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HEARING ON OLIGOPOLY MARKETS

-- Note by Chinese Taipei --

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More documents related to this discussion can be found at www.oecd.org/daf/competition/oligopoly-markets.htm.

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CHINESE TAIPEI

1. This report will illustrate Chinese Taipei's law enforcement experiences in oligopoly markets with some case examples.

1. Provisions Regarding Oligopoly in the Fair Trade Act

2. There are no specific rules with regard to oligopoly in Chinese Taipei's competition law, the Fair Trade Act (FTA). The regulation of oligopolistic businesses in the FTA is based on whether they have significant market power and whether they are able to exert such market power to exclude or restrict competition.

3. Article 7 of the FTC states that, the term "monopolistic enterprise" as used in this Act means any enterprise that faces no competition or has a dominant position to enable it to exclude competition in the relevant market. Two or more enterprises shall be deemed monopolistic enterprises if they do not in fact engage in price competition with each other and they as a whole have the same status as the enterprise defined in the preceding paragraph. The definition of monopoly, according to this article, in the FTA is more comprehensive than the concept of a monopoly in conventional economics: a single firm with ability to exclude competition in the market. Two or more enterprises can be monopolistic enterprises if they do not compete on price and meet the definition under Article 7.

4. Article 8 of the FTA further specifies the market share standards for determining whether the enterprise fits in with the criterion of a dominating position: 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. Intrinsically, the concept of oligopoly is incorporated in these standards.

5. For monopolistic (including oligopolistic) enterprises, the following conducts may be prohibited in Article 9 of the FTA: 1) directly or indirectly preventing by unfair means any other enterprises from competing, 2) improperly setting, maintaining or changing the prices of products or services, 3) making a trading counterpart give preferential treatment without justification, or 4) other abusive conducts by its market power.

6. Even when oligopolistic enterprises do not meet the definition of monopoly in Article 7 of the FTA, Article 20¹ may still apply if there are only a few enterprises in the relevant market and each one of

¹ Article 20: "No enterprise shall engage in any of the following acts that is likely to restrain competition: (a) causing another enterprise to discontinue supply, purchase or other business transactions with a particular enterprise for the purpose of injuring such particular enterprise; (b) treating another enterprise discriminatively without justification; (c) preventing competitors from participating or engaging in competition by inducement with low price, or other improper means; (d) causing another enterprise to refrain from competing in price, or to take part in a merger, concerted action, or vertical restriction by coercion, inducement with interest, or other improper means; (e) imposing improper restrictions on its trading counterparts' business activity as part of the requirements for trade engagement."

them has a certain influence on the prices and production in the relevant market. In other words, any anti-competitive conduct by oligopolistic enterprise, including a boycott, discriminatory treatment without justification or vertical restraints as described in Article 20 of the FTA, the Fair Trade Commission (FTC) may consider such practices as violations of the FTA. For example, in 2012, on the basis of the FTC's investigation, it found that the two leading bicycle manufacturers in the market respectively took advantage of their market power to unjustifiably impose a ban on online retail sales. The FTC concluded that the vertical restraints with an impact on competition constituted a violation of Subparagraph 6 of Article 19 of the FTA (Subparagraph 5 of Article 20 in 2015 amendment). The FTC imposed administrative fines of NT\$2 million and NT\$3.5 million on the two enterprises.

7. The cases involving oligopoly markets in the FTC's investigations include the telecommunications, petroleum, motorcycle, milk, cable TV service, distribution industry and air transport. To improve businesses' awareness of what practices are likely to constitute violations of the FTA in these markets, the FTC has issued policy statements and disposal directions for these markets, including the Disposal Directions (Policy Statements) on the Telecommunications Industry, the Disposal Directions (Policy Statements) on the Motorcycle Industry, the Disposal Directions (Policy Statements) on Cable TV and Related Industry, the Disposal Directions (Policy Statements) on the Distribution Industry, and the Disposal Directions (Guidelines) on Mergers and Concerted Actions of Civil Air Transport Enterprises, etc.

