

# Effective Remedies for Merger Cases

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# Outline

- ▶ The Roles, Types, and Effectiveness of Merger Remedies
- ▶ The Problems Facing the Effective Implementation of Merger Remedies
- ▶ A Function-oriented Framework for Understanding and Evaluating Merger Remedies
- ▶ Experience of Chinese Taipei in Imposing Merger Remedies-Case Illustrations
- ▶ Q & A

# The Roles of Merger Remedies

- ▶ Pre-merger review is a process of predicting competitive effects from mergers; errors are inevitable
- ▶ Merger remedies reduce the error costs from improperly approving or prohibiting a merger, diminishing the risk of rendering the reviewing process into a zero-sum game
- ▶ Merger remedies also facilitate information exchanges to better regulate merger activities

# The Types of Merger Remedies

- ▶ **Structural** remedies—e.g. divestiture, limits on share holding, prohibition of interlocking directorate
- ▶ **Behavioral** remedies (the ICN classification)
  1. IP-related—compulsory licensing, mandatory IP access
  2. Facilitating horizontal rivalry—prohibiting tying or predatory pricing, licensing of essential technology, provision of required information
  3. Controlling outcome—price caps, supply commitments, service level agreements

# The Effectiveness of Merger Remedies

- ▶ Structural remedies
  - one-off remedies usually requires no subsequent long-term monitoring
  - high costs for the merging parties, disrupting customer relationship, **irreversibility**
- ▶ Behavioral remedies
  - avoid disruption of customer relationship, especially in vertical and conglomerate merger
  - difficult to capture all eventualities, **requiring long-term oversight**

# The Problems facing the Effective Implementation of Merger Remedies

- ▶ Problems associated with the **enforcing parties** of the remedies
- ▶ Problems related to the **implementing objects**
- ▶ **Transaction costs** from implementing the remedies
- ▶ **Derived enforcement costs** from implementing the remedies
- ▶ Containing these problems offer a benchmark for more clearly understanding merger remedies

# The Problems facing the Effective Implementation of Merger Remedies

- ▶ Problems associated with the **enforcing parties** of the remedies
  - Imposing overbroad remedies by the competition agency due to overzealous pursuit of specific enforcement goals
- ▶ Problems related to the **implementing objects**
  - Improperly determined scopes of remedies
- ▶ **Transaction costs** from implementing the remedies
  - the incentive to strategically manipulate the divestiture process such as low-price holdup;
  - negotiation costs arising from mandatory licensing or access remedies
- ▶ **Derived enforcement costs** from implementing the remedies
  - subsequent monitoring costs incurred by the competition agency

# Some Guidelines Regarding Merger Remedies

- ▶ 2011 U.S. Antitrust Division Policy Guide to Merger Remedies
- ▶ 2004 Commission Notice on Remedies (revised in 2008)
- ▶ 2003 OECD Roundtables on Standards of Merger Reviews
- ▶ 2005 ICN Merger Remedies Preview Project



# A Function-oriented Framework for Understanding and Evaluating Merger Remedies: Controlling the Problems of Enforcing Parties

- ▶ The purpose of merger remedies is to **preserve “competition”**, **not to protect “competitors”** and should not be used to promote industrial policies
- ▶ The **proportionality** between remedies and the competitive problems they aim to address
- ▶ Effectiveness, potential remedy burdens and costs, and transparency and consistency
- ▶ **Prioritizing structural over behavioral remedies**
- ▶ Constraining the agency’s power in designing the content of remedies-EU example.

