

Unclassified

English - Or. English

18 November 2024

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Working Party No. 3 on Co-operation and Enforcement

The Use of Structural Presumptions in Antitrust – Note by Chinese Taipei

4 December 2024

This document reproduces a written contribution from Chinese Taipei submitted for Item 2 of the 140th meeting of Working Party 3 on 4 December 2024.

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1. This paper introduces the relevant regulations and practical experiences concerning the use of structural presumptions in the competition law of Chinese Taipei.

1. Relevant Regulations and Standards for Identification Regarding the Adoption of Structural Presumptions

1.1. Standards for Identifying Monopolistic Enterprises

2. As for the standards for identifying monopolistic enterprises, market share, an indicator for market structure, is adopted in Chinese Taipei. As stipulated by Article 8 of the Fair Trade Act:

"An enterprise shall not be deemed a monopolistic enterprise as defined in the preceding article if none of the following circumstances exists:

1. *the market share of the enterprise in the relevant market reaches one half of the market;*
2. *the combined market share of two enterprises in the relevant market reaches two thirds of the market; and*
3. *the combined market share of three enterprises in the relevant market reaches three fourths of the market."*

3. For example, when the Chinese Taipei Fair Trade Commission (CTFTC) in 2021 processed the case of "Shin Chang Natural Gas Co., Ltd. being accused of unjustly obstructing pipeline contractors from participating in competition," it determined that, despite four pipeline contractors competing in the "in-the-meter natural gas pipeline engineering market" within the supply area of Shin Chang, the company held a market share of about 90%, exceeding one-half of the relevant market. Besides, the company's sales amount in 2019 reached NT\$7.3 billion, surpassing the standard of NT\$2 billion total sales published by the CTFTC for delisting monopolistic enterprises. Therefore, it was deemed to be a monopolistic enterprise under the Fair Trade Act.

1.2. Merger Notification Threshold Standards

4. As for the regulations governing merger notification thresholds, Article 11 of the Fair Trade Act stipulates that:

"Any merger that falls within any of the following circumstances shall be filed with the 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 exceeds the threshold amount publicly announced by the competent authority."*

5. For instance, when the CTFTC in 2021 processed the case of "Far EasTone Telecommunications Co., Ltd. intending to acquire Asia Pacific Telecom Co., Ltd.," the CTFTC determined that the market share held by Far EasTone in the "mobile broadband

service” market in 2022 was more than 25%, reaching the notification threshold under Subparagraph 2, Paragraph 1, Article 11 of the Fair Trade Act, which stipulates, “one of the enterprises in the merger has one fourth of the market share.” Therefore, Far EastOne needed to notify the CTFTC of the merger.

6. In contrast to most competition agencies in the world adopting the “sales amount” thresholds for merger notification, the Fair Trade Act currently still uses the “market share” as one of the thresholds for pre-merger utility. However, to align itself with international trends in competition law, Chinese Taipei has actively promoted amendment schemes to delete the provisions of market share thresholds regarding merger notifications and has adopted the “sales revenue” as the standard instead.

1.3. Standards for Applying the Simplified Procedure in Merger Cases

7. As to the merger filing types to which the simplified procedure applies, Point 7 of the CTFTC Disposal Directions (Guidelines) on Handling Merger Filings stipulates:

“The [CTFTC] may adopt the simplified procedure for the following merger filing types:

(1) The aggregate market share of the parties to a horizontal merger is less than 20% of the total market.

(2) The aggregate market share of the parties to a horizontal merger is less than 25% of the total market and the market share of one of the parties to the merger is less than 5% of the total market.

(3) The aggregate market share of the parties to a vertical merger in each relevant market is less than 25% of the total market.”

8. As for the exceptions where the simplified procedure does not apply, Point 8 of the CTFTC Disposal Directions (Guidelines) on Handling Merger Filings stipulates: “Under one of the following circumstances, the [CTFTC] shall adopt the regular procedure, rather than the simplified procedure, to process merger filings: the market shares of the top two businesses account for two thirds of the relevant market, or the market shares of the top three businesses account for three fourths of the relevant market that a horizontal merger involves. However, this regulation does not apply if the aggregate market share of the merging parties is less than ten percent.”

9. The procedures that the CTFTC adopts to review merger filings are divided into a simplified procedure and a regular procedure. The overall economic benefits of merger cases processed through the simplified procedure may be regarded as greater than the disadvantages from the competition restrictions thereof incurred. As regards the merger cases processed through the regular procedure, factors including unilateral effects, coordinated effects, and market entry as well as market shares shall be further assessed in order to determine whether the overall economic benefits are greater than the disadvantages from competition restrictions thereof incurred. In general, if the aggregate market share of the merging parties does not reach 25%, the CTFTC presumes that the merger is unlikely to cause significant competition concerns and thus the simplified procedure may be applied.

1.4. The De Minimis Standard for Cartels

10. Under Article 14 of the Fair Trade Act, in the enforcement by the CTFTC against cartels, the determination of illegality is only made where the condition regarding the effects of “resulting in an impact on the market function with respect to production, trade in goods or supply and demand of services” is satisfied; cases with de minimis impacts on

market functions are not pursued. However, it is not clear whether the extent to which the de minimis rule applies, causing uncertainty for enterprises. Therefore, the CTFTC has developed standards on the extent to which situations do not result in an impact on the market function.

