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ROUNDTABLE ON CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

Contribution from Chinese Taipei

-- Session I --

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CROSS-BORDER MERGER CONTROL: CHALLENGES FOR DEVELOPING AND EMERGING ECONOMIES

-- Chinese Taipei --

1. General points

1. In the 2002 amendments to the Fair Trade Act, the merger control system has adopted a "pre-merger notification system" to replace the "prior approval system" in order to streamline the review process for mergers. Any merging party meeting the merger notification thresholds prescribed in the Fair Trade Act is required to notify the Fair Trade Commission (hereinafter the Commission) before implementing a merger. The merger is automatically cleared if the Commission does not raise any objection within a prescribed period after the filing of the merger. To facilitate the process and make it more efficient, the Commission has also set forth the "Guidelines on Handling Merger Filings", "Directions for Application of Merging Parties" and "Guidelines on Extraterritorial Mergers" to serve as guidance in reviewing the merger proposal and as a reference for enterprises.

2. Chinese Taipei's notification system is mandatory. If a merger filing falls within one of the merger types in Article 6 of the Fair Trade Act and falls below the notification thresholds including market shares and turnover prescribed in Article 11 of the Fair Trade Act, the merging parties are required to notify the Commission before implementing a merger. At the same time, the merging parties are required to present sufficient documents and information on the merger, but do not need to pay any notification fees.

3. As defined in Article 6 of the Fair Trade Act, the term "merger" refers to a situation where:

- an enterprise and another enterprise are merged into one;
- an enterprise holds or acquires the shares or capital contributions of another enterprise to an extent of more than one-third of the total voting shares or total capital of such other enterprise;
- an enterprise is assigned by or leases from another enterprise the whole or the major part of the business or properties of such other enterprise;
- an enterprise operates jointly with another enterprise on a regular basis or is entrusted by another enterprise to operate the latter's business; or
- an enterprise directly or indirectly controls the business operation or the appointment or discharge of personnel of another enterprise.

4. For any merger that falls within any of the following circumstances, a notification shall be made to the Commission prior to the realization of the merger:

- as a result of the merger the enterprise(s) will have one-third of the market share;
- one of the enterprises in the merger has one-fourth of the market share; or
- sales for the preceding fiscal year of one of the enterprises in the merger exceeds the threshold amount publicly announced by the central competent authority.

5. With regard to the turnover for filing a pre-merger notification, currently the Commission has set the threshold as follows:

- an enterprise in a merger is a non-financial one, its sales for the preceding fiscal year exceed NTD 10 billion, and the enterprise it merges with has a sales amount exceeding NTD 1 billion; and

- an enterprise in a merger is a financial enterprise, its sales for the preceding fiscal year exceed NTD 20 billion, and the enterprise it merges with has a sales amount exceeding NTD 1 billion.

6. Pursuant to Article 12 of the Fair Trade Act, the Commission may not prohibit any of the mergers filed if the overall economic benefit of the merger outweighs the disadvantages resulted from competition restraint. The Commission's standard for merger review depends on whether the overall economic benefit of the merger outweighs the disadvantages resulted from its restraint on competition. Thus, the net effect between the economic benefit and the disadvantages in terms of the competition restraint resulting from the merger is the basis of the substantive test. If there is no suspicion of obvious competition restraint in the merger filing, then the overall economic benefits of the merger can be considered to outweigh the disadvantages resulting from competition restraint. On the other hand, the Commission is also empowered to attach conditions or require undertakings in its decision to the notified merger if it is satisfied that the measure taken can produce enough economic benefits to outweigh the disadvantages resulted from competition restraint.

7. In practice, when reviewing different types of mergers, the Commission considers different factors in weighting the "disadvantages resulted from competition restraint."

1.1 Consideration of disadvantages resulted from competition restraint

8. Horizontal mergers: The Commission, in the general procedure of a merger review, shall consider the following factors when assessing the competition restraints resulted from a horizontal merger:

9. Unilateral Effects: After the merger, the enterprises participating in the merger are not restrained from market competition and can thus elevate the goods price or services remuneration. The Commission may assess the above-mentioned circumstances according to the market shares of merging enterprises, the homogeneity of goods or services, production capacity and import competition.

10. Coordinated Interaction: After the merger, the merging parties and their competitors restrict business activities among themselves or, even though they are not mutually restricting one another from competition, they have taken concerted actions to remove market competition in practice. The evaluations of whether the market conditions are conducive to concerted actions among competing enterprises, the ease of monitoring and detecting deviation from collusion and the effectiveness of punishments are all factors to determine the success of coordinated interaction.

11. Degree of Entry: The likelihood and timeliness of entry by potential competitors, and whether such entry would exert competitive pressures on the existing enterprises in the market shall be examined.

- Countervailing Power: Refers to the ability of trading counterparts or potential trading counterparts to prevent the merging parties from raising the prices of goods or the remuneration for services rendered.

- Other factors affecting the result of competition restraints.

