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Taiwan's Merger Control Regime and its Application in the Cable Television Market

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Abstract

Taiwan is a small but open economy, not only the private sectors but also the governments are under great pressure to be efficient and flexible within the globalization context. To pursue an efficient market economy, sound competition policy and its rigorous enforcement might very well meet the needs. The general competition law, the Fair Trade Law, was enforced since February 1992. The Law covers both antitrust, including merger control, as well as unfair competition matters. The Fair Trade Commission was set up to administer the Law. To implement the merger regulations to prevent over concentration and ensure the market function, the FTC has constantly reminded itself to keep breadth with the world trend. In 2001 the relevant notification and procedure requirements were amended to streamline the merger notifications processes. This paper will explore the contents of merger control in the Fair Trade Law before February 2002, then the present regulations were introduced. The five cases in the Cable Television Market were used to explain how the merger control was put into practice.

Key words: merger control, Fair Trade Law, competition policy, Cable Television (CATV) Market

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I. Introduction

The Fair Trade Law, which is the principal Law regulating anti-competitive and unfair trade practices in Taiwan, was promulgated in February 1991 and first implemented in February 1992. The Law covers a wide range of antitrust as well as unfair competition matters.

The Fair Trade Commission (the FTC) was set up under the Fair Trade Law as a ministerial level government agency in 1992. The Commissioners' Meeting of the FTC consists of nine full-time commissioners and issues its decision independently by majority vote.

To ensure compliance, the Fair Trade Law equips the FTC with the investigatory power to discover illegal practices and empowers the FTC to issue the cease and desist orders, to require the correction of illegal practices, and to impose administrative fines. Since the FTC was officially established, it worked hard to accomplish its important mission of formulating competition policy and enforcing the Fair Trade Law, thus to ensure fair competition in every market and promote economic stability and prosperity, meanwhile also protecting consumer interests by eradicating deceptive marketing practices. In addition, the Law accords private parties with civil and criminal remedies. Despite that the court and the prosecutor also have the competent authority, the enforcement largely falls upon the FTC[1].

II. Legal Framework

Nowadays, more and more business entities are trying to enlarge their business scale

[1] According to the Fair Trade Law, the FTC shall be in charge of the following matters: 1.preparation and formulation of fair trade policy, Laws and regulations; 2.review of any fair trade matters related to the Fair Trade Law; 3.investigation of activities of enterprises and economic conditions; 4.investigation and disposition of any case violating the Fair Trade Law; and any other matters related to fair trade.

and sharpen their competitiveness through merger and acquisition. In particular, with the wave of economic liberalization around the globe, local business entities around the world are all seeking opportunities for horizontal or vertical integration or even diversified operation with a view to expanding their businesses to combat the competition from international conglomerates. However, this trend raised competition issues such as whether the marketability is enhanced at the expense of free competition, which will in turn be detrimental to the operation of the market mechanism. Therefore, "merger control" becomes an important regulation of competition Laws and is highly concerned by academic fields and competition authorities around the world (Liu 1988).

Since mergers usually may result in excessive market concentration and market monopoly by few enterprises, and thus reducing competition as well as harming the benefit of trading counterparts, the Law takes a prior merger control measure to prevent market from excessive concentration and get rid of harm to overall economy and consumer welfare. Through this kind of regulation system, the FTC could keep an eye on those enterprises which own certain market power in order to prevent them from abusing their market power in advance [2]. Based on this purpose, the term "merger" is attached with a broader meaning under the Fair Trade Law of Taiwan.

1. The Definition of "Merger" under the Fair Trade Law

As defined in Article 6 of the Fair Trade Law, the term "merger" means a situation:

(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 voting shares or total capital of such other enterprise [3];

[2] The regulation on mergers under the Fair Trade Law falls in the antitrust part, while this part also regulates monopolies, concerted actions, and vertical restraints. The Law in general permits the existence of monopolies, as long as they do not abuse their market power.

[3] In computing the shares or capital contributions referred herein, the shares or capital contributions of another enterprise held or acquired by an enterprise(s) controlled by, controlling, or affiliated with the acquiring enterprise shall be included.

(3) 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;

(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.

2. Reform of Merger Control Regime

(1) Regulations before 8th, Feb, 2002：Prior Approval

The FTC has implemented the merger control regime ever since the Fair Trade Law came into force in 1992. The Law designs a certain process system to enforce merger - involving parties reaching a certain sales volume or market shares to obey. Under the original regime, mergers involving parties that reached a certain sales volume or market share must apply to the FTC for prior written approval. The FTC had to make a decision within two months once it received all of the materials requested from the merging parties.

However, the review period is considered to be long and not good for pursuit of business opportunities. And from the view of practice, by the end of 2001, the FTC had received a total number of 5,811 applications for merger approval, while only fewer than 5 of them were turned down. Though the FTC actively simplified the review procedures for some merger types which have less effect on market competition, these changes are still not beneficiary enough to business development. Scholars have introduced US FTC related practices and hence argued Taiwan FTC to revise its relevant regulation (Liu 1992) .

(2) Regulations since 8th, Feb, 2002: Notification and Waiting Period

In 2002, the Fair Trade Law was amended and merger regulation regime has been adjusted. The new system has adopted a notification system to replace the old application

system. The merging parties no longer need to wait for a written approval from the FTC. Instead, as long as they do not receive the FTC's notice within the 30-day waiting period[4], they are free to finalize the notified mergers. When, and only when, the overall economic benefit of the merger couldn't outweigh the disadvantages resulted from competition restraint by a merger, the FTC is authorized to give a notice of prohibition on such a merger. Once the FTC fails to make any formal decision or to notify the parties of an extension, the parties may proceed with the merger when the waiting period is expired.

