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Merger Control in Dynamic Markets

- Contribution from Chinese Taipei –

This paper presents the existing merger regime in Chinese Taipei, and highlights important considerations and certain approaches to competition assessment when the Fair Trade Commission (hereinafter referred to as the "FTC") reviews merger notifications in fast-changing industries. Several case examples in this paper underline the impact of different market conditions on the FTC's decisions.

1. Merger control regime in Chinese Taipei

1. The current provisions relating to mergers under the Fair Trade Act (hereinafter referred to as the "FTA") are designed to prevent potential anti-competitive practices arising from acquisition or strengthening of dominant market position as a result of structural changes through notified mergers. A mandatory pre-merger notification is required for any transaction or acquisition meeting one of the notification thresholds under Article 11 of the FTA[1].

2. To clarify merger review standards and support businesses to promote compliance, the FTC enacted the "Guidelines on Handling Merger Filings" (hereinafter referred to as the "Merger Guidelines"). Non-exhaustive considerations regarding the FTC's assessment on the overall economic benefit and the effect of restricting competition, which vary depending on the type of merger (horizontal, vertical and conglomerate mergers), are set out in the Merger Guidelines. In a case where the FTC finds no significant competition concerns posed by a notified merger, a preliminary conclusion may be made that the overall economic benefit from the merger generally outweighs disadvantages resulting from competition restraint. Nevertheless, the FTC is required to further evaluate whether the

[1] Paragraph 1, Article 11 of the FTA states that any merger falling within any of the following circumstances shall be filed with the competent authority in advance: 1) A post-merger market share reaches one third of the market share; 2) Prior to the merger, one of the merger parties has one fourth of the market share; 3) Sales for the preceding fiscal year of the merger parties exceed the threshold amount publicly announced by the competent authority.

On 2 December 2016, the FTC announced the following turnover thresholds. Any merger falling under one of the circumstances needs to be notified to the FTC:

The combined worldwide sales in the preceding fiscal year of the enterprises in the merger exceed NT$40 billion and the domestic total sales of each of at least two of the enterprises in the merger in the preceding fiscal year also surpass NT$2 billion.

The enterprises in the merger are not financial institutions and the domestic total sales of one of the merger parties in the preceding fiscal year exceed NT$15 billion while the domestic total sales of one of the other merger parties in the preceding fiscal year also surpass NT$2 billion.

The enterprises in the merger are financial institutions and the domestic total sales of one of the merger parties in the preceding fiscal year exceed NT$30 billion while the domestic total sales of one of the other merger parties in the preceding fiscal year also surpass NT$2 billion.

benefits are greater than the disadvantages resulting from the competition restrictions when a likely effect of substantially lessening of competition is identified[2].

2. Competition assessment in dynamic markets

3. To assess the competition restraints resulting from a horizontal merger, the Merger Guidelines set out several key factors, including unilateral effects and market-specific anticompetitive effects. Although no specific timeframe for competition assessment is provided under the Merger Guidelines, the likelihood and timeliness of entry by potential competitors, and whether such entry would exert competitive pressure on the existing enterprises in the market shall be examined. If barriers to entry cannot be overcome to allow potential competitors to enter into the merger related market in a timely manner, the threat of a lengthy delay to entry may not be able to resolve or address competition concerns that an attempted merger may raise.

2.1. Assessing the level of competition in a dynamic market

4. When assessing the level of competition in rapid developing industries, one of the challenges the FTC faces is definition of relevant markets, which may shift from time to time as a result of various substitute products or services being launched in markets with new technologies. The starting point for the FTC to assess mergers in these markets includes changes to the pre-merger and post-merger market concentrations, market shares of merger parties and other market participants, as well as supply-side responses to mergers and buyers' responses to price changes.

