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DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
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Working Party No. 3 on Co-operation and Enforcement

DEFINITION OF TRANSACTION FOR THE PURPOSE OF MERGER CONTROL REVIEW

-- Chinese Taipei --

18 June 2013

The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 18 June 2013.

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1. This report will illustrate the types of transaction for a merger control review, defined in by the Fair Trade Act. A case example is also provided to demonstrate the challenges faced by the Fair Trade Commission in merger definition.

1. Merger Control Regime in Chinese Taipei

2. The term "merger" is defined under Paragraph 1, Article 6 of the Fair Trade Act (FTA) which sets forth as follows: 1) an enterprise and another enterprise are merged into one; 2) 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) 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) 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) an enterprise directly or indirectly controls the business operation or the appointment or discharge of personnel of another enterprise.

3. When a transaction falls within one of the merger types and the scales of parties involved in the transaction meet the threshold, the merger parties are required to file notification to the Fair Trade Commission (FTC). The thresholds of merger notifications are prescribed in Paragraph 1, Article 11 of the FTA: 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 the enterprises in the merger exceeds the threshold amount publicly announced by the central competent authority. As for the factors of merger assessment, Paragraph 1, Article 12 of the FTA provides that the central competent authority may not prohibit any of the mergers if the overall economic benefit of the merger outweighs the disadvantages resulted from competition restraint.

4. To reduce the legal uncertainty in business investment and compliance cost, the FTC plans to base the thresholds solely on the annual turnover. In the latest draft amendment to the FTA, revised Paragraph 1, Article 11 provides that when the sales for the preceding fiscal year of the enterprises in the merger exceeds the threshold amount publicly announced by the central competent authority, a merger notification shall be filed to the central competent authority. This draft amendment is to be reviewed by the Legislative Yuan (Congress).

2. Types of Transaction Subject to Merger Review

5. The purpose of pre-merger control under FTA is to secure competitive market structure by means of reviewing potential anti-competitive effects of mergers ex ante. The type of "an enterprise and another enterprise are merged into one" is defined in Subparagraph 1 of Paragraph 1, Article 6 of the FTA because the merged party, an independent entity would be absorbed in terms of economic and legal aspects after merging, and this would lead to a reduction in the number of firms in the market and an increase in market concentration. For those types of mergers described in Subparagraphs 2 to 5 of Article 6, the merger parties would still remain as independent legal entities but one party could exercise influence on the other party through acquisition of shares, assets or other measures that might change the extent of competition. Thus, these transactions shall also be reviewed under merger control regime.

2.1 Acquisition of Shares

6. The Paragraph 1, Article 369-2 of the Company Act provides that a company which holds a majority of the total number of the outstanding voting shares or the total amount of the capital stock of another company is considered the controlling company, while the said another company is considered the subordinate company. However, merger control in the competition law is to prevent the over-extension of enterprises' market power. It is different from the legislative purpose of the Company Act regarding

regulations on affiliated companies. In other words, merger parties subject to merger review are not restricted to affiliated companies defined in the Company Act. Share acquisition would trigger merger review if the shares either separately or in combination with shares held by the acquirer reach one-third of the voting shares or total capital of the acquired company.

7. Pursuant to Paragraph 2, Article 6 of the FTA, shares of the acquirer shall be calculated by adding the share of those companies which are controlled by, controlling or affiliated with the acquirer. In the following circumstances, the relation of being "controlled by, controlling or affiliated with the acquirer" would be established: 1) a company holds more than 50% of the total outstanding voting shares or total capital contributions of another company; 2) a company directly or indirectly controls the personnel, financial or business management of another company; 3) more than half of the executive shareholders, or members of the board of directors are the same between companies; 4) more than 50% of the total outstanding voting shares or capital contributions of the acquiring company and another company are held by the same shareholders or investors; 5) a company that controls another company in accordance with subparagraph 3 and 4 of Paragraph 1, Article 6 of the FTA.

2.2 Acquisition of Assets

8. Asset acquisition defined as one of merger types in subparagraph 3, Paragraph 1, Article 6 of the FTA, which stipulates 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. The term "assigned" means that one party, through contractual relation, gains ownership of property rights by another party. The term "lease" refers to a contract whereby the parties agree that one of them one party shall let the other party pay it for using an asset or benefit.

9. In the case of asset acquisition, "the whole or the major part of the business or properties" is a criterion for assessing whether such acquisition is a merger. When determining if the acquired asset constitutes the major party of business or properties for the target firm, the following factors are generally considered:

(1) The proportion of the property or business being assigned to the total value of the assignor's property and business volume would be taken into account.