This amendment aims to establish a fair and reasonable competition framework that is in line with international regulatory reform development, and it will not only enhance enterprises to cope with global competition but also ensure a fair and reasonable competition mechanism.

3. Merger Notifications and Procedures

(1) Notification Thresholds

For any merger that falls within any of the following circumstances, an application shall be filed with the central competent authority, the FTC, in advance:

A. as a result of the merger the enterprise(s) will have one third of the market share;

B. one of the enterprises in the merger has one fourth of the market share; or

C. sales for the preceding fiscal year of one of the enterprises in the merger exceeds the threshold amount publicly announced by the central competent authority.

The threshold amount of the sales referred to in the preceding paragraph means the total sale or operating revenue of an enterprise, and the amount may be announced separately for financial enterprises and non-financial enterprises by the FTC[5]. The amount

[4] Such a period may be further shortened or else extended at the discretion of the FTC on a case-by-case basis. For mergers that are unlikely to restrict competition, the FTC may notify the parties to consummate the merger earlier. And for any merger which might result in concerns on competition issues, the FTC may issue a formal decision to notify the parties of an extension of at most an additional 30 days for further review, unless the parties consent to an even longer period.

[5] Before the Fair Trade Law was amended, it has been long disputed how sales amount could best be used as a merger notification threshold. One argument is that the scales of sectors vary significantly, and

announced in present is as follows[6]: a. where an enterprise in a merger is a non-financial one, its sales for the preceding fiscal year exceeds 10 billion New Taiwan Dollars and the enterprise it merges has a sales amount exceeding 1 billion. b. where an enterprise in a merger is a financial enterprise, its sales for the preceding fiscal year exceed 20 billion New Taiwan Dollars and the enterprise it mergers has a sales amount exceeding 1 billion.[7]

(2) Documents Required for Merger Notifications

All enterprises meet the requirements of dual threshold described above are obligated to apply for merger from the authority. The form of the report shall be prescribed by the FTC[8].

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it is quite difficult to find one single standard suitable for every sector. The previous sales volume threshold set up by the FTC (5 billion New Taiwan Dollars) made every merger involving financial institutions fall into this category, which gave rise to the contention that financial institutions were being over-regulated since their sales volumes were normally much higher than 5 billion while the concentration ratio in this sector was quite low. The amendment of the Fair Trade Law in 2002 authorizes the FTC to distinguish financial institutions from non-financial enterprises in determining thresholds for merger notification so that the regulatory burden for financial institutions can be more reasonable.

[6] The FTC now takes a "Dual threshold mechanism" which means sales for the preceding fiscal year of one enterprise involved in merger exceed "high threshold for sales" and the sales of the other enterprise to be merged exceed "Low threshold for sales" will meet the requirements of applying for merger.

[7] Also, the sales monetary amount of a financial holding company or other holding company for the preceding fiscal year shall be verified and determined by calculating the combined sales monetary amounts for the preceding fiscal year of all of its subsidiaries in which it has controlling shareholdings.

[8] According to Article 8, the Enforcement Rules to the Fair Trade Law, an application shall be filed with the following documents: 1. a report form specifying the following information: (1) type and substance of the merger; (2) the name and the place of office of each participating enterprise, or the name and the place of the office or business of each participating company, sole proprietorship, partnership, or association; (3) the scheduled date of merger; (4) the name of the attorney-in-fact, if any, and the supporting document therefore; (5) other required information. 2.basic data on each participating enterprise: (1) the name and residence or domicile of the responsible person or administrator, if any, of each enterprise; (2) the capital and business items of each participating enterprise; (3) the turnover in the preceding fiscal year of each participating enterprise and any enterprise with which it has a relationship of control or subordination; (4) the number of employees of each participating enterprise; (5) certificates of incorporation or establishment of each participating enterprise. 3. the financial statement and operating report for the preceding fiscal year of each participating enterprise. 4. data such as the production or operating costs, sales prices, and production and sales values (volumes) of the participating enterprises' goods or services related to the combination applied for. 5. an explanation of the benefits of the merger for the overall economy and any disadvantages due to restraints on competition. 6. major future operating plans of the participating enterprises. 7. overview of the long-term investments by the participating enterprises in other enterprises. 8. if a participating enterprise's stock is listed on the stock exchange or

Lately on July 6th, 2006, the FTC promulgated the "Fair Trade Commission Guidelines on Handling Merger Filings", adopting simplified and general procedure to review merger filing. According to the guidelines, certain types of mergers (with no suspicion of obvious competition restraints) could be regarded that the overall economic benefits outweighs the disadvantages resulting from competition restraint, and a simplified procedure is applicable.

(3) Exemption for Mergers within Affiliated Enterprises

Adjustments in shareholdings, assets, or operations among affiliated enterprises fall within the types of mergers defined in the Fair Trade Law. According to past enforcement experience, most of these adjustments involving the existing internal economic structures of enterprises do not increase the enterprises' economic scales or reduce market efficiency. Considering that there is little to be gained from subjecting the aforementioned types of transactions to the regulatory purview, the Fair Trade Law now exempts them from the merger notification requirements.