2. The FTC's Enforcement against Concerted Actions in Oligopolistic Markets and Case Examples

8. Consistent pricing policy or price leadership is a common phenomenon in oligopolistic markets. The FTC may launch investigations *ex officio* when it notices such a phenomenon or received complaints on price fixing from the public. Oligopolistic businesses under investigation in these cases would usually argue that such parallel behavior results from a normal phenomenon with economic rationalities in an oligopolistic market.

9. The FTC believes that, due to the small number of businesses in an oligopolistic market and the nature of interdependence, it may lead to price rigidity. When oligopolistic enterprises engage in parallel behavior as a result of their own independent decisions rather than a consequence of a mutual understanding, it is difficult for the FTC to consider such behavior a concerted action in violation of Article 14² of the FTA. If the parallel conduct is a consequence of a mutual understanding, that may be proved by circumstantial evidence (such as incentives, financial gains, similar time points or rates of price increase, frequency, duration, concentration of conduct, consistency, etc.), the FTC may consider the practice in question a concerted action. The following are important judgments from administrative courts on the FTC's decisions on concerted actions in oligopoly markets.

² Paragraphs 1 and 2 of Article 14 of the FTA stipulates that, "the term "concerted action" as used in this Act means that competing enterprises at the same production and/or marketing stage, by means of contract, agreement or any other form of mutual understanding, jointly determine the price, technology, products, facilities, trading counterparts, or trading territory with respect to goods or services, or any other behavior that restricts each other's business activities, resulting in an impact on the market function with respect to production, trade in goods or supply and demand of services. The term 'any other form of mutual understanding' as used in the preceding Paragraph means other than contract or agreement, a meeting of minds whether legally binding or not which would in effect lead to joint actions."

2.1 Decisions Upheld by Administrative Courts

2.1.1 The gasoline price increase case

10. The FTC's investigation found that between 2002 and 2004 Chinese Petroleum Corporation and Formosa Petrochemical Corporation made each price adjustment of gasoline at the same time and same rate by public exchange of price information in advance to achieve a mutual understanding. Hence, the FTC believed that the conduct could affect the prices and supply-demand function in the domestic gasoline market and it was in violation of the prohibition against cartel actions in Paragraph 1 of Article 14 of the FTA and therefore sanctioned the two companies in 2004. The case was appealed but the Supreme Administrative Court upheld the FTC's decision that the simultaneous move of price adjustment had been a result of the two enterprises' mutual understanding through the price advance announcement against economic sense. It was concluded that the appearance of consistent conduct in price adjustment between Chinese Petroleum Corporation and Formosa Petrochemical Corporation constituted a concerted action prohibited under the FTA.

2.1.2 The fresh milk price increase case

11. In 2011, the FTC initiated an ex officio investigation to look into the joint price increase by three fresh milk producers. The FTC's investigation indicated that the consistency of price adjustment by the three companies could be a concerted action conducted through a mutual understanding. The investigation revealed that, though operating costs of the three companies were different, the rate of adjustment was identical and the lists of suggested retail prices these companies gave to retailers were also highly similar. Based on evidences collected by the FTC, it was concluded the conduct of the three companies violated Paragraph 1 of Article 14 of the FTA and administrative fines totaling NT\$30 million were imposed on the companies. The three companies appealed the decision to the Supreme Administrative Court, but the Courts upheld the FTC's decision on the grounds that the conduct in question was not a merely conscious parallel behavior and the only explanation for the concerted action was a mutual understanding in existence among the oligopolistic enterprises.

2.2 Decisions Revoked by Administrative Courts

12. Administrative courts have supported most of the FTC's decisions on concerted actions. However, a small number of cases were challenged by the court owing to the reason that the courts required higher standard of proof with circumstantial evidence.

