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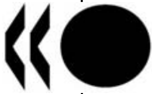

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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

Contribution from Chinese Taipei

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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

1. Introduction

1. The term "hard core cartel" is not defined in Chinese Taipei's Fair Trade Act, regulations or guidelines, but the concept is certainly well-understood. The Fair Trade Act has regulated general cartels, other restraints on competition and unfair competition practices since it came into force in 1992. The term "concerted action (or cartel)," as defined in Article 7 of the Fair Trade Act, refers to the conduct of any enterprise, by means of contract, agreement or any other form of mutual understanding, with any other competing enterprise, to jointly determine the price of goods or services or to limit the terms of quantity, technology, products, facilities, trading counterparts or trading territory with respect to such goods and services, etc., and thereby restrict each other's business activities. It further qualifies "concerted action" as being limited to horizontal concerted action at the same production and/or marketing stage which would affect the market function of production, the trade in goods or the supply of and demand for services. Also, the term "any other form of mutual understanding", as referred to here, means other than by contract or agreement, a meeting of minds whether legally binding or not which would, in effect, lead to joint actions.

2. Important here is that Article 7 of the Fair Trade Act only covers horizontal arrangements. Suppose the involved enterprises are not at the same level of production and/or marketing; in other words, suppose they are not competing enterprises. Under this scenario, they could never be considered to be in violation of the Act which prohibits concerted actions. There are, therefore, other provisions (Articles 18 and 19) in the Fair Trade Act to deal with the vertical arrangements, such as resale price maintenance, tying, exclusive dealing, territorial restraints, and so on. To determine whether the enterprises involved are at the same level of production and/or marketing or are competing firms, the Fair Trade Commission (FTC) makes its decisions on a case-by-case basis. Thus, in cases where there is some inability to obtain direct, unambiguous evidence of an agreement on concerted actions, the FTC does not dispose of the case on the grounds of insufficient evidence, but rather, it may investigate the issue from the angle of Article 19.

3. In addition to enterprises, the prohibition of concerted actions is applied to trade associations because of the extreme ease with which trade associations can engage in restricting the activities of enterprises either through their charter, a resolution of a general meeting of members, or a board meeting of directors or supervisors, or other means (Paragraph 4, Article 7 of the Fair Trade Act). The FTC takes the position that the decision made by a trade association to establish a cartel is sufficient to affect the market functions, even if the scale of the trade association is not so large. Added to this, a trade association is often the planner, or initiator of concerted actions, signifying that the concerted actions on the part of a trade association that affect market competition should be subject to punishment. In cases where self-discipline among members of trade associations affects market competition, the Fair Trade Act does indeed apply. To maximize the understanding of and adherence to the Act and to serve as a source of reference, the FTC issued the Policy Statement on Trade Associations under the Fair Trade Act in 1993.

4. There are many different types of concerted actions, and their effects on markets vary. In principle, to have concerted actions is to limit competition, to impede the adjustment of prices and to harm consumer interests. For these very reasons, the Fair Trade Act makes it a point to impose tight scrutiny. On the other side of the coin, some concerted actions are actually beneficial to the economy as a whole and are in the public interest, too; therefore, in order to be legal, intended actions must be approved by the FTC.

5. Article 14 of the Fair Trade Act provides several exceptions for firms to be able to engage in concerted actions; for these exceptions to apply, a concerted action must satisfy one of the circumstances listed below:

- unifying the specifications or models of goods for the purpose of reducing costs, improving quality or increasing efficiency;
- joint research and development on goods or markets for the purpose of upgrading technology, improving quality, reducing costs, or increasing efficiency;
- each developing a separate and specialised area for the purpose of rationalizing operations;
- entering into agreements concerning solely the competition in foreign markets for the purpose of securing or promoting exports (so-called export cartels);
- joint acts in regards to the importation of foreign goods for the purpose of strengthening trade (so-called import cartels);
- joint acts limiting the quantity of production and sales, equipment, or prices for the purpose of meeting the demand orderly, while in economic downturn, the market price of products is lower than the average production costs so that the enterprises in a particular industry have difficulty to maintain their business or encounter a situation of overproduction (so-called recession cartels); or
- joint acts for the purpose of improving operational efficiency or strengthening the competitiveness of small and medium sized enterprises.