The exemptions for mergers within affiliated enterprises are [9]:

A. 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 .
B. Where enterprises of which 50% or more of the voting shares or capital contribution are held by the same enterprise merge.
C. 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.[10]

traded on over-the-counter markets, the most recent prospectus or annual report. 9. information of the market structure relating to horizontal competition and upstream and downstream enterprises of the participating enterprises. 10. other documents as specified by the Central Competent Authority.

[9] Article 11-1 of the Fair Trade Law.

[10] There is still another exemption: where an enterprise, pursuant to the proviso of Article 167, Paragraph 1 of the Company Act or Article 28-2 of the Securities and Exchange Act, redeems its shares held

4. Factors Considered in Reviewing Merger Notifications

According to Article 12 of the Fair Trade Law, the FTC may not prohibit any of the mergers filed if the overall economic benefit of the merger outweighs the disadvantages resulted from competition restraint. Furthermore, when the FTC extends the "waiting period" as mentioned previously, decisions on the filing shall be made. And for a reasonable duration, the FTC is authorized to attach conditions or require undertakings in any of the decisions to ensure that the overall economic benefit of the merger outweighs the disadvantages resulted from competition restraint. The additional conditions or burdens made by the FTC shall bear justifiable and reasonable relevance to the same consideration. Thus, to decide whether to launch an objection or attach to a merger filed, the FTC has to review the "overall economic benefit" and "disadvantages from the competition restraint".

(1) Factors Generalized from the Reviewed Merger Filing Cases

Factors to be taken into account in assessing "overall economic benefit" mainly include three aspects:

A. Scale economy effect: in terms of production efficacy, management, finance etc., as produced by an expansion of production scale due to the merger.

B. Technological efficacy: extent to which technological standard is upgraded by technology transfer or joint development and research of technology through the merger.

C. Other factors: such as extent of decrease in the prices of production factor and selling prices following the merger, the welfare effects of conglomerate integration (Lein 1988) , or whether one of the enterprises involving in merger is failing.

Factors to be taken into account in assessing "disadvantages from the competition restraint" include the following aspects:

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by shareholders so that its original shareholders' shareholding falls within the circumstances defined in Article 6 of the Fair Trade Law.

A. Whether the merged enterprises becomes a monopoly in terms of its market share;

B. Creation of more entry barriers: for instance, whether the minimum amount of funds required for entry in the market rises markedly as a result of merger;

C. Change in the ratio of concentration of the merged enterprises in the market; often with the application of HHI (Liang & Chen 2000) ;

D. Number of competitors: markets with fewer competitors are more likely to become less competitive due to the merger;

E. Product features: a merger which produces products with a higher degree of similarity in terms of their features will restrain competition more easily;

F. Whether the enterprises have engaged in a concerted action;

G. Degree of liberalization of the international market: the higher the degree of the international market to which the enterprises belongs the fewer the disadvantages

Furthermore, the FTC will also takes into consideration the economic condition of the enterprises and the competition situation in the industry to which the enterprises belong, and along with the opinion of other regulatory authorities.

(2) Factors Integrated in "Fair Trade Commission Guidelines on Handling Merger Filings"

To make the standards of examining merger filing clearer, and hence for the ease of enterprises to abide by, the lately promulgated "Fair Trade Commission Guidelines on Handling Merger Filings" integrated relevant factors that were taken into account in the past reviewed cases.

In a horizontal merger, factors taken into consideration when assessing the competition restraints are:

A. Unilateral effects: whether the enterprises participating in the merger would be restrained from market competition and thus have ability to elevate the goods price or services remuneration. The evaluation factors include the market shares of merging enterprises, homogeneity of goods or services, production capacity, and import competition.

B. Coordinated interaction: whether the merging parties and its competitors would restrict business activities among themselves or take concerted actions. The evaluation factors include the market condition (whether the market is conducive for the enterprises to form concerted actions or not), the ease of monitoring violated acts, and the effectiveness of punishments.

C. Extent of entry: the likelihood and timeliness of entry by potential competitors, and whether such entry would exert competitive pressures on the existing enterprises in the market shall be examined.

D. Countervailing power: the ability of existing and potential trading counterparts to restrict the merging parties from raising the price of goods or the remuneration of services.

E. Other factors affecting the result of competition restraints.

In a vertical merger, factors taken into consideration when assessing the competition restraints are:

A. The probability of other competitors selects their trading counterparts after the merger.

B. The degree of difficulty for an enterprise not participating in the merger enters the relevant market.

C. The possibility of merging parties abuses its market power in the relevant market.

D. Other factors that may result market foreclosure.

In a conglomerate merger, in case there is a likelihood of material potential competition in the relevant market, then the above factors shall be applicable. And to determine if there is a likelihood of material potential competition, the following factors will be taken into consideration:

A. The impact of regulation and control lift up on the merging parties' cross-industry operation.

B. The probability of cross-industry operation by the merging parties because of technology advancement.

C. The original cross-industry development plan of the merging parties besides the merger.

D. Other factors that affect the likelihood of material potential competition

And with regard to the merger filing that has suspicion of obvious competition restraints, the filing enterprises shall submit the following factors of overall economic benefits to the Commission for deliberation:

A. Consumer interests.

B. The merging parties are originally at the weaker position in the trading.

C. One of the merging parties is a failing enterprise.

D. Other concrete results related to overall economic benefits.

5. Remedies

The FTC is authorized to give punishment to an enterprise proceeding with a regulated merger under the following situations when an enterprise:

(1) fails to file an application in advance;

(2) proceeds with a merger before the waiting period expired;

(3) proceeds with a merger despite that the FTC decides upon the filing to prohibit such merger; or

(4) fails to perform the additional conditions or undertakings required by the FTC.

