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AGENCY DECISION-MAKING IN MERGER CASES: FROM A PROHIBITION DECISION TO A CONDITIONAL CLEARANCE

-- Note by Chinese Taipei --

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More documents related to this discussion can be found at www.oecd.org/daf/competition/agency-decision-making-in-merger-cases.htm

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-- CHINESE TAIPEI --

1. This report will illustrate the merger control regime under the Fair Trade Act and share the Fair Trade Commission's experiences in reviewing mergers in Chinese Taipei.

1. The merger control regime under the Fair Trade Act

1.1 Definition of merger and notification thresholds

2. A pre-merger notification regime has been established since 2002 amendments to the Fair Trade Act (hereinafter referred to as the "FTA"). The purpose of pre-notification is to prevent those mergers that may result in anti-competitive effect by means of ex-ante regulation of market structure. As defined in Paragraph 1 of Article 10 of the FTA, "merger" refers to one of the following conditions: (i) where an enterprise and another enterprise are merged into one; (ii) 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 number of voting shares or total capital of such other enterprise; (iii) where an enterprise is assigned by or leases from another enterprise the whole or the major part of the business or assets of such other enterprise; (iv) 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 (v) where an enterprise directly or indirectly controls the business operation or the appointment or discharge of personnel of another enterprise.

3. Chinese Taipei's notification system is mandatory. Paragraph 1 of Article 11 of the FTA provides that any merger involving any of the following circumstances shall be filed with the Fair Trade Commission (hereinafter referred to as the "FTC") in advance: (i) as a result of the merger the enterprise(s) will have one third of the market share; (ii) one of the enterprises in the merger has one fourth of the market share; or (iii) sales for the preceding fiscal year of one of the enterprises in the merger exceed the threshold amount publicly announced by the FTC.

4. The 2015 amendments to the FTA brought two major changes to the merger control regime. Firstly, in a merger case, any natural person who has controlling interest of an enterprise is deemed as an enterprise¹ that is subject to the FTA. Moreover, the aggregated turnover of affiliated enterprises shall be considered when the FTC determines whether a merger meets the turnover threshold or not.

1.2 The substantive merger review standard

5. According to Article 13 of the FTA, the FTC may not prohibit any of the mergers filed if the overall economic benefit of the merger outweighs the disadvantages resulting from competition restraint. The FTC may also impose conditions or undertakings in any of the decisions in order to ensure that the overall economic benefit of the merger outweighs the disadvantages resulting from competition restraint. 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.

¹ Article 2 of the FTA provides that an enterprise refers to a company, partnership, sole proprietor and any other person or organization engaging in transactions through provision of goods or services.

6. The FTC has established the “Fair Trade Commission Disposal Directions on Handling Merger Filings” (hereinafter referred to as “Merger Directions”) to set standards of reviewing mergers for improving transparency. In practice, when reviewing different types of mergers, the FTC considers different factors in weighting the disadvantages resulted from competition restraint.

1.2.1 Consideration of Anti-competitive Effect

7. 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 influence on competition. If a horizontal merger meet 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; (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 of the total market.

8. With regard to vertical mergers, the FTC considers the following factors to determine the likely effects on competition restriction: (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; (vi) other factors likely to lead to market foreclosure.

9. In a conglomerate merger, the FTC considers the following factors to determine 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 improvement 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.

1.2.2 Consideration of Overall Economic Benefits

10. According to the Merger Directions, if a merger is considered likely to entail competition restrictions, the applicant(s) may submit proof of the following factors of the overall economic benefits to be assessed by the FTC: (i) economic efficiency; (ii) consumers’ interests; (iii) one of the merging enterprises is originally a weaker competitor; (iv) one of the merging enterprises is a failing firm; (v) other concrete evidence of overall economic benefits to be expected. The aforementioned “economic efficiency” shall meet the following requirements: (i) it can be brought to realization within a short time; (ii) it cannot be achieved other than through the merger; (iii) it can reflect consumers’ interests.

11. When reviewing merger cases, the FTC may consider the opinions of the competent authority of the industry of concern to assess the overall economic benefits and disadvantages from the competition restrictions thereof incurred. In addition, for mergers in special industries, such as finance, air transportation, cable TV, telecommunications and digital convergence, the FTC has also established corresponding administrative rules for such enterprises to follow as well as to serve as reference when the FTC reviews related cases.

2. Case study: conditional clearance and prohibition decision

12. As specified in the FTA, when the overall economic benefit of a merger outweighs likely disadvantages from the competition restraint thereof incurred, the FTC does not prohibit the merger but it may approve it with conditions or undertakings attached. Otherwise, the FTC may prohibit the merger.

13. The types of conditions or undertakings (merger remedies) can be roughly divided into structural measures² and behavioral measures³. Depending on the specific case, the FTC may determine to attach conditions or undertakings that it sees fit. It may also make inquiries into the opinions of the merging enterprises regarding the conditions or undertakings to be attached before concluding a decision on a merger filing. The FTC has not established disposal directions on the contents of conditions or undertakings to be attached, but they have to comply with the principle of proportionality, the principle of prohibiting improper connection and other general principles of law.

