Organisation for Economic Co-operation and Development

DAF/COMP/WD(2018)27

Unclassified **English - Or. English**

4 May 2018

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Non-price Effects of Mergers - Note by Chinese Taipei

6 June 2018

This document reproduces a written contribution from Chinese Taipei submitted for Item 4 of the 129th OECD Competition committee meeting on 6-8 June 2018.

More documents related to this discussion can be found at www.oecd.org/daf/competition/non-price-effects-of-mergers.htm.

Please contact Mr. Antonio Capobianco if you have any questions about this document
[E-mail: Antonio.Capobianco@oecd.org]

JT03431203

Chinese Taipei

1. This report will introduce regulations of the Fair Trade Act (hereinafter referred to as the "FTA") on reviewing merger cases, and will also illustrate factors taken into consideration and evaluation methods of the Fair Trade Commission (hereinafter referred to as the "FTC") when reviewing mergers in Chinese Taipei.

1. Regulations of the Fair Trade Act on Merger Review

2. A pre-merger notification regime has been established since the 2002 amendments to the FTA. The purpose of pre-notification is to prevent those mergers that may result in anti-competitive effects by means of the ex-ante regulation of market structure.

3. According to Article 13 of the FTA, the FTC may not prohibit any of the mergers filed if the overall economic benefits of the merger outweigh the disadvantages resulting from competition restraints. The FTC may also impose conditions or undertakings on any of the decisions in order to ensure that the overall economic benefits of the merger outweigh the disadvantages resulting from the competition restraint. Thus, the net effect between the economic benefits and the disadvantages in terms of the competition restraints resulting from the merger is the basis of the substantive test.

4. The FTC has established the "Fair Trade Commission Disposal Directions on Handling Merger Filings" (hereinafter referred to as the "Merger Directions") to set standards when reviewing mergers for improving transparency. In practice, when reviewing different types of mergers, the FTC considers different factors in weighting the disadvantages resulting from competition restraints. The factors taken into consideration by the FTC when determining the competition restrictions and overall economic benefits include some non-price effects of the merger. If the FTC determines that the potential competition restrictions are deemed to be insignificant after reviewing factors that may restrict competition, it may be considered that the overall economic benefits of the merger are greater than the disadvantages resulting from the competition restrictions. If the FTC determines that the potential competition restrictions are considered to be significant, the overall economic benefits shall be evaluated to determine whether the benefits are greater than the disadvantages resulting from the competition restrictions. When reviewing merger cases, the FTC may consider the opinions of the competent authority for the industry of concern to assess the overall economic benefits and disadvantages from the competition restrictions thereof incurred.

5. When assessing the effects of the likely competition restrictions thereof incurred in horizontal mergers, the FTC considers unilateral effects, coordinated effects, market entry, countervailing power and other factors that have an influence on competition. If a horizontal merger meets any of the following circumstances, it may be presumed to raise significant competition concerns: (i) the aggregate market share of the merging enterprises reaches half of the total market; (ii) the top two competitors in the relevant market account for two thirds of the total market share, and the aggregate market share of the merging enterprises amounts to twenty percent or more of the total market; or (iii) the top three competitors in the relevant market account for three quarters of the total market share, and the aggregate market share of the merging enterprises accounts for twenty percent or more of the total market.

6. With regard to vertical mergers, the FTC considers the following factors in determining the likely effects on competition restrictions: (i) the possibility for other competitors to choose trading counterparts after the merger; (ii) the level of difficulty to enter the relevant market for businesses not participating in the merger; (iii) the possibility for the merging parties to abuse their market power in the relevant market; (iv) the possibility of raising rivals' costs; (v) the possibility of concerted actions occurring as a result of the merger; and (vi) other factors likely to lead to market foreclosure.

7. In a conglomerate merger, the FTC considers the following factors when determining whether potential competition exists between the merging enterprises: (i) the possibility of a change in regulations and its impact on the cross-industry operations of the merging enterprises; (ii) the possibility of technological improvements enabling the merging enterprises to engage in cross-industry operations; (iii) whether any of the merging enterprises originally had the intention to develop cross-industry operations; and (iv) other factors likely to affect market competition. When the existence of significant potential competition is deemed likely in a conglomerate merger according to the assessment described above, further analysis of the likely effects on competition restrictions shall be taken into account in regard to the post-merger status similar to those in a horizontal or vertical merger.