5. If the merger at issue involves a heterogeneous market, the FTC will make further evaluation on the closeness of substitution between these products or services provided by merger parties, and the pre-merger profitability. To determine the degree of substitution, the FTC may look at a number of factors: 1) whether one product or service is the best alternative for another; 2) whether there is a highly overlapping customer base between these products or services; 3) how close the respective product positioning and pricing strategies are; 4) whether these products or services are delivered via the same distribution channels.

6. Tools used to define markets may include the Herfindahl-Hirschman Index (a measure of market concentration), consumer survey and diversion ratio as well as the GUPPI (gross upward pricing pressure index). In addition to quantitative analysis, the FTC also seeks industrial opinions and first hand experiences on the status quo in merger-related markets from research institutions, business associations, competitors, and upstream and

[2] Point 10 of the Merger Guidelines states that:

"In principle, the FTC shall further assess the overall economic benefit when adopting the regular procedure to review horizontal mergers that involve one of the following situations:

The aggregate market share of the merging parties achieves half of the total market.

The top two competitors on the relevant market account for two thirds of the total market share.

The top three competitors on the relevant market account for three quarters of the total market share.

Under the circumstances described in Subparagraphs 2 and 3 of the preceding paragraph, the aggregate market share of the merging parties shall achieve twenty percent of the total market."

downstream firms affected by notified mergers. The FTC may also consult with regulatory agencies if it is necessary.

7. For example, in the following merger case, where two karaoke service providers filed a notification to the FTC in February 2019, a controversial issue was the impact of technology development and the internet on the definition of the "audiovisual and singing service market". To define an appropriate market under competition law, the FTC conducted a questionnaire survey and applied different methodologies, including diversion analysis, critical loss analysis and regression analysis to this merger case.

Case 1: A merger between the top two karaoke service providers

8. Company A and Company B, the two largest karaoke service providers, filed their first merger notification to the FTC in May 2003. The relevant market was defined as "the audiovisual and singing service market" in which complex-service providers offer audiovisual, singing, catering services and karaoke stages. While the FTC did not prohibit the merger, the two companies did not complete the proposed transaction on the planned date. In December 2006, Company A and Company B notified a new merger proposal to the FTC. In this case the merger was prohibited due to smaller geographic market definitions. The product market was defined the same as in the FTC's previous decision, i.e. " the audiovisual and singing service market", but the FTC's investigation found that the attempted merger was likely to impair competition in urban areas, particularly in the northern region (where appeared to be duopoly). The merger might have also resulted in monopsony power, which could be used to impact upstream karaoke disc products and set hurdles for new entrants.

9. In February 2019, Company A and Company B proposed a further merger transaction and notified it to the FTC. As mentioned above, with advanced technology and development of the internet, there were more innovative types of audiovisual and signing services - for example, karaoke booths, singing apps and online KTV. The definition of the "audiovisual and singing service market" and the associated competition assessment had been challenged by market participants. During the evolution of such a dynamic market, the FTC analyzed information obtained from questionnaires and the merger parties through different methods (diversion analysis, critical loss analysis and regression analysis), in order to properly define the relevant market and conduct an assessment of competition.

10. The FTC's analysis indicated that in the case of an increase in the post-merger price, less than 2 per cent of consumers would switch to innovative types of KTV services (karaoke booths, singing apps and online KTV), and 30 per cent of consumers would switch from the post-merger party to other existing service providers. 57.5 per cent of consumers would remain with the post-merger party. Accordingly, the FTC did not consider innovative types of KTV services as substitutes of the audiovisual and singing services provided by the merger parties. The results of the regression analysis also showed that the proposed transaction gave rise to a unilateral effect and the overall economic benefit arising from the merger was not significant. The FTC subsequent reached a decision to block the merger.