14. Between Jan. 2011 and Sep. 2016, the FTC did not prohibit any merger but attached conditions or undertakings in 13 merger filings it reviewed. The undertakings attached were mostly behavioral measures; only a few of them were structural. Before making the decision, depending on the specific case, the FTC would solicit the opinions of related competent authorities, specialists and scholars, specialized research institutions, related businesses, merging enterprises and the public by sending them written requests or holding seminars.

15. According to Paragraph 1 of Article 39 of the FTA, if any enterprise fails to perform the undertakings required, the FTC may prohibit the merger, prescribe a period for such enterprise to split, to dispose of all or a part of the shares, to transfer a part of the operations, or to remove certain persons from their positions, or make any other necessary dispositions, and may impose an administrative penalty of no less than TWN 200 000 (Taiwanese new dollars) and no more than TWN 50 million upon such enterprise.

2.1 Conditional clearance: Morgan Stanley and CNS

16. The recent merger of Morgan Stanley Equity Asia IV, L. L. C (Morgan Stanley), An Shun Development Co., Ltd. (An Shun), Bo Kong Development Co., Ltd. (Bo Kang) and its affiliates [including China Network Systems Co., Ltd. (CNS), Global Digital Media Co., Ltd. (Global Digital), Keelung Cable TV and nine other cable television services (hereinafter referred to as the A Business Group)] was a case example in which the FTC approved the merger with attached number of conditions.

17. Morgan Stanley planned to conduct a multi-level shareholding structure through NHPEA and bring in capital from company B and Far Eastone Telecommunications Co., Ltd. (Far Eastone Telecom) to acquire the shares of An Shun, An Chan Development Co., Ltd., Bo Kang and Bo Shuo Co., Ltd. from Malaysia-based Evergreen Jade SDN BHD, Goodwill Tower SDN BHD and company C in Chinese Taipei. After acquisition, Morgan Stanley would indirectly hold all the shares of An Shun and Bo Kang, as well as close to 100% of the shares of the affiliates of both companies (including the A Business Group). This case complied with the definition of a merger in the FTA, as well as the market shares of 11 cable television services of the A Business Group achieving the filing thresholds specified in the FTA; therefore, a merger notification was filed with the FTC.

² Such as requesting merging enterprises to dispose of the shares or assets in their possession, assign part of their operations, or remove personnel from certain positions.

³ Such as requesting merging enterprises to continue to provide essential facilities or input elements to enterprises outside the merger, to license such enterprises to use their intellectual property rights, not to engage in exclusive dealings, not to have discriminatory treatment, or not to impose tie-in sales.

18. The decision of the FTC: Besides posting a public announcement on its website, the FTC sent letters to request that the National Communications Commission, Cable Broadband Institute in Chinese Taipei and related enterprises provide their opinions in writing, and also held a seminar attended by specialists and scholars, related competent authorities, the enterprises involved and the related association or institute to collect opinions from different sectors. Following consulting with stakeholders, the FTC concluded that the overall economic benefit would be greater than the disadvantages resulting from competition restraint with certain conditions. These are as follows:

1. The merging enterprises and the companies they control or their affiliates were not allowed to engage in the following practices before Far Eastone Telecom, the companies it controlled and its affiliates filed with the FTC merger notifications regarding their intention to merge with certain enterprises and obtain the approval of the FTC:
 - Appointing the directors, supervisors or managers of Far Eastone Telecom, the companies it controlled or its affiliates that would account for more than half of the total number of the board directors of any of the merging enterprises and companies they controlled or their affiliates.
 - Assigning shares or capital contributions to Far Eastone Telecom, the companies it controlled and its affiliates to enable them to gain more than one third of the voting shares or the total capital of any of the merging enterprises.
 - Allowing Far Eastone Telecom to control either directly or indirectly the business operations or appointment and dismissal of personnel of any of the merging enterprises by signing contracts or through other measures
 - Engaging in joint management with Far Eastone Telecom or the companies it controlled and its affiliates through the provision of technical and consulting services or entrusting Far Eastone Telecom or the companies it controlled and its affiliates to manage cable TV or channel agency operations.

19. The reason the undertaking was attached was to prevent Far Eastone Telecom or the companies it controlled and its affiliates from directly or indirectly controlling the operations or appointment and dismissal of personnel, or engaging in joint management or entrusted management with any of the merging enterprises by assigning contracts, providing technical or consulting services, or adopting any other approaches before filing merger notifications regarding their intentions to merge with certain enterprises and obtaining the approval of the FTC.

2. After receiving the merger decision from the FTC and before Far Eastone or any of the companies it controlled and its affiliates filed merger notifications with the FTC regarding the intention to merge with certain enterprises, Morgan Stanley had to provide the following information:
 - Copies of cooperation (including but not limited to technical and consulting services) agreements signed between the merging enterprises and Far Eastone Telecom or companies it controlled and its affiliates, and the list of consultants providing services (including but not limited to technical and consulting services) and their experiences; revisions or changes made to related information were also to be provided.
 - A list of contents of services (including but not limited to technical and consulting services) provided by Far Eastone Telecom or companies it controlled and its affiliates every six months.