12. Vertical mergers: The Commission, in the general procedure of a merger review, shall consider the following factors when assessing the competition restraints resulted from the vertical merger:

- The probability that other competitors could choose their trading counterparts after the merger.
- The degree of difficulty for an enterprise not participating in the merger to enter the relevant market.
- The possibility of merging parties abusing their market power in the relevant market.
- Other factors that may result in market foreclosure.

13. Conglomerate mergers: The Commission shall take the following factors into consideration when determining the likelihood of material potential competition:

- The impact of regulation and control being lifted on the merging parties' cross-industry operations.
- The probability of cross-industry operations by the merging parties because of technology advancements.
- The original cross-industry development plan of the merging parties besides the merger.
- Other factors that affect the likelihood of material potential competition.

1.2 Consideration of overall economic benefits

14. With regard to the merger filing that raises suspicion of obvious competition restraints, the filing enterprises shall submit information on the following factors regarding the overall economic benefits to the Commission for deliberation:

- Consumer interests.
- The merging parties are originally in a weaker position when trading.
- One of the merging parties is a failing enterprise.
- Other concrete results related to overall economic benefits.

15. As the Commission reviews a merger proposal, the first step is to define the relevant market and calculate the market share or market concentration ratio. Next, the anti-competitive effect will be measured. If the proposed merger will not cause substantial harm to the relevant market, then the Commission doesn't necessarily review further the effects on the overall economic benefit. On the other hand, for merger applications with a significant concern of causing competition restraints, the enterprises filing the application may provide the above-mentioned overall economic benefit factors for the Commission's reference.

16. If a merger is pursued without prior notification, regardless of the Commission's decision to allow or prohibit such a merger, or if the merger fails to perform the undertakings required by the Commission, the Commission may prohibit the merger, and if so, it may prescribe a period for such

enterprise(s) to split, to dispose of all or a part of its shares, to transfer a part of its operations, to remove certain persons from position, or to make any other necessary disposition.

17. The Commission is inclined to require merger notification where a merger has an impact on its jurisdiction, regardless of the regions where a merger takes place. Hence, all mergers that conform to the merger types and thresholds described in the Fair Trade Act shall be filed with the Commission. The Commission has enacted the "Guidelines on Extraterritorial Mergers" for dealing with mergers involving two or more foreign enterprises merging outside Chinese Taipei's territory. Its contents can be divided into two parts. The first concerns the issue of jurisdiction, and the second relates to cases falling under the Commission's jurisdiction as the participating enterprises have the obligation to make notification. Whether or not mergers with foreign enterprises fall under the jurisdiction of the Commission primarily depends on whether it could be reasonably predicted that the merger would directly and substantially have an impact on Chinese Taipei. As for how to assess the impact of mergers of foreign enterprises in the Chinese Taipei market, the Commission still relies on Paragraph 1, Article 12 of the Fair Trade Act.

18. According to Point 3 (1) of the Guidelines on Extraterritorial Mergers, the jurisdiction over extraterritorial merger cases shall be determined in line with the following considerations:

- the relative weight of the merger's effects on the relevant domestic and foreign markets;
- the nationalities, residence, and main business places of the merging enterprises;
- the explicitness of the intent to affect market competition in Chinese Taipei and the foreseeability of effects on market competition;
- the likelihood of creating conflicts with the laws or policies of the home countries of the combining enterprises;
- the feasibility of enforcing administrative dispositions;
- the effect of enforcement on the foreign enterprises;
- rules of international conventions and treaties, or, regulations of international organizations;
- other factors deemed important by the Commission.

19. In addition, in accordance with Point 3 (2) of the same Guidelines, if none of the merging enterprises in an extraterritorial merger case has production or service facilities, distributors, agents, or other substantive sales channels within the territorial domain of Chinese Taipei, jurisdiction shall not be exercised.

2. Co-operation among competition authorities and jurisdictional issues

20. So far, no conflicts have arisen between Chinese Taipei and a foreign jurisdiction over the regulation of a cross-border merger. The bilateral agreements between Chinese Taipei and foreign jurisdictions in the field of competition law have not been used in practice in cross-border merger cases. However, Chinese Taipei has an active involvement in the work and deliberation of international organizations such as OECD and ICN in the area of merger control to serve as reference in handling similar cases in the future.

21. A merging party involved in cross-border mergers with its main business places located outside of the territory of Chinese Taipei will normally designate an agent registered in Chinese Taipei to file the cross-border merger on its behalf. If the Commission requires information from such a party, the designated agent usually provides it. When the Commission conducts investigation or adopts final decisions, the Commission may refer to decisions made by foreign competition authorities in relation to cross-border mergers as well as the industrial and investment policies established by the domestic regulatory authorities. However, the decision of the Commission on cross-merger merger cases will not be bound by such reference.

