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### Working Party No. 3 on Co-operation and Enforcement

#### PUBLIC INTEREST CONSIDERATIONS IN MERGER CONTROL

-- Note by Chinese Taipei --

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*More documents related to this discussion can be found at  
[www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm](http://www.oecd.org/daf/competition/public-interest-considerations-in-merger-control.htm)*

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## CHINESE TAIPEI

1. This report will illustrate Chinese Taipei's law enforcement experiences in its review of merger notifications with some case examples.

### **1. The merger control system under the Fair Trade Act**

#### ***1.1 An overview of the merger control system***

2. The regulations regarding enterprise mergers in the Fair Trade Act (FTA) are based on the principle of a "notification system." The focus is set on market structure control in advance to prevent over-concentration as a result of enterprise mergers from leading to restrictions on market competition. As defined in Paragraph 1 of Article 10 of the FTA, "merger" refers to one of the following conditions: 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 number of 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 assets 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.

3. Meanwhile, it is also specified in Paragraph 1 of Article 11 of the FTA that any merger involving any of the following situations shall be filed with the Fair Trade Commission (FTC) 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 FTC. In other words, enterprises engaging in business activities that comply with any of the merger types described and also achieving any of the notification thresholds where the proviso regulations in Article 12 of the FTA do not apply are required to file merger notifications with the FTC.

4. In the amendment to the FTA announced on February 4, 2015, the revision of the merger control system was focused on the specification of merger types and notification thresholds to bring affiliate enterprises (including brother/sister companies under common control) and natural persons who have controlling shareholdings under regulation as well as to increase the extension of the review period to sixty days. No changes were made to the review standards.

#### ***1.2 Regulations regarding merger review standards***

5. As set forth in Paragraph 1 of Article 13 of the FTA: "The competent authority may not prohibit any of the mergers filed if the overall economic benefit of the merger outweighs the disadvantages resulted from competition restraint." To make the merger notification review standards more exact to make it easier for businesses to follow related regulations, the FTC has established the "Fair Trade Commission Disposal Directions (Guidelines) on Handling Merger Filings" in which considerations in the assessment of various effects of competition restrictions likely to result from horizontal, vertical and conglomerate mergers are specified. At the same time, the factors to be considered in determining the overall economic benefits are also defined in Point 13 of the said disposal directions as "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: 1) efficiency; 2) consumers' interests; 3) one of the merging parties is originally a weaker competitor; 4) one of the merging parties is a failing firm; and 5) other concrete evidence of overall economic benefits to be expected." This means that the FTC's review of any enterprise merger is conducted according to the "overall economic benefits" and "disadvantages resulting from competition restraint" as a consequence of the merger in order to evaluate whether there will be significant competition restrictions so that over-concentration in the relevant market can be prevented.

6. 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 businesses to follow as well as to serve as reference when the FTC reviews related cases. It is specified in the aforementioned administrative rules that the FTC may adopt the "overall economic benefits" as a consideration, such as the influence of innovation in financial services, the policy of the competent authority of the financial industry, whether a merger is able to promote Cable TV digitization, whether a merger can lead to more diverse choices for consumers, whether a merger can help increase competitiveness in international markets, whether a merger can improve research and development and innovation, etc.

## **2. Consideration of the "public interest" in the review of mergers according to the Fair Trade Act**

### ***2.1 Consideration of the role of the "public interest" in the review of mergers***

7. The standards the FTC applies in its review of merger notifications are different from the "substantial lessening of competition test" or "significant impediment to effective competition test" applied by the competitive authorities in the US and the EU. They are closer to the "public interest test." For this reason, besides assessing likely disadvantages from competition restraint, the FTC also takes into account the overall economic benefits when reviewing merger cases. In practice, the scope of the overall economic benefits to be assessed not only includes economic efficiency directly resulting from competition, consumer interests, one of the merging parties originally being a weaker competitor and one of the merging parties being a failing firm, but also encompasses economic benefits not related to competition, such as industrial development, employment and national competitiveness that are associated with the overall economic benefits.