When an enterprises meet the terms described above, the FTC may prohibit such merger, prescribe a period for such enterprise(s) to split, to dispose of all or a part of the shares, to transfer a part of the operations, or to remove certain persons from positions, or make any other necessary dispositions. And if the punished enterprises violate the disposition, the FTC may order the dissolution of such enterprises, or the suspension or termination of their operations.

In addition to the disposition pursuant to the above paragraph, an administrative penalty shall be assessed upon such enterprises.

III. Merger Control in Taiwan's Cable Television-Related Industry

1. General Introduction

The cable television (CATV) market in Taiwan has great difference with those in other countries, no matter the developing history, market structure, enterprises' activities or the consumption habit. It is not only because of the policies, but also is of the geographic feature and population density.

Enterprises in this industry include upstream cable television program content providers ("CATV Content Providers", including production and sales agencies) and the downstream cable television broadcasting system operators ("CATV Operators"). Both of the two shall be under the supervision and administration of the Government Information Office (GIO). Therefore, apart from the merger control provisions in the Fair Trade Law which generally apply to all sectors and which promise all benefits reaped from economic efficiency, still other regulations are stipulated by GIO, under the authorization of the Cable Radio and Television Act. More specifically, these strictly prohibit over concentration in the over-the-air television and cable TV sectors, and thereby protect diversity and plurality in these media segments, while ensuring that all views and opinions are given the right to be expressed.

The CATV-related enterprises started their business earlier than 1970, and following the deregulation on publishing policies in 1987, CATV had quickly become the most popular media of knowledge and entertainment for its various content and programs. In the meantime relevant Act only gave regulation on wireless radio and television industry, and the issue why CATV enterprises providing similar service are not regulated was concerned. Along with the fact that the fast growing of CATV industry brought environmental problems and consumer dispute, regulation setting on the industry was highly expected.

The Cable Radio and Television Act[11] came into effect on August 11, 1993, and pursuant to its Article 69, GIO promulgated the "Temporary Administration Rules for Cable Television Broadcasting Systems" on September 11, 1993 for the purposes of issuing registration certificates to the then-current CATV Operators established before. According to the Cable Television Act, these broadcasting systems could keep operating until any system operators formally receives an Operation Permit and start operating in the same region.

According to the Cable Radio and Television Act, the number of CATV Operators in the same operational region shall be limited to five, and the drawing of the boundaries for such regions is subject to public announcements made by the GIO. In 1994, GIO made a public announcement that divided the island into 51 operational regions, and the system operators in these regions were allowed to file applications for special permits. Over one hundred system operators got special permits, and to date 64 received the formal Operation Permit and is under operating.

The Cable Radio and Television Act was revised and came into effect on February 3, 1999, and lifted the restriction that limited the number of CATV Operators in the same operational region to five. It also set new rules on cross-ownership between telecommunications enterprises and cable television-related enterprises, thus allowing for foreign investment and re-applications for special permits[12]. While the FTC has provided with a rather flexible framework with which to review and control concentration in the media sector, the Cable Radio and Television Act employ stricter, more rigid means to constrain the concentration of the media, and this is accomplished by enforcing various restrictions pertaining to share of system operators' market share and share of subscribers[13].

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[11] The original name of the Act is" The Cable Television Act" which was revised with its name changed in 1999.

[12] And the "Satellite Broadcast Television Act" also came into effect on the same date to provide a legal basis for the administration of satellite broadcast television program content providers.

[13] The related regulations by the Cable Radio and Television Act mainly include:

1. Restriction on scale, cross-ownership and joint provision: (1) For mergers in the over-the-air broadcasting sector, the Enforcement Rules of the Cable Radio and Television Act requires that the

2. FTC's Disposition on Related Cases

(1)Background and General Regulating Situation

In the beginning period that the Cable Television Act just came into effect and set regulations on CATV industry, for there were numerous inefficient operators in the market and GIO had kept encouraging combinations of these enterprises, FTC made a resolution that it would ignore cases where CATV Operators had completed a horizontal combination that met the criteria for a merger provided in the Fair Trade Law but had not obtained prior approval from FTC. However, FTC had sent official notices to all CATV Operators on December 5, 1996 to inform them that any future combinations shall be carried out in accordance with the Fair Trade Law, otherwise FTC shall start investigation and make necessary dispositions. Furthermore, FTC has advised GIO that when handling relevant

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transfer of the stock shares of a radio/television business shall receive prior approval from the GIO. Neither of the following shall be approved by the GIO: a. In the case where the transferee is a natural person, if the transferee in combination with his/her close relatives holds more than 50 percent of the shares of the business, or holds more than 10 percent of the shares in a newspaper or radio/television business; b. in the case where the transferee a legal person, if the transferee holds more than 50 percent of the total shares of a newspaper, radio/television businesses, or a related business. (2) To prevent cable TV system operators that undertake vertical integration of upstream channel providers and/or horizontal merger with competitors to acquire market power to the degree that they could easily engage in anti-competitive behavior, the Cable Radio and Television Act stipulates that system operators, their affiliates, and their directly or indirectly controlled system operators shall observe the following rules: a. The number of subscribers acquired shall not exceed one-third of the total number of subscribers in the nation; b. the number of system operators acquired shall not exceed one-half of the total number of system operators in an administrative district; however, this limitation shall not apply to an administrative district where there is only one system operator; and c. the number of system operators acquired shall not exceed one-third of the total number of system operators in the nation.

