Domestic Regulations on Merger Notification—a Study of Share Acquisitions in the Electronics Industry

1. Background of study

As a result of the competition among bigger economies across the globe, battles over intellectual property rights and patent rights have grown increasingly fierce. Meanwhile, the pandemic continues to spread, causing all major markets and industrial activities to come to a halt, and the global economy is frozen. In order to lower production costs or to conduct technological integration, the global electronics industry has been caught in a wave of acquisitions.

Speaking of share acquisition in the electronics industry, when Advanced Semiconductor Engineering Inc. acquired the shares of Siliconware Precision Industries Co., Ltd. and WPG Holdings Limited acquired the shares of WT Microelectronics Co., Ltd., the two events became hot topics for a while. Back then, the two acquisitions drew the concern about the applicability of the provisions of "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 number of voting shares or total capital of such other enterprise," in Subparagraph 2 of Paragraph 1 of Article 10 of the Fair Trade Law and the provisions of "where an enterprise directly or indirectly controls the business operation or the appointment or discharge of personnel of another enterprise," in Subparagraph 5 of the same paragraph. At the same time, the merger control measures in the current Fair Trade Law and whether minority shareholders had the obligation to file pre-notifications also drew a lot of attention and discussions. However, when assessment is made according to the provisions of "where an enterprise directly or indirectly controls the business operation or the appointment or discharge of personnel of another enterprise," in Subparagraph 5, Paragraph 1, of Article 10, judging whether an enterprise directly or indirectly controls the business operation or the appointment or discharge of personnel of another enterprise, the issue of concurrence in industrial/commercial regulations (the Company Act, Securities and Exchange Act and Regulations Governing Information to be Published in Public Tender Offer Prospectuses, etc.) will arise. Therefore, when controlling mergers conducted through share acquisition, except for analyzing and evaluating from the perspective of the competition authority, it is still necessary to take into consideration the interaction between industrial/commercial regulations and filing of pre-merger notifications.

This paper is intended to reexamine the regulations in the Fair Trade Law for control of mergers conducted through share acquisitions by reviewing cases associated with share acquisition in the electronics industry as well as collecting and consolidating foreign studies of merger control involving minority holdings to come up with conclusions and suggestions to serve as reference when the FTC handles related merger cases in the future.

2. Methods and process of study

In this study, the merger regulations specified in Article 10 and below of the Fair Trade Law are applied to inspect cases of merger conducted through share acquisition in recent years. Meanwhile, judicial opinions regarding share acquisition cases in the past are studied and related regulations and cases in other countries are combined to find out whether there is the need to amend existing merger regulations and to point

out the issues and challenges the aforementioned regulations encounter in practice in order to work out suggestions through analyzation and discussion.

3. Main suggestions

The purpose of domestic and foreign competition authorities in controlling business mergers is to prevent market concentration through merger that cause anti-competition effects, and lead to monopolization and market competition restraints occur as a result. However, since the levels and objectives of economic and industrial development in different countries vary, each country's regulations for merger control also differ. Judged by the legislative purposes of the Fair Trade Law, it is not intended to control and intervene in all business mergers. Besides, the majority domestic businesses that contributed in economic development are small and medium enterprises. Mergers of small and medium enterprises can help achieve economies of scale. Hence, not all mergers have to be filed. Only enterprises reaching a certain scales have the obligation to file their pre-mergers with the FTC.

The merger patterns specified in Paragraph 1 of Article 10 of the Fair Trade Law include merger, share acquisition, asset acquisition, joint operation, and obtainment of direct or indirect control. If the transaction of an enterprise with another enterprise complies with one of such patterns, and the filing threshold prescribed in Paragraph 1 of Article 11 of the Fair Trade Law is achieved while the exemption regulation in Article 12 of the same Law is inapplicable, the enterprises have to file a pre-merger notification with the FTC. However, when the transaction between two enterprises does not comply with any of the merger patterns specified in Paragraph 1 of Article 10 of the Fair Trade Law, and then further review for the filing threshold prescribed in Paragraph 1 of Article 11 will be unnecessary. Such enterprises do not have the obligation to file a pre-merger notification with the FTC in advance.

The administrative decision regarding the acquisition of 30% of the shares of WT Microelectronics Co., Ltd. by WPG Holdings Limited is reviewed to inspect the domestic merger control regulations and compare with administrative decisions made in association with minority acquisitions in foreign countries. Actually, minority acquisitions are not common in other countries and EU member states still have not established clear judgment standards to date. Most of the cases were reviewed and approved or disapproved on a case-by-case basis. Meanwhile, the opinions about the standards for assessment vary, because the regarding industrial/ commercial regulations are dissimilar in different countries the standards for assessment of likely influence on management control resulted from minority acquisitions are different. However, based on the discussion of the concurrence in industrial/ commercial regulations and the Fair Trade Law in the context, the author does not think there is any contradiction as far as the domestic regulation in relation to the merger control. The provisions in Subparagraphs 1 to 4, Paragraph 1 of Article 10 of the Fair Trade Law already include possible economic integration and concentration of market power in the scope of control. Meanwhile, in case there is any loophole, the inclusive general regulation in Subparagraph 5 Paragraph 1 of Article 10 was enacted. In other words, gaining direct or indirect control of the management decision making or appointment and discharge of personnel of another enterprise is considered having control of another enterprise and it is subject to merger control. Compared to the merger regulations abroad, it is more comprehensive and also has won the support of judicial opinions in actual cases. Take the intended merger between Uni-President Enterprises Corp. and Weilih Food Industrial Co., Ltd. for example. Minority holdings and control are evaluated to see whether the two originally independent enterprises