2.2. Market entry and potential competitive pressure

11. Timeliness of entry usually refers to the period from when potential entrants plan for entry to the time when new entrants are able to remain viable in the relevant market. Some variables may have an influence on the timeliness of entry, including statutory restrictions, minimum capital requirements and acquisition of patents and other intellectual

property rights. In the aforementioned merger case regarding the two largest karaoke service providers, the FTC noted that all operators of premises with a karaoke system for business, including providers of online audiovisual and signing services could compete with the merger parties to some extent. Given that no statutory restrictions or minimum capital requirements were applied to the industry, any potential entrant would be able to timely enter into the relevant market within 1 to 2 years, thus the level of barriers to entry was not considered high.

12. Historical data can be used as an important reference to evaluate the likelihood of entry in a dynamic market. Together with historical patterns of entry and exit into and out of the relevant market, profitability of merger parties can be used to assess whether the relevant market will attract potential entrants. Assessment factors for the likelihood of entry may include: the existence of actual entrants in the relevant market; probability of market entry for operators who are granted licenses to run business; changes in consumer behavior and amendment of applicable laws and regulations.

13. To determine whether potential competitors may create competitive pressure on parties involving in a notified merger, from a historical perspective, the FTC may first observe scales of new entrants and competitive products in the relevant market. Then the FTC may further consider whether the merger parties are capable of using their markets shares to gain competition advantages (for instance, greater bargaining power), and potentially lead to higher barriers to entry. By doing so, the proposed merger may interfere with entry of potential competitors and lower their incentives to compete with the merger parties.

Case 2: A merger between two taxi companies

14. In a merger case proposed by taxi companies C and D in 2015, the FTC found that their combined market shares exceeded 50 per cent in the Greater Taipei joint operations area. Under the Merger Guidelines, this merger required further assessment to weigh the overall economic benefit against disadvantages resulting from competition restraint. The FTC eventually concluded that the overall economic benefit of the merger would outweigh the disadvantages resulting from competition restraint, and conditionally cleared the merger to prevent abuse of dominance. The FTC’s decision was underpinned by two main findings:

1. There were more than 30 registered taxi companies operating in the Greater Taipei joint operations area. If the post-merger party increased prices, taxi drivers could easily join other taxi companies without significant switching costs. Therefore, the FTC determined that the merger parties were not able to exercise the market power to unilaterally increase service charges.
2. In a taxi dispatch service market with lower barriers to entry, market participants were not restricted to registered taxi companies. In this market, other operators without licenses for passenger transport services (for example, helloTAXI, EZTAXI, UBER) would also deliver the same or similar dispatch services to compete with the merger parties and posed noticeable competitive pressure on incumbent firms.

3. Assessment of overall economic benefit and economic efficiency

15. Paragraph 1, Article 13 of the FTA states that the FTC may not prohibit any notified mergers if "the overall economic benefit" outweighs "the disadvantages resulting from competition restraint". With regard to the overall economic benefit, the FTC will consider the following factors: 1) economic efficiencies; 2) consumer interests; 3) whether the merging parties are in a weaker position prior to the merger; 4) Whether one of the merging parties is a failing enterprise; 5) Other tangible outcomes benefiting the overall economics. Economic efficiencies need to be verified to meet three requirements: 1) they can be achieved over the short term; 2) they cannot be accomplished in absence of the notified merger; 3) they can be passed through to consumers.

Case 3: Proposed acquisition of Communications Global Certification Inc. by Google Inc.

16. Google Inc. intended to acquire Communications Global Certification Inc. (hereinafter referred to as "CGC"), HTC Corporation's subsidiary, and filed a merger notification to the FTC in 2017. Google's main businesses covered internet search services, mobile operating systems and online advertisements, and CGC provided terminal certification testing services. The proposed acquisition was considered as a conglomerate merger, in which the merger parties did not compete with and did not face potential competition from each other. Moreover, the merger parties claimed that the merger would enhance capabilities of research and development of CGC's parent company, i.e. HTC Corporation, in emerging technologies such as virtual reality, augmented reality and artificial intelligence. The FTC recognized the pro-competitive claim and acknowledged that the proposed merger would benefit the development of related industries and ultimately stimulate innovation in the domestic industry. The merger was cleared as the FTC's investigation showed that Google was not able to leverage its market power through this merger, and the overall economic benefit of the merger outweighed disadvantages resulting from competition restraint.