6. The commonly granted exemptions are for import cartels. Some of the larger users of wheat, soybean and corn, for instance, need to import such goods in bulk from abroad. They claim that they need to conduct joint purchases of such goods from abroad and joint acquisition of shipping services in order to reduce the risks and extra costs that would arise if individual firms were to procure large amounts of these goods on their own. Considering the advantage of the reduced costs, and thus, that it is beneficial to the economy as a whole and in the public interest, the FTC decided to grant approval for such companies provided that they observe certain specified conditions.

7. The FTC grants exemptions in a very strict manner. For instance, although the FTC was allowed to grant exemptions to recession cartels under Subparagraph 6 of Article 14, it rejected applications filed by certain man-made fiber industries under such a provision. Its reason to reject those applications was that despite an economic downturn at that time, the markets were still able to function and the inventory on hand was not extraordinarily high.

8. When granting an exemption to firms to conduct concerted actions, the FTC is always allowed to impose terms, qualifications or conditions. The period to conduct concerted actions shall not exceed three years unless such period has been extended prior to the expiration of the said exemption. The FTC can always terminate such exemptions in cases where there is a change of circumstance or a violation of the terms or conditions set forth in the approval.

9. Article 14 of the Fair Trade Act specifically exempts concerted actions where the intent is to improve operational efficiency or strengthen the competitiveness of small and medium sized enterprises on the condition that these actions are beneficial to the economy as a whole, are in the public interest and have had prior approval. Considering that the number of small and medium sized enterprises is about 98% of all enterprises in Chinese Taipei and that it is necessary to prevent such enterprises from abusing the exemption provisions, a strict procedure has been established for the review of applications for exemptions for joint price fixing by small and medium sized enterprises.

10. The FTC received an application for joint price fixing from tire repair operators, and as part of the rationale behind its decision to approve it, the FTC took into consideration that the explosion of tires is only an occasional and accidental occurrence and that the time and location of receiving necessary repairs are not fixed. Aside from this, repair procedures are quite simple, consistent and of low transactional value. In the case at hand, joint price fixing could reduce the transaction costs of conducting an inquiry, provide an impetus for product or service providers to compete and could prevent obvious unfair opportunistic behaviour when operators are dealing with consumers' problems or urgency. The FTC found joint price fixing in this case was beneficial to the economy as a whole and in the public interest, and consequently, it granted its approval.

11. Before the amendments of 2002, during which time the Fair Trade Act did not specifically provide for direct exclusions, many concerted actions were inherently completely legal -- for example, those involving joint research and development for the purpose of technological upgrading or the concerted actions of two small shops, or in cases where there were possibly slight effects on market functions; in these cases, the drawbacks of such activities were far outweighed by their benefits to the economy as a whole and in the public interest. However, if they had been carried out without prior approval, such actions would have faced the threat of illegality. Because of a lack of regulatory necessity coupled with society's tendency to complain about over-control, Article 7 of the Fair Trade Act was amended to limit concerted actions to horizontal concerted action which could affect the market functions of production, the trade in goods or the supply of and demand for services.

2. Effects of Concerted Actions

12. Article 14 of the Fair Trade Act prohibits enterprises from engaging in concerted actions, save for specific conduct that is listed among the exceptions and is beneficial to the economy as a whole and in the interests of the public at large. The legislation seems to apply the "per se" illegal rule, under which no analysis on the effects of market competition is required. If we look at the definition of concerted action under Paragraph 1, Article 7 of the Fair Trade Act, it seems that whether there is a contract, agreement or any other form of mutual understanding between or among competitors, and if their joint decision on price, quantity, etc. is to restrict each other's business activities, then it should be considered that they are engaging in a concerted action. Also, for Paragraph 2, Article 7 of the Fair Trade Act to apply, it requires that the concerted action would affect the market functions of production or trade in goods, or supply of and demand for services. It seems that the "rule of reason" should be applied.