20. Considering that the merging enterprises had not yet signed service agreements with Far Eastone Telecom and also to ensure that the merging enterprises would carry out the first undertaking, this undertaking was attached as a supervisory measure.

3. Without justifiable reasons, the merging enterprises and companies either controlled or affiliated could not adopt differential treatment toward Far Eastone or companies it controlled and its affiliates and their horizontal competitors. Considering that the total number of subscribers of the cable TV service operators affiliated to CNS was the largest among the five multiple system operators (MSO) while Global Digital was an agent for 11 popular channels, the merging enterprises therefore had rather considerable market power. Since Far Eastone Telecom was about to change from being a creditor to becoming the biggest shareholder, this undertaking was attached to eliminate doubts about the merging enterprises and the companies they controlled and their affiliates adopting unjustifiable differential treatment toward Far Eastone or the companies it controlled and its affiliates and their horizontal competitors.

2.2 *Prohibition decision: Holiday KTV and Cashbox*

21. Holiday KTV Co., Ltd. (Holiday KTV) and Cashbox Partyworld Co., Ltd. (Cashbox) were both KTV service providers. Holiday KTV planned to merge with Cashbox Partyworld and both companies therefore filed a merger notification with the FTC.

22. The case was a horizontal merger. The FTC requested that the filing enterprises present their statements and make certain promises. At the same time, the FTC invited concerned agencies, scholars and specialists, the filing enterprises, upstream and downstream businesses and consumer groups to attend the seminar to provide their opinions. The FTC requested that related associations and guilds provide their views as well. After assessing the proposed merger based on the data gathered, the FTC concluded that: (i) Each of the filing companies was the main competitor of the other. The market shares of the other KTV service providers were extremely small. Hence, after the merger, the two companies would become a monopoly in the KTV market of Chinese Taipei as well as in the main regional markets (Taipei City and Taipei County). As a consequence, competition in the KTV market would be seriously harmed. (ii) After the merger, consumers would not have enough countervailing power against the two companies and their interests would be seriously affected. (iii) After the merger, the filing companies would be able to obtain certain economic benefits, but the economic benefits that the overall market and consumers would receive would be insignificant. In addition, there was no guarantee that they could benefit. (iv) The merger was not the only way for the filing companies to obtain economic benefits. (v) The filing companies made the promises of “not raising prices within five years and absorbing raw material cost increases as feedback to consumers” and “maintaining operations using two different brand names and existing locations.” However, after assessing likely changes in consumers’ interests under different circumstances, whether or not the promises could eliminate any likely competition restriction as a result of the merger, whether or not the overall economic benefit could increase, and the likelihood of the two companies fulfilling their promises, the FTC concluded that the promises were not enough to ensure that the level of market competition would remain the same as that before the merger. Moreover, it was difficult to ensure that the overall economic benefit of the merger would outweigh the disadvantages resulting from competition restraint. Finally, the FTC decided that the disadvantages resulting from competition restraint would be greater than the overall economic benefit and therefore prohibited the merger.

23. Holiday KTV and Cashbox filed an administrative litigation over the definition of product market and the basis for the calculation of the market share in the case, as well as the discrepancies between the FTC’s decisions made in 2003 and 2006. The Taipei High Administrative Court thought that the legislators had authorized the FTC to establish necessary supplementation to merger review criteria and announce the Merger Directions. The court, in principle, respected the decisions made by the FTC according to the

Merger Directions and only reviewed the legality of such decisions. The FTC had reviewed this case in accordance with the Merger Directions and also conducted quantitative and qualitative analysis on the advantages and disadvantages of the merger. The FTC's review was in compliance with regular procedures adopted in merger regulation. Besides, no irrelevant factors to the merger had been taken into consideration. Therefore, the FTC's decision passed the court's legality review. Meanwhile, the FTC had made different decisions at different time points because of the dissimilar parameters applied. Therefore, there was no contradiction with the principle of impartiality. In view of the above-mentioned factors, the Taipei High Administrative Court concluded that the FTC's prohibition decision had been legally sound and therefore overruled the appeal.

3. Conclusion

24. The purpose of the FTA in Chinese Taipei is to maintain trading order and protect consumer interests, ensure free and fair competition, and promote economic stability and prosperity. The FTC reviews merger notifications in advance to prevent the market structure from deteriorating, the over-concentration of economic power and competition restrictions as a result of enterprise mergers. The merger review standards of the FTC are the overall economic benefit and the disadvantages resulting from competition restriction as specified in the FTA. Meanwhile, the considerations to be taken into account in reviewing horizontal, vertical and conglomerate mergers have been clearly listed in the Merger Directions. For mergers in specific industries, the FTC has also established corresponding administrative rules for such enterprises to follow as well as to serve as reference when the FTC reviews related cases.

25. In recent years, the number of FTC merger prohibition decisions was far less than conditional clearance. Before deciding to attach conditions/undertakings, the FTC will send written requests and hold seminars to obtain the opinions of related competent authorities, concerned enterprises, third parties and the public and then the opinions will be taken into consideration. These measures may vary from case to case. The undertakings/conditions that the FTC attached in the merger cases so far are mostly behavioral measures.