2. Merger Remedies: As for the cable TV industry, the fact that one-third of the total number of subscribers or system operators in the nation, as stipulated in the Cable Radio and Television Act, and that the threshold of a merged entity reaching one-third of the market shares post-merger, as set forth in the Fair Trade Law for merger notification, is the same is not a coincidence. Because legislators believe that one-third of total market shares would, to a certain extent, have a strong impact on market power, they decided to establish a clear boundary of the cap of scale for the cable TV industry. In light of consistency between regulations, structural remedies provided in the Cable Radio and Television Act for illegal mergers are similar to those punishment set up in the Fair Trade Law, and include: 1. disposition of all or part of the shares; 2. transferring of all or part of the business; 3. termination of an individual's official duties; and 4. other necessary methods.

cases, the minimum number of CATV Operators in one region shall be kept at two; except in isolated operational regions or for other de facto reasons, the survival of a sole CATV Operator in a single region shall be avoided.

In recent years when the inefficient and small-scaled operators gradually finished combination and the number of operators is reduced to 1 or 2 in each region under the previous limitation of five, FTC takes strict attitude toward cases of mergers. To ensure competition in the market, FTC principally prohibits the mergers of operators in the same region, to prevent the result of monopoly in one region. From 1997 to 2003, FTC found 16 cases of mergers not filed in advance and gave penalties from NT$100,000 to 3,500,000 (per enterprise).

However, FTC also discovered some problems arose by the CATV market structure. For the dimension of Taiwan is quite small and the area of each operational region announced by GIO may not be suitable for plural or even single operator to reach economies of scale, many of the CATV operators try reducing its cost to earn more profit through ways that may bring anti-competitive effect. One situation is that the growing of Multi System Operators (MSO), which controls CATV Operators of different regions and thus has much more superior power, may ask for unfair trading terms when negotiating with the CATV Content Providers. Another worse situation is the undertable concerted action between operators in the same region, such as agreement on trading territory limiting or on not to compete. To maintain competition and promote economic stability and prosperity, FTC keeps investigating illegal concerted actions while in the mean time suggesting GIO to make relevant amendments on the regulation. The issue is still in working and several cases of concerted action are under investigation.

(2) Summary of significant cases

Case 1 [14]: A merger of inefficient and small-scaled CATV operators; Violation of the Fair Trade Law for failing to file for an approval

[14] Fair Trade Commission Decision of October 6, 1999 (the 413th Commissioners' Meeting); Disposition (88) Kung Ch'u Tzu No. 127.

A. Hualien Cable Broadcasting Systems, Chia Jen Television Co., Ltd., and Hui Lan Broadcasting Co., Ltd. all belong to the same operating area designated by the GIO, and are competitors within the same geographical market. Hualien has a 7.5% share of the market, Chia Jen, 24%, and Hui Lan, 68.5%.

B. Investigation by the FTC found that the respondent operated in the following manner:

2.1 Chia Jen, without prior application and approval, shared a common head end with Hualien, and Chia Jen's Temporary Cable Transmission System Registration License had consequently been revoked by the GIO.

2.2 Chia Jen and Hui Lan jointly provided telephone services to their subscribers, printed its viewer subscription invoices, and received mails. Also, the FTC found that an administrative department manager and two employees of Hualien are currently insured under policies belonging to Hui Lan, and Hui Lan likewise advertised Hualien's telephone number as its own customer service hotline. Some other telephone numbers registered to one of the three operators had also been relocated to the others' business address.

2.3 All the three operators jointly conducted business operations at Hualien's business address, as evidenced by the presence of time cards there for the employees of the three companies, along with a stack of Hui Lan programming guides, equipment removal notices, and monthly revenue and expenditure statements of the Hui Lan employee welfare committee.

2.4 The three operators all negotiated purchases of channel programming and paid program royalties through the services of Best News Entertainment Corp., of which Hui Lan's responsible person was an employee.

C. The above evidence showed that the respondent engaged in the form of merger specified in Article 6(1)(iv) of the Fair Trade Law: "frequently conducting business operations jointly with another enterprise." Although the respondents' joint business operations fell into the category of a merger for which an application must be filed pursuant to Articles 11(1)(i) and 11(1)(ii) of the Fair Trade Law, the parties failed to

file an application with the FTC. Administrative fines in the following amounts were therefore imposed on the three enterprises with the amount of Hui Lan, NT$1.5 million, Hualien Cable and Chia Jen, NT$800,000 each.[15]

Case 2 [16]: An approval on a merger of inefficient and small-scaled CATV operators

A. Grand Keelung CATV Co., Ltd. and Gilung CATV Co., Ltd. made a deal within the definition of "merger" under Article 6(1)(iii) of the Fair Trade Law. As a consequence of the merger in this transaction, Gilung would have a 100% share of the market; therefore, a merger approval is necessary under Article 11(1)(i) of the FTL, which requires application for merger approval when "as a result of the merger, the surviving enterprise would have one-third or more of the market share." Accordingly, Gilung and Grand Keelung filed for a merger approval with the FTC.

