Fair Trade Commission Disposal Directions (Policy Statements) on the Cross-Sector Cooperation among Digital Convergence Related Enterprises

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1. Background

With the increasing development of communication networks and digital technology, a tendency towards the convergence of communications, broadcasting and information technology is foreseeable. The realization of liberalization, the lifting of regulations and the elimination of controls has invited digital convergence related enterprises to participate in different markets. Broadly different in definition, two major categories that digital convergence related enterprises are involved in are cross-ownership and joint provision of services. The former refers to the situation where an enterprise enters an adjacent market by virtue of owning shares or establishing and operating another legally separate enterprise, such as a telecommunications enterprise merging with a cable TV enterprise and thus becoming involved in the cable TV market. The latter describes the situation in which an enterprise provides services that originated in another market, and does so through the use of its existing assets, such as infrastructure, services, and technology. Examples include the telecommunications sector that uses its telecommunications network to provide video-on-demand services and the cable TV sector that uses its cable to provide cable telephony or cable modem broadband access services. This development trend in principle strengthens the competition of each relevant market and provides consumers with more choices. However, the cross-participation in different markets of digital convergence related enterprises may potentially give rise to an undue concentration of economic power or an improper expansion of market power and leads to restraints on competition or unfair competition to which is likely to violate the provisions of the Fair Trade Law. The Fair Trade Commission (hereinafter referred to the Commission) has therefore gathered and analyzed pattern of practices by digital convergence related enterprises that may violate the Fair Trade Law and these Policy Statements are stipulated accordingly. These Policy Statements are intended to help related enterprises avoid violations and at the same time to serve as a reference for handling future cases by the Commission.

2. Terminology

The terminologies stated in these Policy Statements are as follows,

A. Digital convergence related enterprises: Digital convergence related enterprises refer to the telecommunications sector, the cable TV sector, the computer network sector, and the E-commerce sector, including e-communication networks built up by telecommunications, broadcasting and information connection networks, as well as any other communication activities, video content, e-trade and online games that are based on the e-communication networks mentioned above.

B. Essential Facilities: Essential facilities refer to the following facilities,

(1) the facilities are owned or controlled by a monopolistic enterprise;

(2) competitors are financially and technically unable to replicate or replace the facility in concern;

(3) competitors are unable to compete with the owner or controller of the facility in the relevant market if they are denied use of the said facility;.

(4) the enterprise that owns or controls the facility in concern has the ability to provide such facility to its competitor.

3. Market Definition

The relevant market definition for digital convergence related enterprises is reviewed in accordance with the Commission’s “Principles of the Fair Trade Commission Regarding the Definition of Relevant Markets”. The business model, transaction characteristics, business nature, technological development and other factors of digital convergence related enterprises will also be taken into account when specific cases are concerned.

Product market in principle is defined as follows,

A. The network layer market for infrastructure facility.
B. The platform layer market for transmission platform services:
   (1) voice service platform market.
   (2) audiovisual media service platform market;
   (3) broadband Internet service platform market;
   (4) other emerging transmission platform markets due to technological development.
C. Content layer market for content and application services.

Geographical market is defined in principle as follows,

(1) Network layer and platform layer markets: As the physical network used to transmit signal content is mainly built within the territory of the country and under the current legal regulatory framework, the platform layer service providers needs to obtain a license for operation. As for the operation, the scope of its operation is also limited to the territory of the country. Consequently, the geographical market in principle is nationwide.
(2) Content layer market: Because of the characteristics of the internet without borders, the digitalized content layer service is less geographically affected, and it is possible to provide services at any place where internet access is available. The geographical market, therefore, has expanded beyond the territory of the nation.

4. Calculation of Market Share

Generally speaking, market shares of digital convergence related enterprises can be computed in one of two ways:

A. For an enterprise that has a fixed number of customers, market share is determined by the proportion of the enterprise's number of users or subscribers to the total number of users or subscribers for all market participants in the relevant market.
B. For an enterprise that is unable to calculate its number of customers, market share is determined by the proportion of the enterprise’s sales of the turnover, business volume, service usage, message flow or capacity (such as line length, number of circuits) and other factors to the total amount of the whole sales of the turnover, business volume, service usage, message flow or capacity (such as line length, number of circuits) and other factors for all market participants in the relevant market.

