A Review of the Domestic Merger-filing Thresholds

1. Background of Study

Both the market share and sales have always been adopted to be merger-filing thresholds in related regulations in the Fair Trade Law. When conducting peer review on the competition law and policy of the FTC in 2006, the Competition Committee of the OECD commented that use of the market share as the merger-filing threshold was full of uncertainties and adjustment was recommended. Afterwards, the FTC convened a number of public hearings on the issue, but domestic scholars held different opinions and either side would not back down whereas the internal opinions of the FTC were also inconsistent. As a result, no modification regarding the issue was made in the 2017 draft amendment to the Fair Trade Law that the FTC presented to the Executive Yuan. Later on, when the Fair Trade Law was amended for the sixth time, adoption of business sales as the only merger-filing threshold was proposed in the draft amendment. However, when reviewing the 2015 amendment, the Legislative Yuan decided to retain the market share as one of the merger-filing threshold. The aforementioned amending process made it evident the difficulty and complexity in the establishment of appropriate merger-filing thresholds. Merger-filing thresholds are closely associated with the obligation of enterprises to file with the competent authority before merger as well as the intensity of the regulation of the competent authority. Moreover, international competition law organizations in recent years have studied the challenges in filing for and review of mergers in the digital era in the hope of finding out the challenges that competition law authorities have to face when interpreting regulations, making analyses and handling evidence. For this reason, this study is initiated to perform a profound analysis and also discuss whether the merger-filing thresholds of the FTC comply with the international tendency in merger control and whether the domestic filing thresholds are appropriate.

2. Methods and Process of Study

Related information is collected to understand the merger-filing threshold regulations in major countries enforcing competition law and their research processes. Then, the findings and concrete suggestions regarding the appropriateness of the FTC's merger-filing thresholds and recommendations for amendment in the future are presented.

3. Main Suggestions

The following are the conclusions of this study and the suggestions regarding the appropriateness and future directions for amendment of the merger-filing thresholds of the FTC:

(1) The market share threshold is an important screening standard in the FTC's merger control. It may not be so precise, but it is easier for the FTC to screen out merger cases likely to cause concerns with competition restraints. A rather large percentage of the merger cases that the FTC reviewed in 2017 and 2018 were filed with the FTC because the merging parties reached the market share threshold. Only one of the mergers filed in those two years was prohibited, while three mergers were not prohibited with undertakings attached. All these cases were filed because the merging parties met the market share threshold. Apparently, the market share threshold may be not so precise, but it is easier for the FTC to screen out mergers likely to cause concerns with competition restraints. In comparison, Australia and Singapore also adopted the market share threshold instead of the sales threshold. In addition, when reviewing Facebook's acquisition of WhatsApp, France also considered readopting the market share threshold as a response to the developments in the digital era.

Obviously, the market share threshold is still an important screening standard in merger control.

(2) Establishment of the sales thresholds of certain industries had its complexity. The FTC has to be cautious when removing the market share threshold. The original intention of the 2015 amendment of the Fair Trade Law was to remove the market share threshold, keeping only the sales threshold and separately announcing the thresholds for some specific industries. If the amendment had been made in accordance with the original version, certain high-profile business mergers would not have to be filed with the FTC because the merging parties did not meet the sales threshold. In the ICN "Setting Notification Thresholds for Merger Review", it was proposed that "…use of 'industry' thresholds creates downside risks that should be carefully balanced against potential benefits. In particular, such a system might undermine legal certainty; it also might be difficult to formulate a principled approach to identifying industries where lower notification thresholds should apply." In other words, decision of the sales thresholds for certain industries had its complexity, and it may end up making some cases impossible to review. If the FTC considers removing the market share threshold, it must be done carefully.

(3) The FTC's adoption of the global sales threshold in order to comply with the international tendency. Nonetheless, whether the consequential regulatory intensity is appropriate requires further observation. The primary consideration in the FTC's domestic sales threshold adjustment is "economic growth rates" and "regulatory intensity". However, when adding the global sales threshold at the end of 2016, the FTC made reference to the global thresholds of different countries before deciding NT$40 billion to be the threshold. An inspection of the merger notifications filed in 2017 and 2018 because the merging parties reached the global sales threshold showed the gap between the global sales of the filing parties and NT$40 billion was still extremely large, and yet none of those mergers was prohibited. Under such circumstances, the question of whether the regulatory intensity is too high rises. Nevertheless, it is hard to evaluate with the cases in those two years. The results of analysis will be more objective after the mergers filed in the next few years with the review outcomes being taken into consideration.

(4) At the moment, there is no temporal immediacy for the amendment of merger-filing thresholds, but the FTC needs to keep track of acquisitions between digital businesses and the development of international merger-filing threshold standards. In the digital era, countries across the globe have noticed existing merger control systems probably won't be able to control all business mergers likely to lessen market competition in the future and started to work on the feasibility of including transaction value in the merger-filing thresholds. According to the design in the country, besides domestic and global sales thresholds, the market share threshold will also be applied in merger screening. Therefore, in mergers that technological giants acquiring new startups, it's less likely that the statutory merger-filing thresholds do not meet. In conclusion, there is no temporal immediacy for the amendment of merger-filing thresholds is not urgent at the moment. However, the FTC ought to keep a close watch on business acquisitions in the digital industry and the development of merger-filing threshold standards around the world.