11. By analyzing data on market structures and market shares of enterprises in past cases of sanctioned cartels, the CTFTC found that the sanctioned enterprises in such cases were mostly small and medium-sized, which are the main constituents of the industrial structure in Chinese Taipei, with a proportion of over 95%. A reference was also made to the standards of the De Minimis Notice published by the EU in 2001 and by Germany in 2007, both of which adopted a 10% market share threshold.

12. The 1266th Commissioners' Meeting of the CTFTC on February 3, 2016 deliberated on the de minimis standards for cartels of the CTFTC, which were then published as an interpretative rule in the government gazette to inform the public of the following: "Enterprises participating in cartels with a combined market share in the relevant market of less than 10% are presumed not to result in an impact on the market function with respect to production, trade in goods or supply and demand of services unless the cartels primarily involve restrictions on the prices, quantities, trading counterparts, or trading areas of goods or services."

1.5. The De Minimis Standard for Resale Price Maintenance

13. As provided by Article 19 of the Fair Trade Act: "An enterprise shall not impose restrictions on resale prices of the goods supplied to its trading counterpart for resale to a third party or to such third party for making further resale. However, those with justifications are not subject to this limitation." If, however, the conduct of resale price maintenance results in de minimis impacts on the market, involves a low market share, and inter-brand competition is intense, should it be exempted from sanctions? If so, what should be the standard? Is it necessary to disclose this information to enterprises by adopting enforcement rules or guidelines? Thus, the CTFTC collected foreign legislation and conducted related research.

14. The regulatory scheme of the FTA on the conduct of resale price maintenance was amended in 2015 to presumed illegal with exceptions where resale price maintenance has justifications. That is, the accused enterprises are allowed to prove reasonable economic grounds as justifications for resale price maintenance (encouraging downstream enterprises to improve the efficiency or quality of pre-sale services, the effects of preventing free-riding, the effects of promoting entries of new enterprises or brands, and enhancing inter-brand competition). The amendment has contemplated the positive effects that may result from resale price maintenance. Therefore, the Commissioners' Meeting of the CTFTC, considering the above, resolved not to adopt market share thresholds concerning enforcement against resale price maintenance at the time, but to strengthen the analysis of the relationship between the industrial structures of the upstream and downstream enterprises and of the anti-competitive effects; whether to adopt standards on market structures will be reconsidered after sufficient experience is accumulated through cases.

1.6. The De Minimis Standard for Vertical Non-Price Transaction Restrictions

15. Under Article 20 of the Fair Trade Act, in the enforcement by the CTFTC against vertical non-price transaction restrictions, such as discriminatory treatments, tie-in sales, exclusive dealing, and territorial restrictions, the determination of illegality is only made where the condition regarding the effects of "likely to restrain competition" is satisfied; cases with de minimis impacts on market functions are not pursued. However, the article

is not clear about the extent to which the de minimis rule applies, causing uncertainty for enterprises. Therefore, the CTFTC has developed standards on the extent to which situations do not result in an impact on market functions.

16. After collecting and compiling regulations from the US, the EU, and Germany, and analyzing data on the market structures and market shares of related enterprises in past cases, the CTFTC found that the illegality condition of “likely to restrain competition” is determined where the market share of the relevant enterprise is greater than 10%. Besides, as regards the market reality that an enterprise with a market share of less than 10% may still enjoy a dominant market position and engage in manifestly unfair practices which affect market order, the “theory of superior bargaining position” is also adopted as a threshold criterion for identifying the enterprises to which the article should be applied. In addition, in certain cases where the market share of the enterprises exceeds the threshold of 10% and thus a certain degree of market power exists, the CTFTC has held that the vertical restraints are not significantly anti-competitive and thus not illegal due to factors where the negative effects may be offset by inter-brand competition, they do not create foreclosure effects, or the buyers have countervailing power.

17. On February 3, 2016, the 1266th Commissioners’ Meeting of the CTFTC passed the following resolution on the de minimis standards for vertical non-price transaction restrictions: “For vertical non-price transaction restrictions, if an enterprise’s market share in the relevant market does not reach 15%, it is presumed not to have market power and generally poses no likelihood of restraining competition. Besides, in taking the market realities into consideration, although an enterprise has a market share less than 15%, if its trading counterparts are not sufficiently likely or can be expected to deviate from that enterprise, it should be determined that dependency exists between the enterprises, which is, the enterprise enjoys a relatively dominant market position, and that Article 20 of the Fair Trade Act is still applicable to its anti-competitive conduct.”

2. Standards for Market Structure in the Analysis of Practical Cases and Related Research

2.1. Standards for Market Structure in the Analysis of Practical Cases

18. In past cases, the CTFTC usually calculated the HHI index for market concentration based on the market shares to assess market concentration and referred to threshold standards for market structure, such as the 2010 U.S. Horizontal Merger Guidelines or the 1995 U.S. Bank Merger Competitive Review, to screen cases for possible anti-competitive concerns.

