

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE****Suspensory Effects of Merger Notifications and Gun Jumping - Note by Chinese Taipei****27 November 2018**

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More documents related to this discussion can be found at

[www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm](http://www.oecd.org/daf/competition/gun-jumping-and-suspensory-effects-of-merger-notifications.htm)

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## Chinese Taipei

To share enforcement experience of the Fair Trade Commission (hereinafter referred to as the “FTC”), this paper outlines the current merger regime in Chinese Taipei, and provides several case examples in relation to gun jumping.

### 1. Merger control regime in Chinese Taipei

1. Amendments to the Fair Trade Act (hereinafter referred to as the “FTA”) in 2002 changed merger control from an “ex-ante approval regime” to a “pre-notification regime” in consideration of the relevant legislation in other countries with long histories of competition law enforcement. Currently there are five types of mergers<sup>1</sup> subject to the merger control under the FTA while six types of transactions are exempt from notification<sup>2</sup>. Both market share<sup>3</sup> and turnover<sup>4</sup> are adopted by the FTC as criteria for the notification thresholds. In other words, for any transaction or acquisition falling within one of the merger types, unless specified otherwise, one or all of the merger parties involved are required to notify the FTC solely or jointly when the combined or individual market share of the merger party(s) meets either of the thresholds, or when their respective annual sales amounts satisfy the turnover thresholds.

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1 The term “merger” defined in the FTA refers to:  
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

2 Any of the following circumstances are exempt from merger review under the FTA:  
Where any of the enterprises participating in a merger, or its 100% held subsidiary, already holds no less than 50% of the voting shares or capital contribution of another enterprise in the merger and merges such other enterprise;  
Where enterprises of which 50% or more of the voting shares or capital contribution are held by the same enterprise merge;  
Where an enterprise assigns all or a principal part of its business or assets, or all or part of any part of its business that could be separately operated, to another enterprise newly established by the former enterprise solely;  
Where an enterprise, pursuant to the proviso of Article 167, Paragraph 1 of the Company Act or Article 28-2 of the Securities and Exchange Act, redeems its shares held by shareholders so that its original shareholders’ shareholding falls within the circumstances provided for in Article 10, Paragraph 1, Subparagraph 2 herein;  
Where a single enterprise reinvests to establish a subsidiary and holds 100% shares or capital contribution of such a subsidiary;

Any other designated type of merger is promulgated by the competent authority.

3 The market share thresholds set out in the FTA are as follows:

A post-merger market share reaches one third of the market share;

Prior to the merger, one of the merger parties has one fourth of the market share.

4 The turnover thresholds established by the FTC are as follows:

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 merging parties in the preceding fiscal year exceed NT\$15 billion while the domestic total sales of one of the other merging 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 merging parties in the preceding fiscal year exceed NT\$30 billion while the domestic total sales of one of the other merging parties in the preceding fiscal year also surpass NT\$2 billion.

2. Up to the present, the FTC has not obtained search and seizure power to conduct unannounced onsite inspections into alleged gun jumping cases. However, tools for administrative investigations are applicable to merger violations, for example, notifying the related parties and relevant agencies to submit necessary documents, and notifying the related parties to appear at the FTC's office to make statements. Once a breach of a notification requirement is found, the FTC may impose appropriate administrative sanctions on the merger parties. Under the FTA, the FTC may (1) prohibit such merger, (2) prescribe a period for such enterprise(s) to divest, (3) dispose of all or a part of the shares, (4) transfer a part of the operations, (5) remove certain persons from positions, or (6) make any other necessary dispositions. In addition, the FTC may also impose an administrative fine(s) between NTD 200,000 and NTD 50 million on the merger party(s) in violation of the FTA and imposed certain conditions or obligations, ordering the merger party(s) to file a notification.

## 2. FTC's empirical experience in gun jumping cases

3. The FTC generally becomes informed of gun jumping through complaints filed by internal employees, referrals given by other government agencies or media reports. Most merger violations, which the FTC has investigated, can be categorized into two different scenarios: 1) where an enterprise fails to notify a relevant transaction or acquisition of control that requires notification; or 2) where it proceeds with the transaction or acquisition that has been prohibited by the FTC. As mentioned above, the potential sanctions include administrative fines, and dispositions to prohibit mergers at issue, or to command the enterprise to file a merger notification. When determining administrative fines, the FTC will consider various factors including motivation, purpose, and expected improper benefit of the violation; the degree of harm incurred from the violation, the duration of the unlawful conduct and benefits derived therefrom.

4. Since 1999, the FTC has investigated 15 cases concerning merger violations in the cable TV market, department store retailing market, food industry and taxi industry as well as the market composed of public natural gas utilities. These cases are mainly related to horizontal and conglomerate mergers. The scale of most infringing enterprises is not large so the proportionate fines are not noticeably high. Furthermore, the number of merger violations has remained around one or two every year, but in the last three years, the annual number has decreased to less than one (i.e. two cases over three years). It shows that there may not be many gun jumping cases in Chinese Taipei. One of the possible factors contributing to this experience is that the FTC continues to advocate for competition in industries and communicate with stakeholders in relevant markets. Another factor that may apply to large-scale enterprises is the importance of business reputation and goodwill.