B. It was in the beginning period that the Cable Radio and Television Act just came into effect and set regulations on CATV industry, and under the existing circumstances in which operating areas have not yet been re-divided and the number of operators has not yet been changed, the scale of the market would likely be too narrow if the number of system operators is too large. In addition, cable television operators are restricted in terms of the areas in which they may operate and yet they need to invest a considerable amount of funds toward the installation and operation of related fixed equipment such as cables and head-ends. As a result, their operating costs are very high.

C. The merger would benefit Gilung as it enters into cross-industry operations such as telecommunications and the internet, and value-added services such as home shopping and home security. These developments would be considered favorable to the industry as a whole. The GIO also said the merger would benefit its participants by reducing their operating and management costs, that it would benefit society by reducing waste of resources, and that it would benefit consumers by providing them

[15] The enterprises filed for application afterwards, and was approved by Fair Trade Commission Decision of March 29, 2000 (the 438th Commissioners' Meeting).

[16] Fair Trade Commission Decision of December 29, 1999 (the 425th Commissioners' Meeting); Approval Decision (88) Kung Chieh Tzu No. 1033.

with higher quality services.

D. Furthermore, according to the Cable Radio and Television Act, Grand Keelung was required to suspend its operations in the cable television program transmission business by not later than 1 November 1999. After the merger, Grand Keelung's rights and obligations to provide viewers with video services would be assigned to Gilung, and there would be no break in the supply of video services to viewers. The viewers' prepaid fees would not be jeopardized, and there would be no need to pay for installation of additional equipment. Also, the merger would reduce the cost of the changeover of cable television program system operators which would be born by the consumers.

E. Although Gilung would be the only cable television program transmission operator in its operating area after the merger, there would be no directly or apparently negative effect on consumers' rights or interests because the company is still subject to regulatory controls. For example, system operators' viewer fees shall be approved by the governments. In the event the cable television system operators hinder fair competition through monopoly, mergers, or concerted actions, the central government authority may require re-applications and accept new applications for operating permits. The GIO shall review the operators' business plans every three years during the term of their operating permit, and if the review results are not acceptable and the operator is not able to make improvements within a specified period of time, the permit may be revoked. An operating permit has a term of nine years and the operator must conduct its cable television system operations in strict conformity with the relevant regulations for the permit to be renewed. In addition, potential competitors could enter the operating area, which act would help to minimize the negative effect of restricting competition.

F. In summary, the merger would be beneficial to overall economic interests and would not have a clear and present disadvantage in terms of restricting competition, and it is approved therefore by the FTC.

Case 3 [17]: Rejection to a merger between CATV operators in the same region (while there are no other existing competitors)

A. Ch'un Chien CATV Co., Ltd.aims to take over Wei Da' CATV Co., Ltd.s major assets and operations in this merger. If successfully combined, the number of subscribers in Ch'un Chien's approved operating districts would total more than 180 thousand when the combined company begins broadcasting operation, making it the largest domestic cable operator. The scale of its operation exceeds the reasonable limit of 150 thousand subscribers for each permitted district of operation [18]. Furthermore, though the market status quo of direct satellite broadcasting operation does imply some degree of interchangeability between satellite and cable operators with respect to technical services, Ch'un Chien will be capable of only a limited degree of competition against direct satellite broadcasting operators for a fairly long time to come, considering the differences with regard to the type of channels they provide, the number of channels, and the fees they charge. So Ch'un Chien would be in a highly advantageous position in its current approved business.

B. Judging by the degree of market saturation and the number of competitors in the cable television market, the realization of the merger will result in an obvious disadvantage toward competition and it would not bring more economic benefits to upstream channel providers and end-consumers. There is, consequently, no logical necessity for the merger. After the combined company began operation in accordance with the Cable Radio and Television Act, it would impose an entry barrier on new operators within a considerable period of time, even though new operators would enter into competition as application for new launches reopens. Taken into consideration is also the fact that operation of a cable broadcasting and television system is a concession business which requires considerable time in preparation for establishment - three years or more to be specific - from network

[17] Fair Trade Commission Decision of March 29, 2000 (the 438th Commissioners' Meeting).

[18] Based on an important indicator drawn up for the "Study of the division of CATV operating districts in Chinese Taipei" and used by the GIO as its reference in dividing up cable broadcasting and television operating districts.

rollout, inspection of established engineering by authorities, to obtaining operation permit.

C. The realization of the merger would indeed also reduce the initial costs for layout of the cable television system's industrial network and equipment, avoiding a waste of resources caused by overlapping networks, and by so Ch'un Chien would enhance its chances of acquiring cross-business operations. And the fulfillment of the merger does not therefore have the significant relevancy or necessity for the promotion of cross-business operations.

D. To sum up, undertaking the merger would not have significant economic benefits and would result in disadvantageous competition, the case is therefore rejected by FTC.

Case 4 [19]: Rejection to a merger between CATV operators in the same region (while there are no other existing competitors)

A. In June 2002, Hsin Taipei Cable TV Co. and Li Kwan Cable TV Co., the only two system operators serving the Neihu area (comprising two administrative areas within Taipei city), notified the FTC of their merger proposal. The two system operators respectively belong to the Eastern Group and the Giga Group, the two largest MSOs in Taiwan, with each controlling the provision of more than ten channel programs.

B. The FTC was concerned that this merger would not only give rise to a monopoly in the Neihu service area so as to be able to abuse the operators' dominant position over the upstream program providers and downstream subscribers, but would also create a setting for possible collusion between the two largest MSOs to lessen their competition in the neighboring service areas and divide their business operation areas by exchanging their subscribers.