8. During commissioners' meetings, the FTC has discussed issues related to the consideration of the public interest in its review of mergers and has concluded that the focus of the FTA is set on maintaining effective competition and fair competition in the market. Merger review standards should only be related to the overall economic benefits and disadvantages resulting from competition restraint. The public interest that is not related to the overall economic benefits should not be taken into account in the review of mergers. In practice, the public interest has been taken into consideration in the review of merger cases since it is associated with the overall economic benefits. In other words, the FTC has not randomly expanded its considerations to include other legal interest or policy targets beyond economic benefits.

### ***2.2 The relationship between the "public interest" consideration and competition analysis in the review of merger cases***

9. The range of overall economic benefits is rather extensive and some considerations may even contradict the benefits directly brought about by competition (such as the consolidation of departments with similar functions after enterprise mergers which may reduce operating costs and boost efficiency but which can also create unemployment). In addition, it is also difficult to choose between various considerations. Therefore, the FTC will only go further to evaluate whether a merger is able to facilitate the realization of other economic benefits outside competition if it concludes that the net effect of the merger will be negative after analyzing the positive and negative effects of the impact on competition from the merger.

10. When assessments are made at different stages as mentioned above, consideration of the public interest in the review of mergers can only be applied in defenses that are advantageous to the merging parties. In other words, if there is no evidence showing that significant competition restrictions are likely to result, the competition authority cannot prohibit a merger simply because the merger will possibly impede the realization of economic benefits that are not related to competition. Take media merger cases for example. Unless the outcome of a merger is bound to restrain market competition to a significant degree (i.e. competition factors are taken into account), it will be impossible to prohibit the merger merely because such a merger will obstruct freedom of speech (i.e. non-competition factors are taken into account).

### **3. Merger cases involving the jurisdiction of other competent authorities**

11. As specified in Point 15 of the Fair Trade Commission Disposal Directions (Guidelines) on Handling Merger Filings, “When reviewing merger cases, the FTC may consider the opinions of the competent authority of the industry in concern to assess the overall economic benefits and disadvantages from the competition restrictions thereof incurred.” Therefore, with merger cases that involve overseas Chinese or foreign investors or special industries, for example, the FTC will work with related competent authorities to review such merger filings in accordance with the jurisdiction of each agency.

#### ***3.1 The competent authority responsible for investment review***

12. When merger cases involve overseas Chinese or foreign nationals investing in the country, the applicants are required to act according to the “Statute for Investment by Overseas Chinese” or the “Statute for Investment by Foreign Nationals” and apply to the Investment Commission of the Ministry of Economic Affairs for approval. It is set forth in Article 7 of the Statute for Investment by Overseas Chinese and Article 7 of the Statute for Investment by Foreign Nationals that overseas Chinese and foreign nationals are not allowed to invest in businesses that are concerned with national security, public order, good customs and practices or national health.

#### ***3.2 The competent authority of the financial industry***

13. According to the authorization given by Paragraph 2 of Article 9 of the Financial Holding Company Act, the FTC has worked with the Financial Supervisory Commission (FSC) and established the “Regulations for the Examination of Financial Holding Company Mergers Cases” in which it is stipulated that when the FSC receives applications for approval to set up financial holding companies, the FSC is required to advise the applicants to file merger notifications with the FTC if there is anything that meets any of the situations described in Article 11 of the FTA. When reviewing such merger filings, the FTC may solicit the opinions of the FSC.

14. Meanwhile, as stated in Article 5 of the Regulations for the Examination of Financial Holding Company Mergers Cases, besides reviewing such merger notifications in accordance with the considerations listed in the Fair Trade Commission Disposal Directions (Guidelines) on Handling Merger Filings, the FTC may also take the following factors into account: 1) the impact on the stability and the integrity of the financial markets, 2) the impact on the availability and convenience of financial services, 3) the impact on the innovation of financial services, and 4) policy made by the competent authority relevant to the financial industry.

#### ***3.3 The competent authority of the broadcasting and TV industry***

15. The FTC has conducted administrative consultations with the National Communications Commission (NCC) over broadcasting and TV business mergers. If there is anything in a merger between broadcasting and TV companies that meets any of the situations described in Article 11 of the FTA, such companies are required to file a merger notification with the FTC. The FTC will review the merger notification after acquiring the opinions of the NCC.