19. The 1676th Commissioners’ Meeting of the CTFTC on February 24, 2021 deliberated over a merger between two financial holding companies. The analysis of the CTFTC found that post-merger market shares would not exceed 15% in the relevant markets for banking (deposits, loans, and credit cards), securities (brokerage, proprietary trading, margin trading), futures brokerage, options brokerage, investment advisory, venture capital, and insurance agency. As for the HHI index for market concentration, the HHIs for these relevant markets were below 1,500, indicating low-concentration markets as classified by the 2010 U.S. Horizontal Merger Guidelines, except for the “futures brokerage market,” where the HHI was over 1,500, indicating a moderately concentrated market. Among them, the HHI for the banking market is estimated to be between 498 and 873, well below the threshold of market concentration for further scrutiny under the 1995 U.S. Bank Merger Competitive Review, which is 1,800.

20. As for the changes in market concentration due to the merger, the changes in the HHIs (Δ HHI) ranged from 5 to 59, with all below 100. Although the HHI for the “futures brokerage market” reached 1,642, the market share for each futures brokerage business of the merging parties was below 5%, and the change in the HHI (Δ HHI) was only 20, below 100. In light of the above, based on the HHI indexes for market concentration, the low concentration and minor increases in market concentration suggested that the merger in the present case was unlikely to cause anti-competitive effects.

21. However, the U.S. abolished its 2010 Horizontal Merger Guidelines in 2023 and introduced the Merger Guidelines. In addition, in September 2024, the U.S. Department of Justice announced the abolition of the 1995 Bank Merger Competitive Review, stating that bank mergers would be uniformly subject to the 2023 Merger Guidelines. Therefore, the CTFTC may refer to the threshold standard for market structure (an HHI over 1,800; a Δ HHI over 200) published by the 2023 U.S. Merger Guidelines as the threshold standard for determining market structures in future cases.

2.2. Research Related to Market Structure

22. The approaches for detecting cartels are mainly divided into the structure approach, the conduct approach, and the performance approach. In 2013, the 1138th Commissioners’ Meeting of the CTFTC approved the research report entitled “Screening and Detecting Cartels with the Structure Approach,” which analyzed the characteristics of 179 past CTFTC cartel cases and obtained the following findings related to the market structure factors in the cases of cartels:

1. There are 124 cases with five or fewer enterprises sanctioned, which represent 70% of the cases with sanctioned cartels. There are fewer cases with a larger number of sanctioned enterprises, which supports the theory that cartels with more participants are more difficult to secure given that their formation requires multiple enterprises.
2. The sanctioned parties were concentrated in 12 industries. Taking the industries of electricity and gas supply, non-metallic mineral products manufacturing, and food manufacturing as examples, the limited heterogeneity of products or services in these industries supports the theory that higher product homogeneity makes it easier for enterprises to reach agreements.
3. There were 64 cases in which industrial and commercial groups or occupational associations were sanctioned, with 57 being trade or professional associations. This indicates that while industrial or occupational associations are established to promote members’ common interests, they are also among the important factors considered by the theory of facilitating practices for cartels.
4. According to economic theories, the main factors of market structures conducive to the formation of cartels include small industrial scales, high concentration, high entry barriers, high operational efficiency, low levels of innovation, and high industrial growth. At least three of these factors can be observed in most of the market structures of the 12 industries to which the CTFTC cases of sanctioned cartels mainly belong.
5. As analyzed from 8 past cases in which the CTFTC sanctioned concerted actions by enterprises, the market structure evidence includes product characteristics, differences in scale and costs among members of the cartel, market and industry structure (market shares, market concentration, entry barriers, and upstream and downstream relationships of the industries), and overall economic conditions.

23. In addition, in 2017, the 1342nd Commissioners' Meeting of the CTFTC approved the research report entitled "Exploring Quantitative Indicators of Industrial Competition." The report aimed to establish a model, as a reference for future enforcement by the CTFTC, for observing patterns of industry competition and screening industries that may lack competitive efficiency or affect consumer interests, using key indicators relevant for the industries, including market power (covering scale and concentration), market structure, entry barriers (covering the entry and exit of markets), efficiency innovation, and existing enterprise conduct.

24. Using related data including those from the Industry and Service Census, the report conducted a comprehensive analysis after calculating indicators of industry scale (the number, revenue, and number of employees of enterprises), concentration (CRn, HHI), operational efficiency (TFP factors including profit margins, labor productivity, labor costs per unit of output, and productivity of capital), entry barriers (entry, exit, and import-export ratios), and innovation. Finally, 18 industries were identified as having higher levels of anti-competitive impacts, including the manufacture of petroleum and coal products, manufacture of petrochemicals, manufacture of fertilizers, drugs and medicines manufacturing, the manufacture of cement, manufacture of basic iron and steel, packaging and testing of semiconductors, electricity supply, gas supply, retail sales in non-specialized stores with food and beverages predominating, air transport, cable and other subscription programming, telecommunications, securities, futures, real estate development activities, real estate operation and related activities, and legal and accounting activities. These findings serve as valuable reference for CTFTC investigations on anti-competitiveness in these industries or related markets.