

Economic Analysis of Competition Law –Case Study on Monopoly, Merger, and Concerted Action

I. Background

Competition law or antitrust law is a law that regulates competition order in the market, and is thus strongly related to economic analysis. Articles of the Fair Trade Law on monopoly, merger and concerted action contain the words: “price competition”, “market share”, “impact on the market function with respect to production, trade in goods or supply and demand of services”, “overall economic benefit”, “average production cost” and “operating efficiency”, which are commonly used in economic theories. Therefore, legal analysis is without doubt important when evaluating whether or not a case has violated the law or determining whether or not to approve an application, but economic analysis or economic evidence also play a key role. In the case of a monopolistic enterprise, an enterprise must meet the conditions set forth in Article 5 of the Law, specifically “faces no competition in a specific market”, “has a dominant position”, “enable it to exclude competition”, “do not engage in price competition,” to be determined as having a monopoly. However, in practice market share is the main standard used for determining monopolistic enterprises. Antitrust economists have proposed many theories and methods for determining if a monopolistic enterprise abuses its market position. In the case of merger applications, whether or not a merger complies with Paragraph 1 of Article 6 of the Law is determined based on legal conditions, but whether if “overall economic benefit” of the merger outweighs the “disadvantages resulted from competition restraint” must be determined based on economic evidence or through rigorous economic analysis. In the case of concerted action, if direct evidence of concerted action is found and other legal conditions are met, enterprises can be determined to be in violation of the law, but when there is a lack of direct evidence, economic theories and evidence can be used to prove the existence of concerted action. Therefore, rigorous economic analysis is not only necessary, but also has a decisive effect on cases involving competition restraint. The presentation of economic evidence can make up for any deficiencies of legal analysis.

Since it was established in February 1992, the Fair Trade Commission (FTC) has used economic theories for analysis to a certain extent when handling competition restraint cases, e.g. monopoly, merger and concerted action. It is as stated by the renowned American scholar on competition law Judge R. Bork that competition law is not only a law, but also a collection of economic theories that are continuously being developed. Following the constant innovation and progress in the industry, new developments have been made in economic theory or industrial economics, and economic analysis methods for antitrust cases not only include quantity analysis, but also quality analysis from an economic foundation. Therefore, it is necessary to summarize and organize antitrust economic theories proposed by foreign scholars in recent years, or economic theories or methods commonly used by competent authorities of competition law. This is the background of this research report.

II. Recommendations

This paper collects and organizes commonly used economic analysis methods in competition law, as well as domestic cases involving monopoly, merger and concerted action. After summarizing economic analysis methods used in the cases, this paper makes the following conclusions and recommendations:

- i. Structural characteristics of the market are an important consideration, but not the only standard for determination

When determining if a monopolistic enterprise abuses its market position, engages in merger or concerted action, both ex-ante and ex-post analysis should be closely related to the market or industry structure of the enterprise. Ex-ante analyses of whether an enterprise is a monopolistic enterprise, whether if enterprises need to submit an application for a merger, and whether if enterprises engaged in concerted action are all related to market structure. Ex-post analyses of the competition restraint effects of a monopolistic enterprise abusing its market position, competition evaluation of merger, and economic evidence of concerted action are also highly related to market structure and market share. Therefore, defining the market and measuring the market power of enterprises are important considerations when handling cases. Yet, even though market structure and market share are important, market share alone cannot be used to determine if an enterprise is in violation with the law; the key is determining if there are entry barriers to the market. Furthermore, it is inappropriate to determine abuse of market position based on high profit margin, because it may either be the result of abuse of market power or better efficiency.

- ii. Select a suitable economic analysis method for determining overall economic evidence

Economic analysis of competition law may be a quantity analysis using econometrics methods, or a quality analysis based on antitrust economics, or may be a combination of quantity and quality analyses. The FTC mainly uses quality analysis methods for cases it encounters, whether it may be abuse of monopolistic power using the “pricing strategies” of discriminatory pricing and predatory pricing or the “non-pricing strategy” of refusing trade; anti-competition effects, both unilateral effects and coordinated effects, of horizontal merger; and efficiency improvement from market blockade effects and elimination of double marginalization from vertical merger. In the cases of concerted action determined by the FTC based on circumstantial evidence, the FTC performs a holistic analysis of whether market structure incentivizes concerted action, if there are differences with normal market functions in a free competitive market, and competition patterns and changes in competition intensity between competitors. The FTC does not determine if an enterprise is in violation with the law before eliminating other possibilities using economic evidence.

- iii. Understand the main issues of a case and conduct thorough investigations

Economic analysis of antitrust cases requires complete information to provide substantial

evidence for determining if a case is in violation with the law. Therefore, besides having a thorough understanding of basic economic theories and analysis methods, it is necessary to first understand the issue and the current status of the industry the case is in, as well as required data and evidence. Next is the collection of highly reliable data related to the facts of the case, besides conducting investigations in accordance with Article 27 of the Law, the FTC should follow changes in industries and industry analysis or market survey reports of research institutes. The next step is choosing a suitable analysis method, and different methods should be attempted to gain an ideal conclusion. When conducting economic analysis of antitrust cases, the FTC should be aware of the limitations of its analysis, and view it as part of its thinking process when formulating arguments. A case should not be determined or decided based solely on economic analysis.

iv. Follow market trends and understand developments in economic theories

Economic analysis under the antitrust law is a way of thinking. It considers possible outcomes based on understanding of human reasoning, decision-making and response, and then analyzes legal effects. The Information and Economic Analysis Office of the FTC often arranges courses on the Law and economic analysis in hopes of enhancing economic analysis capabilities for antitrust cases. The courses involve individual practices that greatly benefit economic analysis. The boundaries of traditional markets or industries have been torn down by innovative developments in the industry and internet uses. New fields such as high-tech industries and intellectual property rights are appearing one after another, and involve even more complex economic theories, making the balance of economic analyses even harder to control. Therefore, it is necessary to follow trends in industries, changes in the system, and changes in industry practices. The FTC should closely follow the latest developments of antitrust economics in other countries' competent authorities of competition law and research institutes, and then apply it to cases to enhance the FTC's law enforcement performance.

v. Implement the FTC's economic analysis method and fully utilize the "Competition Law Economic Analysis Reference Manual"

Economic analysis of antitrust cases must be carried out through investigations and application of economic theories. The FTC established the "Operating Procedures for Economic Analysis of Cases" to provide a guideline for departments to interact and coordinate with the Information and Economic Analysis Office, and specifies cases requiring economic analysis as those involving monopolistic enterprises, mergers, and concerted action, as well as ongoing cases, pre-merger notifications reviewed according to regular procedures, and applications for exception for concerted action under Subparagraphs 1, 2, 3, 4 and 6 of Article 19 of the Law; it also specifies economic analysis procedures of cases that the Information and Economic Analysis Office is involved in. In addition, the Information and Economic Analysis Office completed the "Competition Law Economic Law Reference Manual" in 2014 after referring to domestic and foreign regulations and cases, providing a basis for the FTC to handle antitrust

cases. The FTC hopes to improve its performance through the operating procedures and reference manual, and also drive the development of competition law economic analysis theories and practices.