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TAIWAN FTC NEWSLETTER

2020.6

Taiwan Mobile Violated the Fair Trade Act by Not Filing Its Merger with Bebe Poshe International

The FTC decided at the 1475th Commissioners' Meeting on Feb. 12, 2020 that Taiwan Mobile Co., Ltd. (hereinafter referred to as Taiwan Mobile) had violated the Fair Trade Act by not filing its merger with Bebe Poshe International Co., Ltd. (hereinafter referred to as Bebe Poshe International) after acquiring 85% of the shares of the latter through Dafu (transliteration) Multimedia Technology Co., Ltd. (hereinafter referred to as Dafu Multimedia) and Fubon Multimedia Technology Co., Ltd. (hereinafter referred to as Fubon Multimedia) and gaining direct or indirect control of the management and personnel appointment and dismissal of Bebe Poshe International. The condition complied with the merger patterns described in Subparagraphs 2 and 5 of Article 10 (1) of the Fair Trade Act and reached the filing thresholds specified in Subparagraphs 2 and 3 of Article 11 (1) of the same act while the proviso set forth in Article 12 did not apply. Taiwan Mobile was required to file the merger but did not do so. The conduct was in violation of Article 11 (1) of the Fair Trade Act. For this reason, the FTC imposed an administrative fine of NT$500,000 on Taiwan Mobile.

Although Dafu Multimedia, a subsidiary of Taiwan Mobile, held less than half of the shares and board of directors seats of Fubon Multimedia, Taiwan Mobile admitted that it had gained indirect control of the management and personnel appointment and dismissal of Fubon Multimedia through Dafu Multimedia. Comparisons showed that the personnel of Fubon Multimedia with the authority to make

management decisions in Fubon Multimedia had been appointed by Dafu Multimedia. Moreover, Taiwan Mobile had listed Fubon Multimedia as a subsidiary and part of the group in its consolidated financial statements. The business development plans and corresponding measures of Fubon Multimedia had been determined by Taiwan Mobile, whereas the annual financial statements of Fubon Multimedia also indicated that Taiwan Mobile was its final controller after the merger. In other words, Taiwan Mobile had substantial control of the management and personnel appointment and dismissal of Fubon Multimedia through Dafu Multimedia. Hence, when Taiwan Mobile took part in the cash capital increase and acquired 85% of the shares of Bebe Poshe International through its sub-subsidiary Fubon Multimedia on Jul. 16, 2018 and obtained four of the five seats of the board of directors of Bebe Poshe International on Aug. 12 in the same year, Taiwan Mobile had already gained direct or indirect control of the management and personnel appointment and dismissal of Bebe Poshe International. The condition complied with the merger patterns described in Subparagraphs 2 and 5 of Article 10 (1) of the Fair Trade Act.

In 2017, Taiwan Mobile accounted for one quarter of the domestic mobile broadband service market share. At the same time, the aggregate sales of all the businesses participating in the merger in the previous fiscal year exceeded NT$40 billion while the sales of two of the enterprises surpassed NT$2 billion. These figures achieved the filing thresholds specified in Subparagraphs 2 and 3 of Article 11 (1) of the Fair Trade Act whereas the proviso regarding merger filing in advance set forth in Article 12 of the same act was inapplicable. In other words, Taiwan Mobile was required to file the merger with the FTC in advance but did not do so. The conduct was in violation of Article 11 (1) of the Fair Trade Act. Hence, the FTC made the aforementioned sanction.

Concerted Action Extension Application from First Commercial Bank and Seven other Banks Approved with Undertakings Attached

The FTC decided at the 1477th Commissioners' Meeting on Feb. 26, 2020 to approve the application from First Commercial Bank, Taiwan Cooperative Bank, Mega Bank, Hua Nan Commercial Bank, Chang Hwa Commercial Bank, Land Bank of Taiwan, Taiwan Business Bank and Bank of Taiwan, all public banks, for an extension of their credit card issuance alliance with undertakings attached by citing Subparagraphs 1 and 2 of the proviso set forth in Article 15 (1) and Article 16 of the Fair Trade Act. The concerted action was extended until Mar. 1, 2025.

In order to increase the number of collaborating stores, First Commercial Bank and the other seven banks formed the Public Bank Credit Card Issuance Alliance by using the Public Bank Credit Card Alliance trademark, logo, images and domain name. The FTC first gave the concerted action exceptional approval on Mar. 22, 2012. On Feb. 25, 2015, the FTC approved the application from the banks for the extension of the concerted action until Mar. 1, 2020. Because the extension was about to expire, First Commercial Bank and the other seven banks acted according to Article 16 (2) of the Fair Trade Act and applied for another extension.