13. In practice, the FTC applies the "rule of reason" to most forms of horizontal arrangements and thus, the effect on the relevant market must be examined. Yet it is sometimes very difficult to decide whether the market would be affected in fact. In certain cases, there are some differences in opinion as to the definition of a relevant geographical market, and this could result in the different affected portion in fact.

14. Paragraph 2, Article 7 of the Fair Trade Act requires that joint actions be capable of affecting market functions. In other words, merely a potential effect would be enough. A real effect on the functions of a relevant market is not necessary. Thus, if a concerted action is capable of affecting the market, the provisions regulating concerted actions can be applied without regard to the length of time the concerted action has been in existence and without regard to whether the agreement was in fact still being carried out after the conclusion of the agreement.

15. Although the FTC has not explicitly stated that it applies the "per se" rule in certain types of cases, in practice, it does use the "per se" principle in some limited situations. For instance, prior to the putting into force of the Government Procurement Act, bid-rigging activities were subject to the regulations on concerted actions in the Fair Trade Act. The FTC made quite a number of decisions against

bid-rigging activities without entering into a substantive analysis of the effects from such activities on the relevant market. It was considered a *de facto* application of the "per se" rule. It should be noted that current bid-rigging activities are subject to criminal punishment under the Government Procurement Act.

16. Cases in violation of Article 14 of the Fair Trade Act, which prohibits concerted actions, have accounted for the largest percentage of all fines imposed since the Fair Trade Act came into force in 1992. The total fines for concerted actions imposed during the 14-year period from 1992 to 2005 reached approximately 46% of total fines for all actions covered by the Fair Trade Act. Worth noting is that during the same period, the value of all fines imposed for horizontal agreements was particularly steep in 2003 when it reached NTD 352 million. This was primarily because in 2003, 30 enterprises operating cylinder-filling plants, which were in a competitive relationship with each other, established organisations to reach an agreement to raise the installation fees and delivery rates by their downstream distributors and subsequently imposed restrictions on competition among enterprises as well as restricted the trading counterparts of their distributors. These acts were enough to disrupt the supply and demand functions in retail pricing plus the installation and delivery of cylinder-packaged gas in certain regions, hence violating Article 14 of the Fair Trade Act prohibiting concerted actions. As a punitive measure, an administrative fine of over NTD 300 million was imposed.

3. Forms of Agreements

17. In Chinese Taipei, whenever the FTC is unable to obtain direct concrete evidence of a cartel agreement, it makes every attempt to get indirect evidence to substantiate the notion of a "mutual understanding of a cartel" among competitors. Such evidence is based on the FTC's observations of competitors with the same or similar conduct which might substantiate a "meeting of minds". The most common types of cartel among enterprises involve price fixing, output restrictions, technology restrictions, division of customers, and division of territories. For example, competitors in question have a "meeting of minds" by jointly participating in trade associations, get-togethers, and other informal meetings, which enable them to engage in concerted action; clearly, there is parallel behaviour among such firms after such meetings or occasions. During its investigations, the FTC further makes inferences from its observations of the "inducement, economic benefits, the timing of such similar action, the possibility of substituting different actions, the frequency and the duration of the acts which are deemed harmful to market order, the concentration and concordant degree of the conduct, etc." And such testimony has been made by respondents when they have presented themselves before the FTC. To be sure, the FTC has applied such circumstantial evidence in the past to support its decisions against some accused parties.

4. Case Study: Petroleum Products Market

18. Since the FTC was established, it has usually investigated and found cartel agreements based on direct evidence. Until now, the administrative courts have almost supported the FTC's decisions on cartel cases when appellants have appealed competition litigation. In 2003, the FTC dealt with a cartel agreement where there was no direct evidence, and this was in the petroleum products market. In this case, the two disposed parties appealed litigation to the Taipei high administrative court. This case is currently on appeal. Detailed information about the case is presented in the following.

19. The FTC opened an investigation against the only two gasoline suppliers in Chinese Taipei, and this was to examine their pattern of simultaneously adjusting their wholesale prices of 92 and 95 unleaded gas and premium diesel oil. Chinese Petroleum Corp. ("CPC") had long been the monopoly provider. Formosa Petrochemical Corp. ("FPCC") later entered the market in September 2000. (Esso also entered the market, but it soon exited after less than two years.) CPC and FPCC account for about 70% and 30%, respectively, of the market for gasoline and diesel fuels.