5. For a listed company, any change that may significantly affect its share structure or management will often attract media attention. Through media reports, the FTC can closely monitor changes in shares of or control over such a company. While doing so, in the case where a listed company fails to file a notification prior to a merger, the FTC, relatively speaking, can promptly detect the alleged violation and initiate an ex-officio investigation. Given that the FTC's investigation may adversely impact on business reputation and goodwill, the listed merger party(s) may not choose to circumvent the mandatory notification obligations to engage in gun jumping, and may not risk an increased level of scrutiny or being prohibited by the FTC from proceeding with the merger. As a result, the FTC observes that the listed merger party(s) tends to file a merger notification in a timely

and proper manner when the change falls into any of the merger types set out in the FTA, and the listed merger party(s) satisfies any of the statutory notification thresholds.

### 3. Case Examples

#### 3.1. Failure to notify acquisitions of shares and controls of five public natural gas utilities<sup>5</sup>

6. The FTC received a complaint from a retired government employee alleging that Family A violated the FTA to acquire controls over five public natural gas utilities, and requesting an investigation into these acquisitions.

7. In Chinese Taipei, there were 25 public natural gas enterprises- each was a de jure monopolist engaging in supply of “household natural gas” and “non-household natural gas” in its designated area. Given the differences of prices, regulations and customers between these two products, the FTC defined the relevant product market as the “household natural gas market”. Regarding the relevant geographic market, every public natural gas enterprise is restricted to operate and supply natural gas in the area delineated by the competent authority under the Natural Gas Enterprise Act. For example, a geographic segmentation in a municipality has to be same as a “district”, but in a county (or city) the geographic market is defined in line with the area covered by a “township” (or “urban area”).

8. After the FTC’s investigation, it found that Family A acquired more than one third of shares of five public natural gas utilities and controlled their business operations, and appointments or discharges of personnel through 7 companies controlled by, controlled and affiliated with Family A or some second-level relatives in Family A. Every legal entities and related persons involved in the acquisitions were required to notify the FTC, and a failure to file a merger notification constituted a violation of the FTA.

9. Notwithstanding this case only involved changes in ownership percentages of the public natural gas utilities (neither horizontal nor vertical mergers), held by controlling companies, the FTC determined NTD 1.2 million as a basic amount of an administrative fine in consideration of high market shares of public natural gas utilities and the maximum fine, approximated NTD 1 million imposed on similar violations by the FTC in the past. Among the infringing enterprises, the fine amount of one public natural gas utility increased to NTD 1.8 Million due to its high sales volume and the fine amount of another utility decreased to NTD 600,000 with its lower sales volume. The individual amounts of the remaining infringing enterprises were calculated on the basis of the number of seats on Board of Directors, ranging from NTD 200,000 to 900,000. The aggregate fines amounted to NTD 5.4 million in this case. Following the FTC’s order, the infringing enterprises filed merger notifications in August 2018. Until now, they are still under the FTC’s investigation.

#### 3.2. Failure to notify frequent joint operations of two cable TV operators

10. The National Communication Commission (NCC) informed the FTC of alleged joint operations of Company B and Company C without going through merger review under the FTA. Both companies competed with each other in the relevant market along

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<sup>5</sup> Subparagraph 5, Article 3 of the Natural Gas Enterprise Act provides that natural gas utility enterprise refers to enterprises, which supply natural gas to households, commercial sectors, and service businesses via natural gas conduit network.

with overlapping shareholders. The NCC assumed that the two companies might not be familiar with the provision of joint operations under the FTA, leading to an unintentional failure to notify in violation of the FTA.

11. Given that the cable TV industry in Chinese Taipei was governed under specific regulations, the relevant markets were defined as “cable radio and television services markets in Wanhua district and Zhongzheng district in Taipei”. In May 2014, the relevant markets simply comprised two operators, i.e. Company B and C. For the second quarter of 2014, their respective market shares were 76.5% and 23.5%.

12. The FTC’s investigation found that Company B began to deal with monthly fees of Company C’s customers, and they engaged in various coordination conducts, including joint collection of fees for cable TV, sharing control rooms and a television production studio, and joint purchase of equipment in relation to cable TV, as well as co-production of TV programs and co-promotion. Furthermore, same employees worked for the two companies at once in personnel, financial, engineering, secretary and legal departments, and the companies also jointly organized educational trainings. There was evidence that the two companies jointly operated businesses to provide cable TV services on a regular basis and they were fully integrated in aspects of administration, personnel and financial management. Furthermore, with market shares reaching the notification thresholds, the two companies were obligated to notify the FTC of the relevant merger. The FTC concluded that the failure to notify constituted a violation of the FTA, and imposed NTD 850,000 and NTD 250,000 on Company B and Company C respectively and ordered them to file a merger notification. To comply with the FTA and the FTC’s decision, the two companies filed a merger notification in March 2017, which was cleared by the FTC afterwards.