# A Function-oriented Framework for Understanding and Evaluating Merger Remedies: Controlling the Problems of Implementing Object

- ▶ The US experience
  - Flexible choices of the divested assets to facilitate continuing post-merger competition
  - Consider first the **existing business entity** for divestiture
  - Behavioral remedies must be **specific and precise**  
ex. firewall provisions, non-discrimination provisions, mandatory licensing provisions, transparency provisions, anti-retaliation provisions
  - **Hybrid remedies**

# A Function-oriented Framework for Understanding and Evaluating Merger Remedies: Controlling Problems of Implementing Object

- ▶ The EU experience
  - Flexible selection regarding the divested assets to facilitate continuing post-merger competition, with the exception of **hostile takeover**
  - Consider first the **existing business entity** for divestiture, with the exceptions of **carve-outs**, **brand licensing**, and **rebranding**
  - removal of connections with competitors
    - sales of minority shareholding in joint venture
  - Behavioral remedies must be specific and precise
    - access remedies
    - change of long-term exclusive contracts
    - other non-structural remedies: ex. conglomerate merger

# A Function-oriented Framework for Understanding and Evaluating Merger Remedies: Controlling the transaction-cost problem

- ▶ The US experience
  - Setting deadlines for completing divestiture
  - The “**hold separate**” provision
  - The appointment of operating and monitoring **trustees** and selling trustees
  - The DOJ’s right to approve the asset purchasers

# A Function-oriented Framework for Understanding and Evaluating Merger Remedies: Controlling the transaction-cost problem

- Other controlling mechanisms
  - Reviewing **sale prices** of the divested assets?
  - Prohibiting **resale or buy-back** of the divested assets
  - Prohibiting **financing** by the merging parties to potential asset buyers
  - the “**crown jewel**” provisions

# A Function-oriented Framework for Understanding and Evaluating Merger Remedies: Controlling the transaction-cost problem

- ▶ The EU experience
  - Setting deadlines for completing divestiture
  - Provisions on maintaining the **independence** of the divested assets
  - The appointment of **hold-separate manager**
  - The appointment of monitoring and divestiture **trustees**
  - The Commission's right to approve the asset purchasers
  - **Financing** by merging parties is **disfavored**
  - The "**crown jewel**" provision

# A Function-oriented Framework for Understanding and Evaluating Merger Remedies: Controlling the Derived Enforcement Costs

- ▶ The US experience
  - The “**fix-it-first**” provisions
    - remedies implemented by the merging parties and approved by the DOJ
    - inapplicable to behavioral remedies
  - The “**upfront buyers**” provision
  - The **arbitration provisions**
    - resolving issues from **behavioral remedies**, such as licensing fees from mandatory licensing or access, by the merging parties and related third parties

# A Function-oriented Framework for Understanding and Evaluating Merger Remedies: Controlling the Derived Enforcement Costs

- ▶ The EU experience
  - The “**fix-it-first**” provisions
    - remedies implemented by the merging parties and approved by the Commission
  - The “**upfront buyers**” provision
    - in particular, when finding a qualified buyer and the salability of the divested assets are uncertain
  - The **arbitration provision**
    - resolving issues from **non-structural remedies**, such as licensing fees from mandatory licensing or access, by the merging parties and related third parties



# Experience of Chinese Taipei in Imposing Merger Remedies-Case Illustrations

- ▶ The Chinese Taipei has never impose divestiture remedies in cases filing for pre-merger review
- ▶ Structural remedies are mainly in the form of **disposition of shares**, **removal of the positions for director or manager**, and the **prohibition of interlocking directorate**.
- ▶ Commonly used behavioral remedies by the Chinese Taipei include:
  - Prohibition of post-merger **boycott**
  - Prohibiting the merging party from engaging in **unfair transaction** with its counterparts or entering into agreements that might lead to **restriction of market competition**
  - Prohibiting improperly determining **post-merger market prices** or engaging in unfair competition
  - Obligations on the merging parties to cooperate with the Commission in subsequent supervision on remedies implementation
  - The merging parties might have the obligation to submit periodic implementation reports

## Experience of Chinese Taipei in Imposing Merger Remedies-Case Illustrations

- ▶ **Mergers in Cable TV Industry:** *Wangzhong Broadband Media Co., Ltd. & 11 cable TV system operators*
- ▶ **Extraterritorial Merger:** *US-based Microsoft Corporation & US-based Yahoo! Inc.*
- ▶ **Merger in KTV Market:** *Holiday Entertainment Co. & Cashbox Partyworld Co.*

# Thanks for Listening!



Question and  
Comments?