8. If a merger is considered likely to entail competition restrictions, the applicant(s) may submit proof of the following factors regarding the overall economic benefits to be assessed by the FTC: (i) efficiency; (ii) consumers' interests; (iii) one of the merging parties is originally a weaker competitor; (iv) one of the merging parties is a failing firm; and (v) other concrete evidence of the overall economic benefits to be expected. The economic benefits stated above shall meet the following requirements: (i) they can be brought to realization within a short period of time; (ii) they cannot be achieved other than through the merger; (iii) they can reflect consumers' interests.

9. In addition, for specific industries, such as for cable TV, telecommunications, digital convergence, and finance, the FTC has also established corresponding administrative rules for such enterprises to follow as well as to serve as reference when the FTC reviews merger cases. The FTC has further proposed the following factors to be taken into consideration when determining the overall economic benefits of mergers in specific industries, such as innovation, quality and product diversity.

10. For vertical mergers that are likely to incur competition restrictions in the cable TV industry, the FTC will further consider: (i) Will the merger drive the digitalization of cable TV? (ii) Will the merger diversify program content? (iii) Will the merger benefit competition between platforms? (iv) Will the merger drive digital convergence developments and competition? and (v) Will the merger provide consumers with more options?

11. For mergers in the telecommunications industry, the FTC may evaluate: (i) the effects of the merger on improving production efficiency, allocation efficiency, and dynamic efficiency; (ii) Will the merger increase competition in the market? (iii) Will the merger help provide a broader scope, wider variety and high quality services? and (iv) Will the merger benefit international competitiveness?

12. For mergers in the digital convergence industry, the FTC will further consider: (i) Will the merger contribute to competition in the relevant market? (ii) Will the merger enhance service provision in respect of quality, variety or geographic coverage? (iii) Will the merger enhance competition power in the global society and promote research as well

as development? (iv) Will the merger include any network externalities in terms of consumption? (v) How will the merging enterprises transform their internal profits into an externality? and (vi) Will the merger contribute to content digitalization, application diversification, and provide innovative digital convergence services?

13. When reviewing mergers in the financial sector, the FTC will also consider: (i) the impact on the stability and integrity of the financial markets; (ii) the impact on the availability and convenience of financial services; (iii) the impact on innovation in financial services; and (iv) policies formulated by the competent authority that are relevant to the financial sector.

2. Case Study：T Optical Platform Co., Ltd. and Eastern Broadcasting Co., Ltd.

14. T Optical Platform Co., Ltd. (TOP), the Multiple System Operator (MSO, i.e., an enterprise that controls two or more cable television system operators), filed a pre-merger notification with the FTC. TOP planned to acquire 65% of the shares of Eastern Broadcasting Co., Ltd. (EBC) through Subsidiary A. TOP already owned shares of four cable television system operators, and Subsidiary A and EBC had five and eight channels, respectively. This case complied with the definition of a merger in the FTA and reached the threshold required to file a pre-merger notification. The four cable television system operators had to obtain a license from their upstream satellite channel program providers before broadcasting programs. Subsidiary A and EBC were both satellite channel program providers. TOP represented four cable television system operators in negotiating channel license affairs with satellite channel program providers. Hence, the case involved both a horizontal merger and a vertical merger.

15. Besides posting a public announcement on its website, the FTC sent letters to request that the National Communications Commission (hereinafter referred to as the "NCC"), the Consumer Protection Committee, related associations or institutes and related enterprises provide their opinions in writing to collect opinions from different sectors. The FTC analyzed competition restraints specified in the Merger Directions and overall economic benefits listed by administrative rules relevant to the cable television industry, and took industry information and the opinions of various parties into consideration as well. On this basis, the FTC concluded that:

1. The merger would not have a significant effect on the market structure of the cable television system operator market, MSO market, and satellite channel program provider market.