22. The Fair Trade Act is a domestic law but it does, just the same, apply to foreign enterprises as far as their conduct in Chinese Taipei is concerned. To explain this more clearly, this is the case where their conduct affects market competition in Chinese Taipei, irrespective of whether those foreign enterprises have representatives, subsidiaries or branches in Chinese Taipei or are recognized by the government of Chinese Taipei. The merger notification thresholds are currently appropriate to catch mergers which have an impact on Chinese Taipei's territory. Whether a party of an intended merger is based domestically or in a foreign country, it is required to provide all necessary documents and to file them with the Commission, so that the Commission can make formal and substantial reviews. If the materials submitted with the merger report fail to comply with the requirements of the regulations or are deficient in content, the Commission may issue notices to require supplementations or corrections within a specified period of time. If such supplementations or corrections are not made within a specified period of time or are made but the submitted materials remain deficient, the filing will not be accepted by the Commission. So far, the Commission has not encountered difficulty when making such requests.

3. Merger remedies

23. Pursuant to Paragraph 2 of Article 12 of the Fair Trade Act, the Commission may attach conditions or require undertakings in any of the decisions it makes on the filing merger cases in order to ensure that the overall economic benefit of the merger outweighs the disadvantages resulted from competition restraint. The Commission's practice regarding the treatment of merger remedies includes structural and behavioral remedies. The Commission usually imposes behavioral remedies on parties to a cross-border merger when it attaches conditions or requests undertakings in its decisions.

24. Take as an example the extraterritorial merger of US-based Microsoft Corporation (hereinafter Microsoft) and US-based Yahoo! Inc. (hereinafter Yahoo). The two corporations proposed to merge outside of the territory of Chinese Taipei. Yahoo authorized Microsoft to use part of its core search technology. Microsoft consolidated the search engines and keyword-based advertising platforms of both companies and became the exclusive provider of these services for Yahoo. After the said consolidation, Yahoo stopped operating the above-mentioned businesses and instead became responsible for the promotion and management of "Premium Direct Advertisers" (PDAs). Such a merger constituted the merger type set forth in Subparagraph 4 of Paragraph 1 of Article 6 of the Fair Trade Act. In addition, the sales of the subsidiaries of both corporations in Chinese Taipei exceeded NTD 4.5 billion for the preceding fiscal year and Yahoo's subsidiary Yahoo! Taiwan Holdings Limited (Hong Kong), Taiwan Branch (hereinafter Yahoo Taiwan) had more than 65% of the market share in the keyword-based advertising market in 2008. Therefore, the extraterritorial merger of Microsoft and Yahoo had a direct, substantial and reasonably foreseeable impact on the relevant market in Chinese Taipei and thus fell under the jurisdiction of the Commission. At the same time, as Yahoo Taiwan already had more than a 25% market share in the internet advertising and keyword-based advertising service markets, this reached the threshold for pre-merger notification filing as required by Subparagraph 2 of Paragraph 1 of Article 11 of the Fair Trade Act and also did not fall into the exceptions provided in Article 11-1 of the same Act. Therefore, the subsidiaries of both corporations in Chinese Taipei (i.e., Microsoft Taiwan and Yahoo Taiwan) filed a merger with the Commission according to the Fair Trade Act.

25. Before the merger, Microsoft had not provided the keyword-based advertising platform service in Chinese Taipei, thus competition between the two firms had not existed. After the merger, Microsoft consolidated the technologies of both firms and became the provider of the keyword-based advertising platform service, whereas Yahoo stopped providing such a service. Based on the distribution mechanism for the revenue from keyword-based advertising sales as well as each firm's interests, both firms were to make separate endeavors to increase income from keyword-based advertising businesses. Each firm operated its portals and, although Microsoft was responsible for providing the search technology, Yahoo retained the right to edit the contents of the web pages. After investigation, the Commission made a decision that a merger of Microsoft and Yahoo did not have a significant concern about causing competition restraints and the overall economic benefit of the merger outweighed the disadvantages resulting from competition restraints. Therefore, the Commission did not prohibit the merger.

26. However, in order to prevent the applicant from employing market power through such a merger and engaging in competition restraint or unfair competition in the search service and keyword-based advertising service markets, the Commission imposed undertakings on merging parties in its decisions in accordance with Paragraph 2 of Article 12 and requested that merging parties should perform undertakings. Those behavioral remedies included:

- The applicant shall not employ its market position after the merger to improperly restrict any keyword-based advertising trading counterparts from trading with any particular enterprises;

- The applicant shall not employ its market position after the merger to engage in other unfair transactions with any trading counterparts or enter into agreements concerning trading conditions that may lead to competition restraint;

- The applicant shall not employ its market position after the merger to improperly determine, maintain or alter prices, or impede other enterprises' fair competition or other actions abusing its dominant market position;

- The applicant is required, within three years from the day after the receipt of this merger decision, to provide the Commission with the following information before the end of December each year: the operating scale of the keyword-based advertising, the numbers of employees and researchers in Chinese Taipei, and the industrial structure such as the market share, and so on.