2.2.1 The industrial paper price increase case

13. In 2010, the FTC made a decision to fine the three major industrial paper manufactures for a cartel practice of joint price increase between Aug. 2009 and Mar. 2010. However, the Taipei High Administrative Court concluded that the FTC had not obtained the sufficient evidence to prove that information had been exchanged among the aforesaid paper manufactures. In addition, the dates and rates of the price increases by the said businesses had been different and the offenders had all indeed been affected by rising costs, whereas the circumstantial evidence provided by the FTC could not rule out the possibility that the price increase by the three companies was a result of price leadership in an oligopolistic market. The decision of the FTC was revoked in 2011. The FTC appealed and the Supreme Administrative Court remanded the case to the Taipei Administrative Court. The Taipei Administrative Court revoked the FTC's decision again in 2013 and the FTC appealed once more. The Supreme Administrative Court remanded the case a second time and the case is currently being reviewed by the Taipei Administrative Court for the third time.

2.3 *Summary*

14. As cartels are becoming more clandestine, it is getting harder to acquire direct evidence of “mutual understandings” among enterprises, especially in oligopoly markets. In recent years, the number of enterprises sanctioned by the FTC on the basis of circumstantial evidences has been increasing. Although administrative courts have gradually accepted such evidences, the standard of proof is getting higher. To fight against concerted actions effectively, Article 14 of the FTA was amended on February 4, 2015 to add Paragraph 3 which stipulates: “The mutual understanding of the concerted action may be presumed by considerable factors, such as market condition, characteristics of the good or service, cost and profit considerations, and economic rationalization of the business conducts”. The 2015 amendment can solve the problem of the FTC in obtaining direct evidence of mutual understandings and recognize expressly the circumstantial evidence in proof of concerted actions.

3. **Merger Cases in Oligopoly Markets**

15. The FTC determines to object to mergers or not on the basis of net effect between the overall economic benefit and the disadvantages from competition restraint³. Regarding mergers in oligopolistic markets, the FTC will be more cautious when assessing the possible disadvantages from competition restraints resulting from the merger, particularly the likelihood of unilateral effect after the merger. For mergers with the effect of competition restriction disadvantages being greater than the overall economic benefit, the FTC will either prohibit them or approve them with remedial measures to ensure market competition.

3.1 *Mergers prohibited by the FTC in oligopolistic markets*

3.1.1 *The karaoke market*

16. Cashbox Partyworld Co., Ltd. and Holiday Co., Ltd. filed a merger notification with the FTC in December 2006. In this case, the FTC defined the relevant market as the “audiovisual and singing services (karaoke) market”, and its investigation revealed that the two companies accounted for almost half of the market share. Moreover, in Taipei County (now New Taipei City) and Taipei City, the most important geographic markets, they had over 90% of the market share. Obviously, they would create a dominant position after the merger as well as become a monopsony in the upstream karaoke tape market, and the development of the businesses in the upstream market would be affected. The FTC considered that the disadvantages of competition restraint would outweigh the overall economic benefit so prohibited the merger in March 2007. The merger applicants appealed and the Appeals and Petitions Committee of the Executive Yuan revoked the FTC’s decision two times. However, when the FTC made its decision for the third time in April 2009, the merger prohibition was upheld by the Supreme Administrative Court in 2011.

3.1.2 *The instant noodle market*

17. In 2010, the FTC reviewed a merger notification filed by Uni-President Enterprises Corporation and Wei Lih Food Industrial Co., Ltd. that the Uni-President would control more than half of the Wei Lih’s shares. The merging parties were the two largest instant noodle producers in the oligopoly market and the market share after merger would reach nearly 70%. The FTC’s analysis indicated that, after the merger, the

³ Article 13 of the FTA stipulates: “The competent authority may not prohibit any of the mergers filed if the overall economic benefits of the merger outweighs the disadvantages resulted from competition restraint. The competent authority may impose conditions or undertakings in any of the decisions it makes on the filing cases referred to in Article 11, Paragraph 8 herein in order to ensure that the overall economic benefits of the merger outweighs the disadvantages resulted from competition restraint.”

two companies would have the ability to raise prices in the market. If they chose to do so jointly, other instant noodle producers could also follow suit. Furthermore, Uni-President, President Chain Store Corp. with 5,000 convenient stores in Chinese Taipei, and Carrefour Hypermarkets belonged to the same business group. Once the merger was completed, they would gain even more bargaining power when negotiating with retailers and, consequently, the cost to competitors to access such sales channels would increase. The FTC concluded that the proposed merger significantly restrict competition in the domestic instant noodle market while the overall economic benefit to the relevant market and consumers was insignificant. Therefore, the FTC prohibited the merger and the Supreme Administrative Court also supported the FTC in this case.