After reviewing the application, the FTC concluded that, according to the tendencies of the numbers of credit cards issued and the amounts charged, the growth of other credit card issuers continued to exceed that of the Public Bank Credit Card Issuance Alliance. In the meantime, as a consequence of the emergence of mobile payments and online-only banking, the alliance would face more competition. Furthermore, the market status of the alliance showed no significant improvement. Hence, an extension of the concerted action would have no significant risk of an increase in competition restraints. Another consideration was that the concerted action could help First Commercial Bank and the other seven banks save on the expenses and costs needed to negotiate with collaborating stores as well as increase the number of stores that holders of credit cards issued by the public banks could choose. At the same time, the collaborating stores could also have more consumers to provide services to and increase the ranges of their services. In other words, both consumers and the stores would benefit from the concerted action. In addition, the Ministry of Finance also indicated that since the public banks had the responsibility to carry out government policies and maintain financial order, the alliance could help strengthen the competitiveness of public banks. Therefore, the FTC considered that the concerted action would have positive effects on the overall economy and approved the extension application.

However, to protect the overall economy and the public interest, the FTC cited Article 16 (1) of the Fair Trade Act and attached the following undertakings to the approval:

1. The applicants may not use this approval to engage in concerted actions with regard to credit card issuance conditions, fee collection and the rights and obligations of credit card holders.

2. Outside the agreed number of collaborating stores to be provided by each bank, the applicants may not restrict any individual applicant from offering additional collaborating stores or better terms to credit card holders.

3. The applicants may not refuse the withdrawal of any applicant from the concerted action. When any change occurs to the participants in the concerted action, the applicants are required to present it to the FTC in writing for reference within 30 days.

4. The applicants are required to present photocopies of the meeting information and record to the FTC for reference within 30 days after the executive team of the Public Bank Credit Card Issuance Alliance holds a meeting.

5. Before Dec. 31 each year, the applicants are required to present in writing to the FTC for reference the agreed number of common collaborating stores to be provided by each member in that year and a list of the names of stores remaining in collaboration.

Bain Capital's Indirect Pooling of Interests with LSDI and SSST Not Prohibited

The FTC decided at the 1477th Commissioners' Meeting on Feb. 26, 2020 to cite Article 13 (1) of the Fair Trade Act and approve US company Bain Capital Investors, LLC (hereinafter referred to as Bain Capital) to engage in a pooling of interests with US company Lite-On Sales & Distribution Inc. (hereinafter referred to as LSDI), a subsidiary of Lite-On Technology Corporation (hereinafter referred to as Lite-On Technology), and Solid State Storage Technology Corporation (hereinafter referred to as SSST) through its subsidiary.

Japanese company Kioxia Holdings Corporation (hereinafter referred to as KHC), a subsidiary of Bain Capital, intended to go through its Taiwanese subsidiary Kioxia Taiwan Corporation and American subsidiary Kioxia American, Inc. to acquire the shares of the Taiwanese subsidiary SSST and American subsidiary LSDI of Lite-On Technology. The condition complied with the merger patterns described in Subparagraphs 2 and 5 of Article 10 (1) of the Fair Trade Act. Meanwhile, one of the merging parties accounted for one quarter of the relevant market share, meeting the threshold set forth in Subparagraph 2 of Article 11 (1) of the same act, whereas the proviso in Article 12 did not apply. Therefore, a merger notification was filed with the FTC.

KHC produced and sold NAND flash memory and solid-state drives through its subsidiaries while SSST and LSDI only produced and sold solid-state drives. Since NAND flash memory was a material needed to produce solid-state drives, the case involved both the NAND flash memory and solid-state drive markets. In addition, as the costs of transportation of NAND flash memory and solid-state drives were low, the prices of such products in different parts of the world were not significantly different and trading counterparts could easily switch to different trading partners. Furthermore, the shares of the merging parties in the domestic and global NAND flash memory markets would remain unchanged after the merger. Although the solid-state drive market shares of the merging parties would increase slightly, competitors in the relevant market were many and competition was rather fierce, there would be no competition restraint concerns after the merger.

After obtaining and assessing the opinions of the competent authority of the industry in question, competitors as well as upstream and downstream trading counterparts and also evaluating the aforementioned factors, the FTC cited Article 13 (1) of the Fair Trade Act and did not prohibit the merger.

Merger between NXP and Marvell Not Prohibited

The FTC decided at the 1464th Commissioners' Meeting on Nov. 27, 2019 to approve the merger between Dutch company NXP Semiconductors N.V. (hereinafter referred to as NXP) and Bermuda-based Marvell Technology Group Ltd. (hereinafter referred to as Marvell) by citing Article 13 (1) of the Fair Trade Act.