20. CPC and FPCC simultaneously adjusted wholesale prices within the same range at least 20 times from April 2002 to September 2004. Typically, the initiating party would announce its decision to change prices in the media. Whenever one of them made such an announcement, its rival would follow; then the two competitors would make the same changes at the same time. If the rival announced it would not, then the initiating party would withdraw or amend its earlier announcement.

21. The FTC contended (among other things) that this public exchange of views and intentions was more than parallel action and, in fact, constituted a "meeting of minds"; as such, it was deemed a prohibited "concerted action." The FTC argued that disclosing sensitive market information, exchanging business strategies or directly communicating business intelligence can be construed as reaching a "meeting of minds." This was inferred from indirect evidence based on what the FTC described as inducement, economic benefits, the timing or the amounts of the price increases, the possibility of substituting different actions, the frequency, duration and concentration of the actions and the unanimity. The FTC admitted that simple uniform pricing would not necessarily have been unlawful. But it contended that the two enterprises here did not just reach the same price levels, but rather, they communicated their intent in advance and their actions led to simultaneous moves, which retail operators typically followed too.

22. The FTC sent a letter to the two firms warning them not to use advance announcements to change wholesale prices simultaneously and demanded that they make price decisions in accordance with their own individual operating conditions instead. On account of their having disregarded the warning and on account of their concerted action in violation of Article 14(1), in October 2004, the FTC imposed an administrative fine of TWD 6.5 million on each firm. The parties appealed, and the matter was returned to the FTC for it to justify the fines. In July 2005, the FTC again imposed the exact same fines, reciting the considerations that are set out in its sentencing guides, namely motive, objective, expected improper benefits, degree of damage to trading order, duration, benefits obtained, scale of business, business operations, revenue and market position, previous correction of or warning about the conduct, type and number of previous violations, interval of violations, punishments incurred, conduct after the violation, cooperation during the investigation and other factors. Once again, the decision is on appeal.

5. Conclusions

23. After 14 years of implementing the rules on cartels, the FTC has found more than 114 violations of Article 14 of the Fair Trade Act. The FTC was not very vigorous in applying the provisions against concerted actions prior to the amendments to the Fair Trade Act in 1999, due to the fact that there was an immediate criminal punishment against such violations. Since the 1999 amendments, the FTC has been able to apply Article 14 and has imposed administrative fines in a more active manner. It can be expected that the FTC will continue to adhere to its strict position when carrying out its law enforcement against concerted actions.

24. Given the difficulty in obtaining substantive evidence of concerted actions, it has become increasingly more prevalent among competition law authorities to adopt leniency programs. With these, conspirators who voluntarily reveal to the competition law authorities or judicial organisations such collusive agreements and assist in the investigation may receive immunity or reductions in their administrative and criminal liability. While the contents of leniency programs vary across countries, generally speaking, conspirators should voluntarily reveal or assist before the authorities learn of the agreement or obtain adequate evidence; alternatively, they are required to provide concrete evidence in the investigation process that enables the authorities to successfully complete their investigation. Such a program can save on investigative costs, prevent the spread of injury, deter hard-core cartels and contribute to preventing and discouraging enterprises from being so inclined. In light of the potential benefits derived from leniency programs, the FTC has researched the designs and the methods of enforcement of such

programs in other countries. The findings will serve as important references for the adoption and introduction of such a program to Chinese Taipei.

25. As mentioned above, it is often very difficult for the FTC to collect information to prove the existence of anti-competitive activities. The FTC has entered into agreements with competition authorities in New Zealand, Australia and France under which there are provisions for cooperation between the enforcement agencies in the respective jurisdictions. However, there has not been an agreement entered by the FTC with those enforcement agencies of the foreign jurisdictions under which the FTC has been able to obtain useful confidential information to correct illegal activities. The FTC is exploring the possibility of entering into cooperation arrangements with its other counterparts in other countries to ensure that enforcement activities can be undertaken in an even more effective manner and to improve the enforcement of competition law to combat cross-border anticompetitive practices and international cartels.