(2) The portion of the property or business being assigned could be separated from the assignor to be viewed as an independent business unit. For example, sales outlets, individual departments of the enterprise, trademarks, copyright, patents and so on.

(3) The property or business being assigned is considerably important for production, sales, distribution.

(4) The part of the property or business being assigned will increase the economic power of the assignee and enhance its current market position.

2.3 Joint Ventures

10. As stipulated in Subparagraph 4, Paragraph 1, Article 6 of the FTA, an enterprise which operates jointly with another enterprise on a regular basis or is entrusted by another enterprise to operate the latter's business is also qualified as a merger transaction. The so-called "joint operation on a regular basis" means that enterprises enter into a contract on a lasting basis under which they share all profits and losses in the form of a single entity under the control of a unified management. Profits and losses may be distributed in a ratio of the investment of each party concerned.

11. With regard to the term "entrusted operation," it denotes that an enterprise (hereinafter referred as the "consignor") entrusts its business entirely to another enterprise, but the business is still operated in the name of the cosigner and its profit and loss would belong to the consigner. In this regard, the consignor has decision-making power to supervise the business operation of the entrusted enterprise, and has to pay it remuneration in return.

12. The aforesaid joint operation may include joint venture created in a formation of new entity or by jointly controlling an existing entity. The criteria of a joint venture are as follows: 1) the existence of a joint venture contract, 2) the existence of common interests, 3) sharing of profits and losses, 4) rights to operating business jointly, and 5) interdependence between the shareholders operating the joint venture based on the principle of good faith.

13. At early stage of FTC's establishment, the joint venture created by incorporation of a new entity was not subject to merger review in consideration of law enforcement cost. In 2002, the FTC made an explanation for joint ventures. It clarified no matter when an enterprise invested in an existing or a new entity, the potential restrictive competition effect in the relevant market would be the same. Therefore, the term "another enterprise" used in Paragraph 1, Article 6 of the FTA, would cover not only an existing entity at the time of merging, but also a new entity set up through joint venture. The subparagraph 4 paragraph 1, Article 6 of the FTA has been applied by the FTC in a number of joint ventures recent years[1].

2.4 Interlocking Directorates

14. Interlocking directorates may constitute the merger type specified in Subparagraph 5, Paragraph 1, Article 6 of the FTA: "where an enterprise directly or indirectly controls the business operation or the appointment or discharge of personnel of another enterprise." The prima facia evidence applied in such a case is whether more than half members of the board in the target will be appointed by the acquirer. The FTC found that the competition might be lessened significantly, particularly for horizontal mergers as a result of interlocking directorates.

15. The cases of interlocking directorates are not rare in the FTC's law enforcement experience. For instance, the FTC in 2010 launched investigation into an alleged unlawful merger between Cashbox Partyworld Co., Ltd. and Holiday Entertainment Co., Ltd. It found that the Cashbox appointed more than half members of board and supervisors of the Holiday. The FTC concluded that the Cashbox could exercise control over the Holiday by sharing common members of their boards. The phenomenon of interlocking directorates between competitors was viewed as a transaction under merger review in Chinese Taipei.

Case example: Uni-President Enterprise Corporation and Weilih Food Industrial Co., Ltd.

16. Uni-President Enterprise Corporation (hereinafter referred to as Uni-President) and Weilih Food Industrial Co., Ltd. (hereinafter referred to as Weilih) respectively accounted for 47.7% and 21.2% of the instant noodle market. Uni-President filed a merger notification with the FTC in Apr. 2008 regarding its intention to indirectly acquire through its subsidiary one third of the shares of Weilih. In Sep. 2008, the FTC decided prohibiting the merger.

1 For example, Chinese Petroleum Corporation and 7 other petrochemical companies set up a joint venture called Kuo Kuang Petrochemical Technology Corporation; Lien Hwa Industrial Corp. set up Blue Sea Industrial Gases Co. with Air Products San Fu Co., Ltd.; Far Eastone Telecommunications Co., Ltd. and 8 other businesses set up an on-line digital music service company; and 5 domestic telecommunication companies and EasyCard Corporation jointly set up a new business to operate a trust service management platform.

17. On Oct. 7 the same year, however, a newspaper reported that Uni-President had obtained 3 seats on the board of directors and 1 seat of the board of supervisors of Weilih in the director and supervisor reelection held on Oct. 6, and the general manager of Uni-President had taken office as the chairperson of the board of directors of Weilih after restructuring. The FTC initiated an investigation and discovered that Uni-President had indeed obtained over half of the seats on the board of directors and board of supervisors and also appointed the chairperson.