NXP intended to go through its subsidiary to acquire the wireless access department of Marvell. The condition complied with the merger pattern described in Subparagraph 3 of Article 10 (1) of the Fair Trade Act. At the same time, the sales of the merging parties in the previous fiscal year also reached the filing threshold specified in Subparagraph 3 of Article 11 (1) of the Fair Trade Act while the proviso in Article 12 of the same act did not apply. Therefore, a merger notification was filed with the FTC.

The wireless access product that NXP marketed was MCU which was an IC type different from the wireless logic IC applied in the main product of the wireless access department of Marvell. Moreover, the data transmission per second bandwidths, signal reception methods, signal ranges and power consumption rates of various types of wireless access devices were all different, whereas the ranges of application also varied in terminal markets which, therefore, could be considered independent markets. As the shares of the merging parties in the BTLE access MCU, IEEE802.15.4 access MCU, Wi-Fi access MCU, Wi-Fi access logic IC and Wi-Fi/BT access logic IC markets were not large while there also existed other competitors, it was difficult to conclude the merger could lead to competition restraint concerns.

As to whether the FTC would approve or prohibit the merger, the key consideration was whether the overall economic benefit would be greater than the disadvantages from competition restraints thereof incurred. After obtaining and assessing the opinions of the competent authority of the industry in question, of competitors and downstream trading counterparts as well as evaluating the aforementioned factors, the FTC decided not to prohibit the merger by citing Article 13 (1) of the Fair Trade Act.

Wonderful Life Violated the Multi-level Marketing Supervision Act by Making Changes without Filing with the FTC in Advance

The FTC decided at the 1463rd Commissioners' Meeting on Nov. 20, 2019 that Wonderful Life Co., Ltd. (hereinafter referred to as Wonderful Life), a multi-level marketing business, had violated Article 7 (1) and Article 13 (1) of the Multi-level Marketing Supervision Act by changing its participation contract and sales systems without filing with the FTC in advance and not signing participation contracts with participants recruited to join its schemes or organization. For the two unlawful acts, the FTC imposed on the company administrative fines that totaled NT$200,000.

When the FTC's staff members inspected the main office of Wonderful Life in March and April of 2019, they discovered that the product value depreciation table attached to the product return regulations indicated that products returned within 30 days and over 45 days but within three months would respectively be subject to a deduction of 10% and 20% of the original value. The deductions were inconsistent with the promise of buying back at the original value and at a 10% discount of the original value that the company originally filed with the FTC. Moreover, the company had filed with the FTC in September 2018 that the corporate member hierarchy system would be removed, but participants were still being promoted from gold-level members to become corporate members while new recruits could also be given corporate memberships. At the same time, the registered bonus system included a K value design (weighted mean), yet it was not applied when the company calculated bonuses. In other words, Wonderful Life had changed the participation contract and sales systems without filing with the FTC in advance and the conduct was in violation of Article 7 (1) of the Multi-level Marketing Supervision Act.

In addition, Wonderful Life had nine participants who joined the company online and made their payments by using credit cards. They became participants without signing contracts. The fact that Wonderful Life accepted these recruits to join its sales schemes or organization without signing contracts was in violation of Article 13 (1) of the Multi-level Marketing Supervision Act.

Sinyi Real Estate Violated the Fair Trade Act by Posting False Ads Claiming "Congratulations on Continuous Closed Deals"

The FTC decided at the 1477th Commissioners' Meeting on Feb. 26, 2020 that the claim "Congratulations on continuous closed deals" posted by Sinyi Real Estate Co., Ltd. (hereinafter referred to as Sinyi Real Estate) on the flyers distributed in the Xin An Public Housing Complex was a false and misleading representation with regard to content of service and could also affect transaction decisions. The practice was in violation of Paragraph 4 of Article 21 and Paragraph 1 of the same article was applicable mutatis mutandis. The FTC imposed an administrative fine of NT$100,000 on the company.

