Unclassified **DAF/COMP/WP3/WD(2014)3**

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

12-Feb-2014

English - Or. English

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Working Party No. 3 on Co-operation and Enforcement

INVESTIGATIONS OF CONSUMMATED AND NON-NOTIFIABLE MERGERS

-- Chinese Taipei --

25 February 2014

This note is submitted by Chinese Taipei to the Working Party No. 3 of the Competition Committee FOR DISCUSSION under Item III at its forthcoming meeting to be held on 25 February 2014.

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JT03352322

− Chinese Taipei −

1. The merger notification regime in Chinese Taipei

1. The merger regulation under the Fair Trade ACT (FTA) in Chinese Taipei adopts the "pre-merger notification regime." For any merger transaction falling into the definition in Article 6[1] and meeting the threshold for merger notification[2] in Paragraph 1, Article 11 of the FTA, the merging parties shall file a notification with the Fair Trade Commission (FTC) in advance.

2. Paragraph 3,4 and 5, Article 11 of the FTA provides as follows:

> *"Enterprises shall not proceed to merge within a period of 30 days from the date the Central Competent Authority accepts the complete filing materials, provided that the Central Competent Authority may shorten or extend the period as it deems necessary and notifies the filing enterprise of such change in writing.*
>
> *Where the Central Competent Authority extends the period in accordance with the proviso of the preceding paragraph, such extension may not exceed 30 days; for cases of extension, decisions on the filing shall be made in accordance with the provisions of Article 12.*
>
> *Where the Central Competent Authority fails to notify of the extension as referred to in the proviso of Paragraph 3 or makes any decision as referred to in the preceding paragraph when the period is going to expire, the enterprises may proceed to merge provided that the merger may not proceed under any of the following circumstances: 1. Where the filing enterprises consent to a further extension of the period. 2. Where the filing contains any false or misleading item."*

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[1] The term "merger" as used in the FTA refers to the following transactions:

1. where an enterprise and another enterprise are merged into one;
2. where 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;
3. where 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;
4. where an enterprise operates jointly with another enterprise on a regular basis or is entrusted by another enterprise to operate the latter's business; or
5. where an enterprise directly or indirectly controls the business operation or the appointment or discharge of personnel of another enterprise.

[2] Any merger that falls within any of the following circumstances shall be filed with the central competent authority in advance:

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

The threshold amount of the sales referred to in Subparagraph 3 of the preceding paragraph may be announced separately for financial enterprises and non-financial enterprises by the Central Competent Authority.

2. Dispositions on non-notifiable mergers

3. The FTA clearly points out that notification is required for all mergers meeting the thresholds of market shares or sales revenue. In consideration of the stability of the legal system, for enterprises which do not meet the above threshold, the FTC cannot request merging parties to file a notification. This is also the reason why the FTC sets the threshold for merger notification to select those mergers with certain impacts on the market. In addition, merger are also exempted from the FTA in the following situation where the Financial Competent Authority deems it necessary to adopt an emergency measure prescribed in financial laws such as the Banking Act, Insurance Act and the Financial Institutions Merger Act, and where such measure does not have any significant adverse effect on the competition in financial markets. The above laws state expressly these specific mergers are exempted from application of the FTA, and thus the FTC has no room to intervene. To sum up, for non-notifiable mergers, regardless of whether the mergers are completed or not, the FTC cannot intervene, review, or challenge in principle.

2.1 Case 1: The FTC's stance on non-notifiable mergers regarding the franchise agreement

4. In the early stages of the implementation of the FTA (Feb. 1992 to Jan. 2002), the FTC adopted the "ex-ante approval regime" for the merger review, and only set a single threshold of the sales amount. Retailers such as convenience store chains needed to acquire the FTC's merger approval before signing franchise agreement. However, in order to well allocate the administrative resources, the FTA was amended in Feb. 2002 to adopt the "pre-merger notification regime". It also introduced the duel thresholds of the sales amount. As a result, since the merged parties, namely franchisee who are either individual sole proprietorships or partnerships, do not meet the lower threshold of NT$1 billion sales in the previous fiscal year, no notification is required to be filed with the FTC in advance. In terms of market share thresholds, it is rather hard to define the market of convenience store chains and, therefore, the FTC does not apply market share thresholds prescribed in Subparagraph 1 and 2, Paragraph 1, Article 11 of the FTA to such cases at present for merger filing.

5. In order to monitor the structural change of the convenience store chain market and to prevent the franchising headquarters from dominating the market through "creeping mergers," the FTC reached the following resolution on November 28, 2012 at the 1099th Commissioner's Meeting: "due to differences in defining relevant market and its market share of convenience store chains, the FTC shall sustain its decision made by the 536th Commissioner's Meeting, which the franchising of a convenience store chain is not required to file a merger notification in advance. However, the FTC will continue conducting market survey on convenience store chains for further evaluation of the needs to include franchises into current merger regime."