18. The FTC's found that, the Weilih's board of directors indeed had the authority to control business management and the appointment and discharge of important personnel. After obtaining half of the seats on the board of directors of Weilih, Uni-President apparently played an important role in the operation of the said board of directors as well as the appointment and discharge of Weilih's personnel. Uni-President also stated that it had appointed its own personnel to be on the board of directors of Weilih in order to ensure that Weilih would not make investments in other fields and could concentrate on the instant noodle business. This proved that Uni-President was indeed able to affect Weilih's business management decisions by obtaining half of the seats on the board of directors and appointing the chairperson of Weilih. It was impossible that both companies would continue to compete in the instant noodle market. Therefore, Uni-President's de facto control of Weilih had weakened the incentive for either side to compete in the market.

19. The FTC decided that Uni-President's acquisition of half of the seats on the board of directors and board of supervisors and appointment of the chairperson of Weilih had already complied with the merger type described in Subparagraph 5, Paragraph 1, Article 6 of the FTA. In addition, as the merging enterprises in this case met the merger notification filing threshold, Uni-President should file a merger notification with the FTC in advance as set forth in Subparagraph 3, Paragraph 1, Article 11 of the FTA and Paragraph 1, Article 7 of the Enforcement Rules to the FTA. However, Uni-President failed to do so and therefore violated Paragraph 1, Article 11 of the FTA. As a consequence, the FTC in 2009 ordered Uni-President to remove the personnel concurrently holding positions in Weilih to relinquish the de facto control, and also imposed on Uni-President an administrative fine of NT$500,000.

20. Uni-President filed an appeal and administrative litigation but both were initially overruled. However, the Supreme Administrative Court supported Uni-President's request, discarded the original ruling, and remanded the case to the Taipei High Administrative Court for retrial. The original decision was revoked. The main reasons for the ruling stated in the Taipei High Administrative Court's decision as follows: 1) The provision of "an enterprise directly or indirectly controls the business operation or the appointment or discharge of personnel of another enterprise" set forth in Subparagraph 5, Paragraph 1, Article 6 of the FTA shall apply only when the influence of the controlling enterprise on the operation or personnel appointment and discharge of another enterprise achieves a level where market competition is (likely to be) endangered. 2) The FTC was not able to prove that Uni-President did control the business operation and personnel appointment and discharge of Weilih. Although the FTC filed an appeal on the grounds that the court had confused Article 6 (merger definition), Article 11 (harm of competition restrictions), and Article 12 (disadvantages of competition restrictions outweighing overall economic benefits) of the FTA, the Supreme Administrative Court dismissed the appeal. The FTC filed for retrial, but the Supreme Administrative Court dismissed retrial request on Mar. 28, 2013.

3. Exemption

21. Pursuant to Article 11-1 of the FTA, there are four exemptions from filing requirement in the following circumstances: 1) where any of the enterprises participating in a merger already holds no less than 50% of the voting shares or capital contribution of another enterprise in the merger and merges such other enterprise; 2) where enterprises of which 50% or more of the voting shares or capital contribution are held by the same enterprise merge; 3) where an enterprise assigns all or a principal part of its business or

assets, or all or part of any part of its business that could be separately operated, to another enterprise newly established by the former enterprise solely; 4) where an enterprise, pursuant to the proviso of Paragraph 1, Article 167 of the Company Law or Article 28-2 of the Securities and Exchange Law, redeems its shares held by shareholders so that its original shareholders' shareholding falls within the circumstances provided for in Subparagraph 2, Paragraph 1, Article 6 herein.

22. The reasoning behind the aforesaid article is that if a merger involves only the internal adjustment of an economic entity and will not necessarily lead to an expansion of economies of scale or lessening of competition in the relevant market or is a result of mandatory compliance with the Company Act or Securities and Exchange Act because of an enterprise's holding the shares of another enterprise, such a merger is not covered by merger control and, therefore, the concerned parties are given exemption and need not file a merger notification with the FTC.

23. The FTC added one more exemption in the latest draft amendment of the FTA: when an enterprise makes a reinvestment to set up a subsidiary and holds 100% of the shares or has put up 100% of the capital contributions or makes other types of investment, which have been publicly announced by the competent authority as not requiring filing of merger notifications, it shall be given exemption and need not file a merger notification.