5. Abuse of Market Power

The following practices of digital convergence related enterprises with the monopolistic market power may be in violation of the provisions of Article 9 of the Fair Trade Law,

A. Abuse of essential facility: Without reasonable justification, to refuse or suspend the provision of competitors' use of essential facilities owned or controlled by them, establish obviously unfair trading terms, or to provide essential facilities to other competitors under different trading terms.
B. Leverage of market power: To use the strategies of tie-ins or bundling sales to expand the market share of new service items so as to extend their market power to new services market. However, a tie-in or bundling sale, conforms to the conditions of a combined production economy, or meets consumption habits or simply provides the convenience of one-stop shopping, could be deemed reasonable.
C. Predatory pricing: To sacrifice its short-term profits and set prices below costs so as to exclude its competitors from competition, to stop potential competitors from entering the market, to protect and/or expand its market share and to benefit from extra profits in the long run. However, such conduct could be regarded as reasonable when lower prices are used as part of a short-term promotion method or when an unexpected fall in costs results in lower prices.
D. Undue cross-subsidies: An enterprise providing multiple services uses revenue from a monopolizing business to subsidize a competing business, or uses the revenue from a controlled business to subsidize a non-controlled business. However, if the subsidy results from obligations that a digital convergence enterprise has to meet to make its services available to all, or the subsidy is to comply with the controls of the government, it would be regarded as being justified.
E. Raising rivals' costs: An enterprise controlling productive elements improperly set a price that is higher than the stand-alone cost and that results in an increase in their competitors' cost and subsequently forces competitors to leave the market.

6. Mergers

Digital convergence related enterprises' merger notification cases shall be reviewed under "Fair Trade Commission Disposal Directions (Guidelines) on Handling Merger Filings".

In addition to the provisions as set forth in the aforesaid Guidelines, the Commission may consider the following factors in reviewing the overall economic benefits:

A. Will the merger contribute to competition in the relevant market?
B. Will the merger enhance service provision in respect of quality, variety or geographic coverage?
C. Will the merger enhance competition power in the global society and promote research and development as well as innovation?
D. Will the merger include any network externalities in terms of consumption?
E. How will the merging enterprises transform their internal profits into an externality?
F. Will the merger contribute to the digitalization of content, the application of diversification, and the provision of innovative digital convergence services?

7. Concerted Actions

The Fair Trade Law regulates a concerted action by prohibiting it in principle but permitting it in exceptional instances. If acts of digital convergence related enterprises fall within the provisions of Article 14 of the Fair Trade Law and meets one of the requirements as set forth under paragraph 1, Article 15 of the Fair Trade Law, it is necessary to obtain a prior approval from the Commission for such concerted action.

Any one of the following conduct made by a digital convergence related enterprise with other competing enterprises which would affect the market function of supply and demand of services, such conduct is considered a concerted action as stipulated in Article 14 of the Fair Trade Law:

A. Jointly determining the prices of products or services, or restricting price adjustments and discounts as a result of a contract, agreement or other form of mutual understanding.
B. Agreeing to restrain each other's productive quantities, qualities or facilities, or jointly agree to allocate the market and trading partners.
C. Disclosing and exchanging crucial information such as pricing, discounts, costs of production, research information and customer data.

D. Jointly price reduction, jointly developing unfair trading terms, joint refusals to deal or refusals to deal to provide network connections in an effort to exclude or impede others from competing and to block the whole market

8. Resale Price Maintenance

A digital convergence related enterprise may be in violation of Article 19 of the Fair Trade Law when imposing restrictions on resale prices of services for resale purposes to downstream resale business without justifiable reasons.

9. Other Practices Impeding Competition

An existing enterprise of digital convergence related enterprises or its upstream and downstream business, although not in an exclusive position, yet with a significant market position, may be in violation of Article 20 of the Fair Trade Law when there is boycott, improper treatment, improper low price competition, or other impeding competition conduct, forcing participation in restricting competition, improper vertical non-price trading restrictions and etc. to which conduct is likely to restrain competition to the new entrant of the cross-participation in different markets

10. Unfair Competition

In addition to the provisions of these Policy Statements, the digital convergence related enterprises shall observe and obey the provisions of "Fair Trade Commission Disposal Directions (Guidelines) on Handling Cases Governed by Article 21 of the Fair Trade Law "," Fair Trade Commission Disposal Directions (Guidelines) on Comparative Advertising Fair Trade Law", "Fair Trade Commission Disposal Directions (Guidelines) on the Reviewing of Cases Involving Enterprises Issuing Warning Letters for Infringement on Copyright, Trademark and Patent Rights", and the "Fair Trade Commission Disposal Directions (Guidelines) on the Application of Article 25 of the Fair Trade Law " with respect to false advertising, comparative advertising, false or obviously unfair competition and other unfair competition practices.

11. These Policy Statements only serve as a general description of the characteristics of digital convergence related enterprises and examples of practices that may be considered in violation of the Fair Trade Law. In every individual case, determination will be made in accordance with available evidences.