3. Review of notifiable mergers but failed to file with the FTC or proceed with merger despite being prohibited

6. According to Article 13 of the FTA, where an enterprise fails to file a notification for any merger being notifiable, or proceeds with the merger despite being prohibited, the FTC may (1) prohibit such merger, (2) prescribe a period for such enterprise(s) to split, (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. For an enterprise violating the disposition made by the central competent authority pursuant to the preceding paragraph, the FTC may (1) order the dissolution of such enterprise(s), or (2) the suspension or (3) the termination of their operations. In addition, the FTC may impose an administrative fine between NT$100,000 and NT$50million on such enterprise(s), pursuant to Paragraph 1, Article 40 of the FTA.

7. Accordingly, when an enterprise fails to file a merger notification, or proceeds with the merger despite being prohibited, the FTC retains its authority to review such mergers based on the FTA. Since the types of the above administrative dispositions are adverse actions of a punitive nature under Article 2 of the Administrative Penalty Act, they are subject to the three-year time limit prescribed in Article 27 of the Administrative Penalty Act. In other words, where the FTC intends to sanction enterprises for failing the above notification obligation, it has to act within statutory time limit, beginning from the date of the merger.

3.1 Case 2: Mergers failing to file a pre-merger notification-Nexon Co., Ltd., and Gamania Digital Entertainment Co., Ltd., failed to file pre-merger notification

8. The FTC received a complaint alleging that Nexon Co. Ltd. (hereinafter "Nexon") acquired more than one third of the voting shares of Gamania Digital Entertainment Co., Ltd. (hereinafter "Gamania") and continued to purchase its shares in the public market. Gamania has more than one fourth of the market share in the domestic online game market; however, Nexon failed to file a pre-merger notification with the FTC.

9. The FTC's investigation showed that, as of Apr. 6, 2012, Nexon was in possession of 34.6% of the issued shares of Gamania, it fell into the merger transaction type of Subparagraph 2, Paragraph 1, Article 6 of the FTA: possession or acquisition of more than one-third of the shares or capitals. Furthermore, statistics on revenues of the online game industry from the Industrial Development Bureau of the Ministry of Economic Affairs showed that the output value of the domestic online game market in 2011 was about NT$24.7 billion, including NT$5.274 billion in revenues from overseas markets and NT$19.426 billion from the domestic market. The sales of Gamania in 2011 reached NT$5.544 billion, which was accounted for about 28.54% of the domestic market share, the second largest in the market; it also met the one-fourth market share threshold for pre-merger notification set forth in Subparagraph 2, Paragraph 1, Article 11 of the FTA.

10. The FTC concluded that Nexon had violated Article 11 of the FTA for failing to notify the FTC, and imposed an administrative fine of NT$0.9 million on the company pursuant to Article 13 and Article 40 of the FTA.

3.2 Case 3: Mergers despite being prohibited-Cashbox Partyworld Co., Ltd. & Holiday Entertainment Co., Ltd. merger case.

11. After the FTC prohibited the merger of Cashbox Partyworld Co., Ltd. (hereinafter "Cashbox") and Holiday Entertainment Co., Ltd. (hereinafter "Holiday"), it was informed that the two enterprises substantially proceed with merger through cross-shareholdings, the control of the board of directors and the assignment of personnel. They failed to file a notification with the FTC and violated the FTA. The FTC thus decided to further investigate these two companies.

12. The FTC's investigation found that Cashbox and Holiday had filed pre-merger notifications on multiple occasions. The FTC concluded after its investigation that the anti-competitive disadvantages outweighed the overall economic benefits and prohibited the merger of the two companies in 2007, 2008, and 2009, respectively. However, the two companies jointly operated a call center and computer audiovisual information services through their co-investment companies. Holiday also contracted the KTV operations of its store on Linsen North Road to Cashbox. The office of Holiday's Chairman was also leased from Cashbox. These acts fell within the type of mergers for regular joint operations prescribed by Subparagraph 4, Paragraph 1, Article 6 of the FTA.

13. In addition, Cashbox obtained one director's seat and two supervisors' seats through its subsidiary during Holiday's election of directors on June 13, 2007. As a result, Cashbox directly or indirectly controlled three out of five seats on the board of directors and two seats on the board of supervisors of Holiday. In addition, Cashbox also assigned Li Hao-yin, one of its directors, to serve concurrently as Holiday's CEO so that Cashbox could actually control Holiday's business operations and the appointment and discharge of its personnel, which also met the merger type of controlling the business operation or personnel appointment or discharge of another enterprise as stated in Subparagraph 5, Paragraph 1, Article 6 of the FTA.

14. The FTC concluded that the above practices of Cashbox and Holiday had reached the threshold for pre-merger notification. They failed to file the merger notification with the FTC and violated Article 11 of the FTA. The FTC ordered the parties to cease the joint operation and to remove those who served concurrently as directors, supervisors or the CEO in the two companies within three months so that there would be no more substantial control pursuant to Article 13 of the FTA, and also imposed administrative fines of NT$3 million and NT$1.5 million on Cashbox and Holiday pursuant to Article 40 of the FTA.

4. Follow-up review for those cleared and consummated merger cases

15. For those consummated and cleared mergers, the FTA does not expressly provide any justification for further review even when the FTC found competition issues later. In short, the FTC can only re-open investigations on those false notification cases.