

Research on Merger Guidelines—A Study on Uni-President and Weilih Case

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Abstract

Since parties to a merger must file a premerger notification once the transaction meets the merger control threshold, merger analysis is necessarily predictive. However, how to evaluate the potential of the merger case and to provide a transparent standard of enforcement practice poses a challenge. Starting in 1968, the U.S. released several merger guidelines concerning the application of contemporary industrial economics. The horizontal merger guidelines revised in 2010 illustrate the balance between transparency and elasticity, which serves as a valuable reference for our country.

Based on the ongoing evolution of merger enforcement in the U.S., this essay concludes on three notes: (1) the importance of market structure is in decline, (2) the discussion of competitive effects is expanding, (3) the guidelines provide more details and reflect more diversity of industries. In Taiwan, since the Fair Trade Commission (hereinafter referred to as the FTC) is an independent agency, the court highly respects the evaluation of the FTC, and so the decisions of the FTC are decisive in almost all merger cases. To contribute to the development of merger enforcement policies in Taiwan, which is limited due to the heavy emphasis on market definition and concentration, this essay suggests that Taiwan should follow several ongoing trends: it should play down the role of market share and market concentration factors, it should abandon the step-by-step approach, it should lay more emphasis on an analysis of the competitive effects, it should expand the list of factors and it should explain more.

The Uni-President and Weilih Case revolves around two issues: interlocking directorates in 2008 and increased shareholdings in 2008 and 2010, which met reporting requirements. As for the former issue, this essay suggests that the definition of a merger

should draw a clear line between the cases involving interlocking directorates, and the cases involving not knowing whether to meet the interlocking threshold or not beforehand should be exempted from notification. As for the latter issue, the FTC prohibited Uni-President from increasing its shareholdings of Weilih without clearly asserting itself. Therefore, besides following developing trends, this essay recommends that the FTC ought to introduce a more detailed and sophisticated analysis, reflecting the unique features and circumstances of the case being considered. For this purpose, the FTC should look at a wide variety of evidence, especially regarding historical events, and use a wide variety of methods when making its final decision. Although the industrial economies have a tendency to adopt a more interventionist posture, the FTC must discharge the burden of proof: to prohibit a merger on the grounds of a stringent evaluation as a result of which the disadvantages associated with adverse competitive effects outweigh the benefits from the merger, or simply let the market decide.

Keywords: merger control, horizontal merger, merger guidelines, guidelines on handling merger filings, Uni-President and Weilih Case, interlocking directorates