13. In this case, factors considered in determining fines included:

1. Company B and Company had engaged in unlawful joint operations for more than a year.
2. In 2013, the sales amount of Company B was NTD 360 million, and the sales amount of Company C was NTD 120 million.
3. In the second quarter of 2014, the numbers of subscribers for Company B and Company C approximately added up to 52,000 and 16,000 households respectively. Compared to 60,000 to 110,000 subscribers of other cable TV operators in their own designated areas in Taipei City and few cable TV operators located in the proximity of New Taipei City, the two companies had relatively less subscribers.
4. The two companies violated the FTA for the first time and fully cooperated during the FTC’s investigation process.

### **3.3. Enterprises implemented a merger despite it been prohibited by the FTC**

14. The aforementioned cases refer to the scenario in which enterprises fail to file merger notifications to the FTC when their market shares or turnovers reach the statutory thresholds. Nevertheless, the following two cases – unlawful mergers between the top two Karaoke TV businesses, and an unlawful merger between two manufacturers of instant noodle- illustrate another scenario in which two competitors proceed with the merger in defiance of the FTC’s prohibitive decision.

### ***3.3.1. Unlawful mergers between the top two Karaoke TV (KTV) businesses:***

15. On 9 May 2003, KTV I and KTV II filed a merger notification to the FTC and noted that KTV I attempted to merge KTV II with an agreed condition where KTV I would be a surviving company and KTV II would be a disappearing company after completing the merger. While the FTC did not prohibit the merger, the two KTV businesses discontinued the merger due to divergent opinions on future planning of business operations.

16. Upon a later complaint, the FTC launched an investigation into an alleged violation of KTV I. Its investigation indicated that KTV I provided false information in the notification as of 9 May 2003. Consequently, the FTC made a decision on 4 August 2004 to fine KTV I NTD 400,000.

17. On 26 December 2006, KTV I and KTV II notified a new merger proposal to the FTC; nevertheless, the merger was prohibited by the FTC on 9 March 2007. The FTC's further investigations pointed out that, in spite of the FTC's prohibitive decision, the two companies continued to engage into frequent joint operations and acquired controls over business operation and personnel for two times. For these two separate violations, the FTC imposed NTD 1.5 million and NTD 4 million on KTV I, and NTD 3 million and NTD 5 million on KTV II, in 2010 and 2014 respectively.

### ***3.3.2. An unlawful merger between two manufacturers of instant noodle:***

18. On 10 September 2008, the FTC prohibited a merger between Company D and Company E, both were manufacturers of instant noodle. However, the FTC's investigation found that in October 2008 Company D acquired controls of business operations or personnel of Company E, amounting to gun jumping conduct. As a result, Company D was fined NTD 500,000 on 24 February 2009.

19. In fact, Company D held 33.3 % of Company E shares before it proposed an acquisition of shares for the first time. On 2 July 2010, Company D attempted to acquire 17.45 % of Company E shares and thereby Company D could own 50.75% of Company E shares. For this new proposed merger, the FTC made a decision to prohibit it on 1 September 2010. In April 2018, Company D filed the FTC a new proposal with the aim of acquiring 20 % of Company E shares so as to hold 53.3% shares in total. This merger is still under the FTC's review.

## **4. Conclusion**

20. A "pre-notification regime" has been expressly adopted under the FTA in Chinese Taipei. Briefly speaking, for any transaction or acquisition falling into one of the merger types defined in the FTA without application of exclusionary types, the merger party(s) involved is required to file the relevant merger to the FTC when the merger party(s) meets any of the notification thresholds. Gun jumping constitutes a violation of merger provisions of the FTA, which may trigger the FTC's investigation.

21. When tackling with gun jumping cases, the FTC determines fines on a case-by-case basis and takes into consideration all factors set forth in the relevant law and regulations. The FTC will also order infringing enterprises to file relevant mergers.

22. As mentioned above, there are only few cases in the cable TV market, food industry and public natural gas touching on gun jumping issues. These cases are mainly related to horizontal and conglomerate mergers with relatively smaller merger parties and lower

administrative fines. The important reasons to explain the low number of merger violations may be the high percentage of clearance of reviewed mergers<sup>6</sup> and the FTC's constant advocacy as well as increasing public awareness of the FTA.

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<sup>6</sup> The 2017 yearbook of statistics in relation to the FTC enforcement activities showed that there were 894 merger notifications received by the FTC from 2002 to 2017, of which only 7 mergers were prohibited and 99.21% of mergers were cleared.