3.2 *Conditional Merger Clearance*

18. The FTC reviewed a merger notification in 2012 filed by five major telecommunications enterprises and EasyCard Investment Holdings Corporation for setting up a joint venture to operate a trusted service management (TSM) platform. The FTC found the undertaking could facilitate innovation in R&D as well as reduce costs and inefficiency. It would benefit the overall economy. On the other hand, the mobile payment market may be affected by the proposed joint venture as a result of economies of scale and network effect after the merger, and it is likely to abuse its market power in such monopolistic or oligopolistic market in the long run. In the meantime, the merger may also result in foreclosure in other markets (such as the micro-payment tool market, the market of e-payment on transport). To ensure that the overall economic benefit could outweigh the disadvantages from competition restraint, the FTC therefore approved the merger with eleven conditions (including four structural remedies, four behavioral remedies, two obligations of information disclosure and one supervisory measure).

3.3 *Summary*

19. The FTC also found that oligopolistic enterprises sometimes failed to notify the FTC before consummating the merger. For example, despite the FTC's prohibition decision on the merger between Cashbox and Holiday in March 2007, the two companies still set up a regular, jointly-managed customer service center and started to run computer multimedia services. Through interlocking directorates, the two companies achieved a *de facto* merger. After investigation, the FTC concluded in March, 2010 that the two companies should have filed the merger notification under the FTA but failed to do so; therefore, they had violated the FTA. In 2012, the FTC initiated an *ex-officio* investigation on these two companies and found that they jointly operated business by sharing offices and resources. And moreover, the intranet and telephone systems were connected and the employees could act on behalf of one another. The conduct was in violation of the FTA and the FTC therefore in 2014 imposed the administrative fines of NT\$5 million and NT\$4 million on the two companies respectively.

20. The other case was the illegal merger between Uni-President Enterprises Corporation and Wei Lih Food Industrial Co., Ltd. After an *ex officio* investigation in 2009, the FTC discovered the Uni-President had obtained half of the seats on the boards of directors and supervisors of Wei Lih. It met the type of merger stated in the FTA. The two companies should file a merger notification but failed to do so; hence, the FTC sanctioned both companies. However, during the administrative litigation, the Supreme Administrative Court determined that Uni-President's possession of half of the seats of the boards of directors and supervisors and chairpersonship of Wei Lih was not sufficiently to prove that Uni-President acquired control of Wei Lih. Therefore, the FTC's decision was revoked.

4. Conclusion

21. As stated above, the FTC's law enforcement experiences on concerted actions in oligopoly market show the difficulties of obtaining direct evidence and the challenges of identifying legal parallel behavior and illegal concerted actions. The FTC developed the concerted action theory and also amended the FTA to give circumstantial evidence its lawful status as an attempt to solve the problems in law enforcement against concerted actions in oligopoly markets. As for mergers in oligopoly markets, the factors to be considered in the analysis of anti-competitive effect may be similar to those for mergers in non-oligopoly markets. However, as stated in Point 10 of the FTC's Guidelines on Handling Merger Filings⁴, mergers in oligopoly markets are more likely to raise competition concerns and further examination of the overall economic benefits is required. Compared to mergers in non-oligopoly markets, such cases therefore need more time to review, and they are more likely to be blocked or approved with remedies. In the future, the FTC will strengthen its economic analysis tools to cope with competition law issues that occur as a result of the characteristics of oligopoly markets.

⁴ Point 10 of the Guidelines on Handling Merger Filings stipulates: In principle, a horizontal merger reviewed through the regular procedure and found to involve one of the following conditions requires further examination of the overall economic benefits by the FTC: 1) The aggregate market share of the merging parties achieves half of the total market. 2) The top two competitors in the relevant market account for two thirds of the total market share. 3) The top three competitors in the relevant market account for three quarters of the total market share.