2. Analysis of competition restrictions incurred by a horizontal merger: Subsidiary A was required to pay a fee to cable television system operators before its five channels could be broadcasted. TOP would acquire several popular channels after the merger. TOP had the lowest number of subscribers among MSOs in Chinese Taipei. Hence, if the trading counterpart for a channel license was an MSO with stronger bargaining power, or if the MSO was also the agent for popular channels, then the countervailing power would prevent TOP from engaging in tie-in sales of its original channels and new channels. However, the motivation and possibility for TOP to force tie-in channel programs on cable television system operators with weaker bargaining power could not be ruled out.

3. Analysis of competition restrictions incurred by a vertical merger: (i) Based on the current situation in the domestic cable television market, competitors still had many

trading counterparts to choose from after the merger. (ii) The merger did not change regulatory or investment restrictions on cable television services and satellite channel program supply. (iii) The merger did not affect the market structure of the relevant market, and enterprises participating in the merger still faced high levels of competition. Hence, the merger would not increase the probability of the enterprises abusing their market power. (iv) EBC's channels were among the top 30 in ratings, and two of them were the most commonly viewed news channels. Hence, TOP might engage in discriminatory treatment in its trading conditions when licensing EBC's channels to its own cable television system operators and their competitors. Furthermore, the cost to competitors of obtaining licenses for the channels would increase. (v) The merger did not change the market structure of the relevant market, and the rate charged for cable television services was controlled by the competent authority. Hence, the merger did not increase the transparency of rates. The merger therefore did not increase the probability of a concerted action.

4. Assessment of overall economic benefits: The merger could bring in capital for the merging enterprises to speed up the improvement of channel content and image quality as well as help accelerate digital convergence. Since cable television system operators involved in the merger had already completed cable TV digitalization, the merger would not have much of an effect on cable TV digitalization. However, the cable television system operators of TOP had moved the position of a specific channel without permission from the NCC, and the channel was subsequently removed from MOD. Hence, as to whether the merger would promote cross-platform businesses competition, the FTC still had reservations.

16. Current development trends in digital convergence and competition among cross-platform businesses might reduce the power of the merging enterprises in the satellite channel program supply market, and lower the above competition concerns. The FTC determined not to prohibit the merger, but attached the following undertakings to eliminate disadvantages from competition restraints being incurred as a result of the merger and ensure overall economic benefits: (i) In principle, Merging enterprises and the companies they controlled or their affiliates were to make the two news channels of EBC available on multimedia content transmission platforms or other public broadcasting within six months after the merger was to take effect. (ii) The enterprise filing the merger notification had to provide licensing conditions for channels produced by or by agents of the merging enterprises and their controlling company or their affiliates (including but not limited to the licensing fee, contract period, and basis for calculating the number of subscribers), regulations on sales (including but not limited to regulations on discounts on the price of each channel and broadcasting rights for the number of channels purchased), and the names and quantities of channels purchased by cable television system operators in Chinese Taipei to the FTC on June 1st of each year for five years starting in the year of the merger.

3. Conclusion

17. The FTC reviews merger cases based on the assessment of the overall economic benefits and disadvantages resulting from competition restraints. The Merger Directions lists the factors to be taken into consideration by the FTC when assessing competition restraints and the overall economic benefits. Administrative rules for the cable TV, telecommunications, digital convergence and financial industries further provide factors that should be taken into consideration when the FTC determines the overall economic

benefits of mergers in the above industries. Except for unilateral effects and coordinated effects that may involve price effects of the merger, the factors listed by the Merger Directions and administrative rules of specific industries are mostly non-price effects. Hence, the FTC usually considers non-price effects when determining the competition restraints and overall economic benefits of mergers, and also considers the information and opinions provided by relevant competent authorities, research institutes, experts and scholars, related associations or institutes, and related enterprises as well. If the FTC deems it necessary to attach conditions or undertakings to the merger to ensure that the overall economic benefits are greater than the disadvantages resulting from the competition restraints, the conditions or undertakings may be related to the results of evaluating the non-price effects.