The FTC was seriously concerned that the disadvantages resulting from competition restraints could not be outweighed by the possible overall economic benefits produced by

[19] Fair Trade Commission Decision of August 8, 2002 (the 561st Commissioners' Meeting).

this merger and, consequently, rejected the proposal[20].

Case 5[21,22]: Rejection and approval to mergers between CATV operators and CATV Content Providers

A. The application which was first made for enterprise merger by Eastern Multimedia Co., Ltd. aimed at controlling, directly or indirectly, the operations and personnel recruitment of Lien Ch'un, Hsin Taipei, Chin P'in Tao, and Hsin Chu Chen Tao cable television stations was reviewed and rejected by the FTC due to the fact that the merger would bring greater disadvantage through restraint of competition than the overall economic benefits it would provide. Details are as follows:

a. Theoretically and empirically, market penetration will create economies of scale for cable programming providers. Also note that revenues from advertisements are the major sources of income for programming providers and that revenues from advertisements have a positive correlation with penetration. At the time of the application, Eastern Multimedia and its associated enterprises controlled nearly 50% of available channels though producing, programming and investing.

b. The FTC's analysis found that the competitive superiority of the combining cable systems and their power to scare off competitors would tend to concentrate the cable television industry to the detriment of the competitive mechanism. An examination of Eastern Multimedia's application, moreover, revealed that in order to allay doubts about the merger, the applicant had not offered concrete measures describing how it would independently limit its own possible restriction of competition or encourage the externalization of internal advantages. Cable television market penetration has reached more than 70 % in a majority of regions, and watching cable television programs is not only the population's major leisure activity, but also their primary source of information. The implementation of this merger would concentrate the upstream and downstream cable television markets

[20] The FTC kept watching the two operators and found them violating the Fair Trade Law for exceeding the prohibited merger. Each of the enterprises were fined by NT$500,000.

[21] Fair Trade Commission Decision of April 19, 2000 (the 441st Commissioners' Meeting).

[22] Fair Trade Commission Decision of November 22, 2001 (the 524th Commissioners' Meeting).

and might, through forcing the disadvantages on consumers, injure consumer welfare.

c. After consultation with the competent authorities on the national and the local levels with regard to the possible creation of restricted or unfair competition in the event of this application's approval, the Commission found that these agencies also had concerns regarding the possible effects of the merger. In view of the considerations outlined here, the Commission denied the application for merger due to the merger bringing greater disadvantages through restriction of competition than the overall economic benefits it would provide.

B. Later in 2001, Eastern Multimedia applied again for an approval of the same merger and was approved by the FTC (FTC Vol.6, 2002) . Reasons for approval are as follows:

a. Benefits to the overall economy

a1. Strengthening the management of the acquired companies: The applicant in this case is much superior to the acquired companies in terms of capital, annual sales, and managerial expertise. Moreover, the cost of building and upgrading cable television networks is extremely high. The financial, technical, and managerial backing of Eastern Multimedia would significantly enhance the management of the acquired companies, and could thereby directly or indirectly improve the quality of services provided by the acquired companies.

a2. Facilitating the upgrade of the cable television industry: cable television provides one of the best 4C convergence platforms thanks to the strong penetration of cable networks in Taiwan. It is also among one of the most important targeted industries for the development of information infrastructure. However, the cost of expanding and upgrading a cable network is so high, and a single platform brought by the merger could be used to provide integrated cable television, communications, and Internet services. This would enable these companies to offer a diverse range of services (such

as broadband network transmission, pay-tiered service, interactive two-way services, and other value-added services), and would also spur progress in related industries (such as manufacturing of cable modems and set-top boxes, and the building of cable networks).

a3. Reducing the risks associated with the renewal of program licensing: Under the Copyright Act, unauthorized broadcasting of programs is prohibited. As a result, during renewal negotiation for program licensing contract, unforeseen circumstances and changing market conditions can easily trigger disputes between program providers and cable system operators, and thus harm the interests of consumers. If the proposed merger is carried out, the firms acquired by Eastern Multimedia would have access to a large, stable source of programs, which would reduce the transaction costs for both sides and stabilize the supply-and-demand relationship.

a4. Providing comprehensive services to consumers: cable system operators would very likely find that the involvement of the applicant in their businesses has enabled them to upgrade both software and hardware, and to implement new management techniques. By achieving greater efficiency, these companies would be able to deliver better and more diversified entertainment, information, and communications services.

b. Restricting effect upon competition

b1. In view of the applicant's strength in the market of program supply, and the market position of the acquired companies in the cable television system, there is room for concern about the potential for the program-supply market to become more concentrated after the merger. Induced by personal interest and acting through the acquired companies, the applicant could significantly lower the appearance frequency of its programs by means of refusal to deal, discriminatory treatments, leveraging the advantages from joint bargaining power, or acting collusively with other cable system operators to prevent other program providers from entering the system of the acquired companies. That

will result in higher average costs and lower income for competing program providers, which in turn would weaken their competitiveness and possibly force them out of the market altogether.