17. In respect of merger-specific efficiency claims, the aforementioned merger between the two largest karaoke service providers serves as an example of the FTC's standpoint. The notified merger was purported to integrate human and financial resources through the merger with commitments proposed by the merger parties to update existing facilities and equipment, invest in research and development and the design of equipment, and engage in technology development programs associated with entertainment services. The FTC found that each of the merger parties could proceed with resource integration and improvements to service quality independently and respectively in response to competition in the relevant market. The merger parties failed to prove that the benefit could only be brought about through the merger, and subsequent investment and research and development would not occur in the absence of the merger. Therefore, the FTC did not adopt the efficiency claim proposed by the notifying parties.

4. Merger remedies

18. Under Paragraph 2, Article 13 of the FTA, the FTC may impose conditions or undertakings on its merger decisions in order to ensure that the overall economic benefit of the merger outweighs the disadvantages resulting from competition restraint. In an industry featuring dynamic competition, however, the competitive environment changes rapidly over time and future changes in market structure are difficult to predict. In view of higher costs of structural remedies, the FTC may intend to adopt behavioral remedies in such industries. The case below presents several behavioral remedies (prohibitions of discrimination, group boycott, interference in entry and exit into and out of the relevant market) required by the FTC to a joint venture for mobile payments in order to prevent anti-competitive issues arising from the merger.

Case 4: Mobile payments joint venture

19. The FTC decided in 2013 not to prohibit a joint venture, set up by five telecommunication companies and one company issuing electronic stored-value cards to operate a Trust Service Management (TSM) platform. Considering the joint venture involved horizontal integration that might raise anti-competitive or unfair competition concerns, the FTC attached 11 conditions (structural and behavioral remedies) to minimize competition restrictions incurred, and secure the overall economic benefit. These conditions included:

1. Structural remedies: (i) upon establishment of the joint venture, the total shares held by, or the capital contributions from, the five telecommunication companies (and their subsidiaries and affiliates) can not exceed one half of the voting shares or total capital of the joint venture for four years (ii) upon establishment of the joint venture, the shares held by, or the capital contributions from, the company issuing electronic stored-value cards (and its subsidiaries and affiliates) can not exceed one tenth of the voting shares or total capital of the joint venture.
2. Behavioral remedies: without justification, the newly-established joint venture and the merger parties can not prohibit competitors (including mobile communications service providers and electronic stored-value card issuers) from entering or exiting from (through share holdings, acquisition or disposal) the joint venture. The joint venture and the merger parties should make a lawful public offering based on the principle of open and free capital investment, and qualified investors would include, but not be limited to, the competitors of the merger parties.
3. Monitoring measures: after its establishment, the joint venture was required to provide the FTC with the following information before the end of March each year for four consecutive years: a list of shareholders, total sales in the previous year, the number and names of service providers, regulations on operation of the TSM platform, and new business items not registered in the merger notification (if any).

5. Conclusion

20. The "overall economic benefit" and "disadvantages resulting from competition restraint" are the FTC's assessment criteria in reviewing merger notifications. The Merger Guidelines provide details on a number of considerations, including the FTC's evaluation of anti-competitive effects and overall economic interests. Nevertheless, the FTC may take different approaches in its competition assessments to address the characteristics of industries in question, particularly in fast-changing industries. For example, the FTC may further take into account relevant factors and available tools in dealing with digital economy effects on industries.

21. The FTC will also consider market data or opinions provided by regulatory agencies, research institutions, specialists and academic experts, business associations and related businesses in the process of assessing unilateral effects, coordinated effects and other potential anti-competitive effects. If the FTC determines any competition concerns, it can exercise its authority to impose proper conditions or undertakings to ensure that the overall economic benefit outweighs the disadvantages resulting from competition restraint.