The false claim included "Congratulations on continuous closed deals as well as 1) a 33 ping unit in the northern district sold for NT$21.56 million, 2) a 38 ping unit in the northern district sold for NT$24.70 million, 3) a 45 ping unit in the northern district sold for NT$27.88 million, 4) a 38 ping unit in the northern district sold for NT$25.20 million, 5) a 25 ping unit in the southern district sold for NT$18.00 million, 6) a 29 ping unit in the southern district sold for NT$19.00 million, 7) a 25 ping unit in the southern district sold for NT$19.00 million, and sincerely seeking to purchase units in the Xin An Public Housing Complex." At the bottom of the flyer the name Sinyi Real Estate was indicated. The wording gave people the impression that the seven closed deals had been made by Sinyi Real Estate. However, three of them had not been made by Sinyi Real Estate, but the company did not disclose the sources of the closed deal records or related information. Consumers had no idea that not all seven continuous closed deals had been made by Sinyi Real Estate, yet the ability of the company to close deals could not only have an effect on consumers' willingness to entrust the company to sell their properties, but also reduce the opportunity for competitors to do business. In other words, the claim was inconsistent with the facts and could also cause the general public to have wrong perceptions. It was a misleading representation in violation of Paragraph 4 of Article 21 of the Fair Trade Act and Paragraph 1 of the same article was applicable mutatis mutandis.

Statistics on Complaint Cases

Complaint cases received are cases in which informers present to the FTC personally signed written (including emails, faxes, etc.) or oral statements (which are filed as records or complaints) that describe concrete evidence of activities suspected of being in violation of the Fair Trade Act or the Multi-level Marketing Supervision Act or personally signed statements transferred from other agencies. Statistics show that the FTC accepted 421 complaint cases (76.0% of the total number of cases) and reviewed 560 cases (including 139 cases remaining unclosed at the end of 2019) between January and March 2020. From 2015 to the end of March this year, the FTC processed 8,289 complaint cases in total. (Table 1)

Between January and March 2020, the FTC closed 366 complaint cases, made sanctions in 3 cases and did not make sanctions in 16 cases. In the five recent years, the FTC closed 8,204 complaint cases, made sanctions in 172 cases, did not make sanctions in 508 cases and decided on administrative disposal in 4 cases. Review was suspended in 7,259 cases due to the involvement of criminal or civil cases or the jurisdiction of other agencies or as a result of procedural inconsistency. (Table 1)

Table 1 Statistics on Complaint Cases Processed in the 5 Recent Years

Unit: Case; %

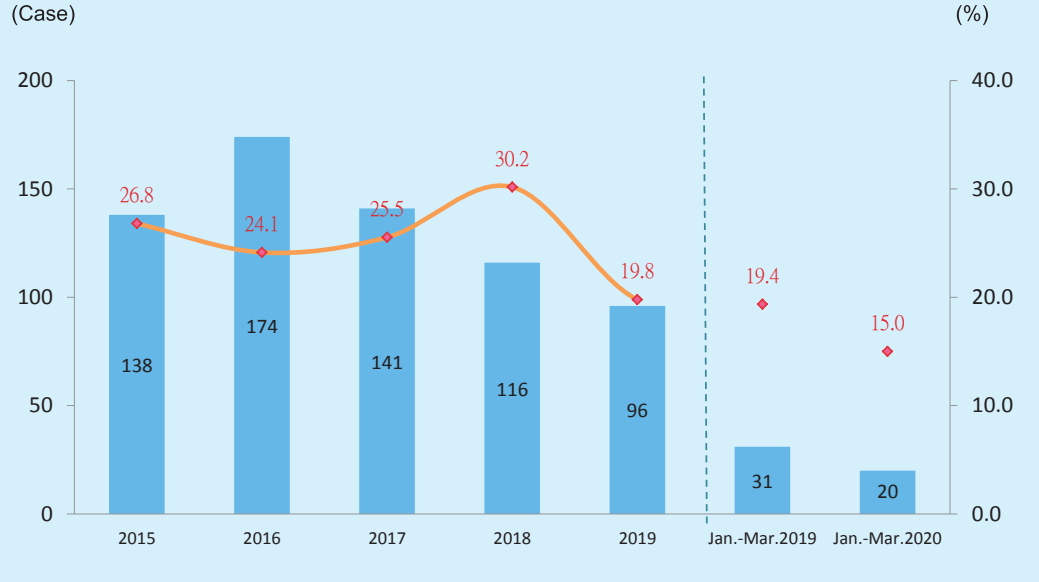
Year	Reported Case Processed Cases	Ratio to Total Number of Cases%	Handling Result						
			Total	Sanctions Made	No Sanctions Made	Administrative Disposals	Suspension of Review	Termination of Investigation	Combination with Other Cases
Total (2015-Mar.2020)	8,289	70.5	8,204	172	508	4	7,259	1	260
2015	1,302	62.3	1,283	37	101	-	1,108	-	37
2016	1,587	68.7	1,545	42	129	2	1,327	1	44
2017	1,671	73.0	1,728	36	104	1	1,485	-	102
2018	1,802	73.0	1,782	35	81	-	1,617	-	49
2019	1,506	73.6	1,500	19	77	-	1,384	-	20
Jan.-Mar.2020	421	76.1	366	3	16	1	338	-	8