could become a single operating entity through a certain way of linkage and achieve competition restraints to become a monopoly or lead to market concentration. In other words, an enterprise has to gain control of the business management or appointment and discharge of personnel to meet the description of merger in Subparagraph 5, Paragraph 1 of Article 10 of the Fair Trade Law. If the condition seems to comply with the merger pattern specified in Subparagraph 5, Paragraph 1 of Article 10 because of other uncertain factors, it can not be considered really a merger as described therein. Therefore, according to available judicial opinions and the actual condition, as far as the acquisition of the shares of WT Microelectronics Co., Ltd. by WPG Holdings Limited is concerned, no amendment is needed before judicial opinions in practice have been changed.

As for whether there should be different considerations as a result of hostile acquisition or industrial structure, the obligations to file merger pre-notifications, the conditions for approval or disapproval and the review timeline are all clearly specified in the Fair Trade Law. Merger patterns, filing thresholds, the waiting period, exemption conditions, merger decision and additional provisions are respectively specified in Articles 10, 11, 12 and 13. At the same time, the enterprises are required to file pre-merger notifications, the documents to be presented, supplementary documents (including merger type and content, merging parties, scheduled date of merger, etc.), and the complete filing of report materials provided by agencies obligated to apply to are all indicated in the Enforcement Rules of Fair Trade Law. Whether friendly takeovers or hostile takeovers, as long as they comply with the merger patterns and the conditions meet the filing thresholds, the enterprises in concern are required to present all documents needed to file with the FTC in accordance with the regulations set forth in the Fair Trade Law, the Enforcement Rules of Fair Trade Law and Merger Filing Notice. In practice, however, the production and sales information of the merging parties, business operation plans and expected results of merger indicated in the application presented for a friendly takeover are all based on the consensus of the merging parties. In hostile takeover cases, as there is no consensus, the authenticity and completeness of the documents and information are not like those presented by friendly takeover cases. Moreover, the contents of such documents and information are likely to be challenged by the involuntary merging party. Take the merger between ASE and SPIL for example. When dealing with the hostile takeover, the FTC posted an announcement online as usual to solicit opinions and carefully reviewed the opinions obtained. As mentioned earlier, when reviewing merger cases, the FTC gathers evidence related to factors to be considered in comparison between disadvantages from competition restraints and the overall economic benefit. Whether a takeover is friendly or hostile, the FTC has to review it in accordance with the Fair Trade Law. If the documents presented are incomplete, the FTC will act according to Articles 9 and 10 of the Enforcement Rules of Fair Trade Law and request the applicant or applicants to turn in supplementary documents or information no matter it is a friendly or hostile takeover.

That is, the existing regulations and procedures regarding the FTC’s review of friendly or hostile takeover merger cases are still adequate. Same regulations and procedures are applied to process all cases. The FTC has not established different reviewing procedures to handle friendly and hostile takeovers separately.

As for the concurrence in industrial/commercial regulations and the Fair Trade Law when a merger involves, although the definitions of merger set forth in Paragraph 1 of Article 10 of the Fair Trade Law may be different from the definitions of merger specified in industrial/commercial regulations, such as the Company Act

and the Business Mergers and Acquisitions Act, it is a merger subject to the regulation of the Fair Trade Law as long as the pattern of market concentration likely to be created complies with any of the merger definitions prescribed in Paragraph 1 of Article 10 of the Fair Trade Law no matter what it is called. In the meantime, standards for assessment of control and affiliation relationships and existence of direct or indirect control between enterprises are stipulated in the Company Act and the Business Mergers and Acquisitions Act. When assessing the control and affiliation relationships between enterprises according to the Fair Trade Law, it is considered by whether direct or indirect control of another enterprise's management or personnel appointment and discharge exists. Apparently, there is no discrepancy between different regulations. As there is no contradiction or incongruity, amendment of related regulations is unnecessary.

However, as far as control of business mergers is concerned, except for making references to the amendment of related regulations in other countries, the domestic industrial structure and economic development tendencies must be taken into account, in order to maintain competition and order as well as mergers of small and medium enterprises that pursuit economies of scale enhance competitiveness, so as to reach the goal of keeping a balance between controlling mergers and fostering industrial development.