#### **4. Merger cases the FTC has reviewed in recent years with the public interest being taken into consideration**

##### **4.1 *The merger between PXMart and Sung Ching Supermarket***

16. Chuan Lian Enterprise Co., Ltd. (PXMart) intended to lease from Sung Ching Commercial Co., Ltd. (Sung Ching Supermarket) all of its 65 supermarkets as well as acquire the trademark, inventories and certain fixed assets of Sung Ching Supermarket. The condition complied with the merger type described in Subparagraph 3 of Paragraph 1 of Article 10 of the FTA; therefore, PXMart filed a merger notification with the FTC.

17. The merger would have no significant impact on the structure of the relevant market and competition. The number of competitors would decrease but there would still be many similar businesses in the market and competition would remain fierce. Furthermore, these businesses sold plenty of product types and items which were highly substitutable whereas the prices were highly transparent. There were many businesses and products in the relevant market for consumers to choose from. It would be difficult for any of these businesses to engage in concerted actions. There was no significant market entry barrier and countervailing power was existent. The interests of consumers would not be jeopardized as a result of the merger while existing shopping convenience would be maintained. Through the merger, the merging parties could make the deployment of their marketing channels and resources more efficient to achieve economies of scale. On top of it all, the marketing strategy of PXMart to offer cheap prices would be advantageous to consumers. If the merger were prohibited, the aforesaid overall economic benefits could not be achieved. There were also other considerations. PXMart would continue to hire Sung Ching Supermarket's employees if they wished to stay. It meant that the hundreds of workers of Sung Ching Supermarket would not become unemployed so that the unemployment rate would not go up. Hence, after concluding that the overall economic benefits would outweigh the disadvantages from the competition restraint thereof incurred, the FTC did not prohibit the merger.

##### **4.2 *The merger between Taiwan Depository and Clearing Corporation and Taiwan Integrated Shareholder Service Company***

18. Taiwan Depository and Clearing Corporation (TDCC) intended to merge with Taiwan Integrated Shareholder Service Company (TISSC). The condition complied with the merger type described in Subparagraph 1 of Paragraph 1 of Article 6 (Subparagraph 1 of Paragraph 1 of Article 10 today) and TDCC therefore filed a merger notification with the FTC.

19. The industry (shareholders' meeting electronic voting platform service) involved in this case had the characteristic of economies of scale. Market demand was subject to the range of electronic voting applicable defined by the FSC and the scale of the market was limited. Even in countries with mature capital markets, there was usually only one electronic voting platform being operated because it was considered the most economically efficient. Moreover, this merger could provide public companies and investors with a safer and more convenient electronic voting platform service. The result would be a positive effect on industrial development. In addition, as the competent authority, the FSC also believed that the merger would be beneficial in the achievement of financial supervision policy targets and there existed proper price supervision mechanisms to prevent excessive pricing and other anti-competition practices. Therefore, the FTC concluded that the overall economic benefits would be greater than the disadvantages from the competition restraint thereof incurred and decided not to prohibit the merger.

#### **5. Conclusions**

20. The competition policy in Chinese Taipei is intended 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 market structure deterioration, over-

concentration of economic power and competition restriction as a result of enterprise mergers. In addition to the adoption of whether the overall economic benefits outweigh the disadvantages resulting from competition restraint as specified in Paragraph 1 of Article 13 of the FTA as a standard in the review of mergers, the FTC has also established administrative rules for special industries. It is clearly specified in such rules that the FTC may apply the “overall economic benefits” which include the policies of the competent authorities of various industries, the promotion of competitiveness in international markets, the improvement of research and development and innovation, and the diversification of choices for consumers. Other factors such as freedom of speech, environmental protection, etc. are not associated with the overall economic benefits or core issues in effective competition; therefore, they are not to be considered in the review of mergers.

21. When merger cases involve the jurisdiction of other competent authorities, the FTC will act according to the FTA and only decide by taking into consideration the overall economic benefits and disadvantages resulting from competition restraint according to the market structure, market concentration, entry barriers, countervailing power in the upstream, midstream and downstream sectors, and other competition factors in order to avoid confusion over jurisdictions between the FTC and other competent authorities.