially to Restrain Competition in a Particular Field of Trade’ Concerning M&As (21 December 1998),” explicitly the JFTC applies these thinking in the JAL/JAS case.

5.9. *The other items*

There are the other eight items in the checklist, future viability, inefficiencies, net effect, measurement, merger specificity, discounting, burden of proof, prosecutorial discretion versus litigation, and rebuttal versus defense (many of them are efficiency issues). All of them are unrelated or have no implication in the JAL/JAS case.

5.10. *Overall assessment*

It is difficult to put together above assessments and establish policy analysis with rigor. However, it is beneficial for our future research to establish a tentative theory of the

¹⁴ See JFTC’s statement (2002/4/26).

character of the merger policy of the JFTC. From above discussion applying checklist item-by-item, it is natural to deduce that the JFTC's merger control is competition-oriented policy. Especially, that is demonstrated by the JFTC used consumer's surplus standard (item (1)) and the JFTC considers both "unilateral effects" and "co-ordinated effects" through Bertrand model based on actual competitive condition in airline industry (item (4)) without any competitiveness interests (item (2)). And the JFTC's merger policy is based on case-by-case method (item (7)), full consideration (item (9)) and merger guidelines thinking (item (10)). The analysis of these items shows that the policy seems to be systematically designed and transparent.

5.11. Regulatory feature

On the other hand, the merger policy of the JFTC has not only interventionist but also regulatory feature. For example, the remedial measure of undertakings of normal fares 10% cut (item (6)) is like a price regulation. That the JFTC would keep close contact with the Ministry of Land, Infrastructure and Transport is also for the competition authority to be another regulator (item (8)).

Any competition agency can permit a merger "with conditions," especially behavioral conditions. This case includes remedial measures concerning airfares, such as 10% cut *etc.* This type of outcome is likely to make the JFTC as another regulator.

After setting up the new JAL/JAS company, the war in Iraq began. Severe acute respiratory syndrome (SARS) made news headlines around the world. Both occurrences directly affected the airlines, especially international airlines like JAL/JAS. Thus, JAL/JAS re-opened the airlines' discussion of raising airfares by 10% (to set back original fares). The JFTC heard the reason to raise the airfares and did not object. Because of staff limitations and the ambiguous standard of price freezing, competition agencies cannot be a regulator. The JFTC chose a requirement of accountability for raising JAL/JAS airfares. This is far better than being another regulator.

6. Conclusion

This paper breaks down the JFTC's merger control through the JAL/JAS case, descriptively. The system of the Japanese merger control process is competition-oriented, systematic designed and transparent. But the direction of the policy is a kind of regulatory one.

There are a few controversial cases in Japanese merger control policy up to the present. In the deflation phase or cold stock market period, it is not good for merger control policy development due to the small number of merger itself. Today, the international antitrust discussion has processed in several places, such as ICN, OECD, *etc.* already.

In this paper, the tentative theory is established. The important expand is whether this policy is good or bad (normative analysis) or how the policy is determined (from the perspective of political economy). The former question can be examined in experimental

analysis of the firm's data. The latter question can be approached both economics and politics in the firms or the authorities.

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