b2. To be sure, the merger does create the benefit of reducing transaction risks, improving management quality, stabilizing supply-and-demand relationship and realizing cross-industry integration for the acquired companies, and could also lower their costs of purchasing programs via the joint bargaining power attained through the merger. Still, the parties to the proposed merger would enjoy a clear competitive advantage over other cable systems operating in their same districts. Thus, in addition to the previously described tendency toward greater concentration in the program-supply market, it is quite possible that the competitive advantages enjoyed by the cable system operators participating in the proposed merger could make it difficult for cable system operators outside the proposed merger to compete in the market, or could discourage potential competitors from entering the market. Under the circumstances, we do not exclude the possibility that the proposed merger could lead to a higher degree of concentration in the market for cable television systems. If these concerns turn out to be a real problem, under the current structure of the cable television market, the adverse effects of the merger would be passed on to consumers, and harm their interests.

c. Overall assessment

Advances in science and technology are expected to provide alternative platforms besides cable television such as direct broadcast satellite (DBS), multi-channel microwave distribution systems (MMDS), and video on demand (VOD) for program broadcasting. In the long term, cable television is going to be only one among many different platforms for program broadcasting, a situation of which should decrease the likelihood that the proposed merger would lead to a higher degree of concentration in the market of cable system operation. Moreover, the applicant has sold out some of the shares it owned of certain content providers to

a company not involved in the proposed merger. This sale should mitigate the adverse impact of the proposed merger upon the market for program-supply. In addition, as compression technologies becoming more mature and set-top boxes more widely used, the number of channels that will be broadcast via cable networks is expected to increase dramatically. Accordingly, the likelihood that the proposed merger will trigger increased degree of concentration at the program-supply market will be sharply curtailed. Moreover, in view of the trend toward 4C convergence, the proposed merger could spur further progress in related technologies, encourage "creative competition," and prompt cable system operators, communications firms, and Internet firms to engage aggressively in cross-industry integration. Such a trend would further mitigate any tendency of the proposed merger to restrict competition.

d. Also, the applicant and the companies are all governed by the Cable Radio and Television Act and other related laws and regulations. Any disputes with consumers concerning price and/or quality would still have to be referred to the competent government authority for resolution, and the relevant regulations still make it possible for potential competitors to enter the market. If the applicant excludes other programs from entering into the market by establishing a cartel, refusing to deal, discriminatory treatments, leveraging its joint bargaining power, or abusing its dominant market position, or use its competitive advantage secured from the proposed merger to engage in restrictive or unfair competition, the Fair Trade Law would still be applicable. The FTC had consulted with the GIO and other government agencies, and found that they generally believe that the proposed merger could spur further building out of the cable television network, improve the network's performance, and reduce costs for the firms taken over by the applicant. Accordingly, the proposed merger ought to spur healthy development of the related industry.

IV. Conclusion

Taiwan is a small but open economy. Globalization has already blurred the boundaries that once separated domestic markets. As boundaries of domestic markets are no more clear under the global framework, not only the private sectors but also the governments come under greater pressure to be efficient and flexible. To pursue a competition-oriented market economy, sound competition policy and its rigorous enforcement might very well meet our needs.

In this regards, the FTC has constantly reminded itself to keep breadth with the world trend, and keen to discuss competition issues and exchange views and experiences with foreign counterparts. FTC continues to expand all channels of dialogue to participate in the various activities of international organizations with regards to competition issues.

In 2001 the relevant notification and procedure requirements in the Fair Trade Law and relevant regulations were amended to streamline the merger notifications processes to make the enforcement more effective and reduce the unnecessary burden of law enforcers and the business involved. The result of the amendment was quite satisfactory. The FTC now has a reasonably quick turnaround on merger matters and its time frames are on a par with other countries.

However, to make our merger control regime in line with advanced foreign counterparts, the FTC do feel there is a further need to elaborate our merger review criteria more precisely. Considering Taiwan is a small but open economy, the legal term and the current standard we used could be too vague and too sophisticated to the law enforcer and the businesses concerned. To make the enforcement more predictable and enhance our accountability, the FTC held a series of seminars on the criteria of merger review to provide some inputs and to facilitate its preparatory work in revising its merger review process. Therefore, lately on July 6th, 2006, the FTC promulgated the “Fair Trade Commission Guidelines on Handling Merger Filings”, which adopts simplified and general procedure to review merger filing, and make the standards of examining merger

filing clearer. The guidelines are set for the the ease of enterprises to abide by, and thus create a more efficient environment for competition.

Furthermore, to provide a supplemental competitive safeguard beside the sector-specific regulation framework, the FTC will establish co-operative links to avoid duplicative regulation and to co-ordinate government agencies' regulatory purposes. It is clear that, within the global economy, the principal objective behind competition policy or economic regulations could only be general economic efficiency and it is believed that competition policy can best play the role to maintain and improve the market economy.

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臺灣結合管制及其在有線電視市場之應用

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臺灣係一小型開放經濟體，在全球化之際，私部門固然受到莫大衝擊，政府部門亦面臨必須更有效率及彈性之壓力。為了追求更有效之市場經濟，完善的競爭政策及嚴格的執法實有其必要。台灣公平交易法自 1992 年 2 月起實施，內容涵蓋限制競爭及不公平競爭之管制，結合管制即為前之一部份。公平法之執法機關為公平交易委員會，為了避免市場過度集中及確保市場機能有效運作，公平會於 2001 年修正公平法中有關結合管制方式，由事前許可制改為申報異議制，並加速允許結合通知程序。本文除探討修法前後之法令內容外，並以有線電視市場之五個案為例，說明公平會在結合管制上之執法應用實況。

關鍵詞：結合管制、公平交易法、競爭政策、有線電視市場

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