Notes:

1. The total number of cases refers to the aggregate of complaint cases, concerted action approval applications, merger notifications, interpretation applications and cases in which the FTC initiated ex officio investigations.
2. "Administrative disposals" refers to administrative measures adopted by the FTC, including issuing industrial warnings (or corrections) or case warnings (or written requests for improvement) and requesting that related competent authorities take necessary action.
3. "Termination of investigation": According to Article 28 added as a result of the amendment to the Fair Trade Act made on Feb. 4, 2015, the FTC may decide to terminate the investigation when the enterprise under investigation for violation of the Fair Trade Act has made the commitment as well as actually taken concrete measures to cease and correct its unlawful conduct.
4. "Combination with other cases" means that the same informer has repeatedly reported the same violation or different informers have reported the same violation and the complaints thus filed have been combined and processed together.

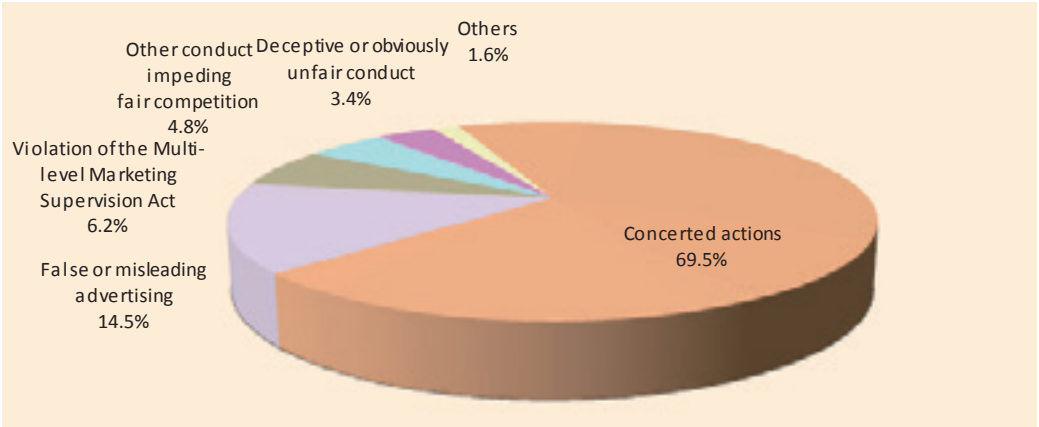
Among the complaint cases closed between January and March 2020, after subtracting the ones in which review was suspended because they did not belong to the jurisdiction of the FTC or involved procedural inconsistency and those repeatedly filed, there remained 20 cases (hereinafter referred to as the violation cases) that belonged to the jurisdiction of the FTC. Sanctions were made in 3 cases, accounting for 15.0% and decreasing by 4.4% compared to the same period in the previous year. In the five recent years, sanctions were made in 172 cases, accounting for 25.1% of the total violation cases. (Figure 1)

Figure 1 Statistics on the Ratio of Sanctions of Complaint Cases to Violation Cases in the 5 Recent Years



Among the complaint cases processed in the five recent years, the FTC issued 181 dispositions. Judged by the type of violation (those involving two or more articles calculated repeatedly), 102 cases, about 56.0% of the total violation cases, associated with false or misleading advertising topped the list, followed by 34 cases, about 19.0%, involving multi-level marketing. The fines imposed totaled NT$231.05 million. Those imposed for concerted actions added up to NT$160.54 million (69.5%), forming the largest proportion, followed by NT$33.56 million (14.5%) for false or misleading advertising and then NT$14.35 million (6.2%) for violation of the Multi-level Marketing Supervision Act. (Figure 2)

Figure 2 Statistics on the Fines for Complaint Cases in the 5 Recent Years – by Type of Violation



The fines imposed for complaint cases totaled NT$231.05 million in the 5 recent years

FTC International Exchanges in March and April 2020

- On Mar. 3, the FTC attended an online workshop “Vertical Restraints Project - An Exploration of Remedies and Addressing Market Harm in the Digital Era” held by the ICN Unilateral Conduct Working Group.
- On Mar. 19, the FTC attended a teleconference “Advocacy and Digital Markets” held by the ICN Advocacy Working Group.
- On Apr. 23, the FTC signed with Indonesia the “Taipei Economic and Trade Office in Indonesia and Indonesian Economic and Trade Office to Taipei Memorandum of Understanding on the Application of Competition Law”.

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