

Unclassified

DAF/COMP/GF/WD(2016)51

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

15-Nov-2016

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Cancels & replaces the same document of 20 October 2016

Global Forum on Competition

INDEPENDENCE OF COMPETITION AUTHORITIES - FROM DESIGNS TO PRACTICES

Contribution from Chinese Taipei

-- Session III --

1-2 December 2016

This contribution is submitted by Chinese Taipei under Session III of the Global Forum on Competition to be held on 1-2 December 2016.

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JT03405388

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INDEPENDENCE OF COMPETITION AUTHORITIES--FROM DESIGNS TO PRACTICES

-- Chinese Taipei --

1. This paper explains changes in the organizational design of the independence of the Fair Trade Commission (FTC), the central competition authority in Chinese Taipei, from when it was set up until its independence was further reinforced as a result of the structural reform in 2012 and the latest amendment to the Fair Trade Act in 2015.

1. The independence of the FTC prior to 2012

2. Chinese Taipei's competition law, the Fair Trade Act (hereinafter referred to as the FTA) was promulgated on February 4, 1991 and went into effect a year later, in 1992. Article 25 of the FTA (1991) provides that, "In order to administrate matters in respect of fair trade as set forth in this Law, the Executive Yuan shall establish the Fair Trade Commission". Hence, the "Organic Statute of the Fair Trade Commission"¹ (hereinafter referred to as the Organic Statute) was promulgated on January 13, 1992 and the "Fair Trade Commission, the Executive Yuan" was established on January 27, 1992 accordingly.

3. According to the Organic Statute, the FTC was a ministerial level agency under the Executive Yuan (i.e., the Cabinet) and its responsibilities included the formulation and implementation of fair trade policies and laws. Although there was no statutory definition of the independent agency, the FTA (1991) and the Organic Statute ensured the FTC to some extent its independence in the following aspects.

4. As specified in the Organic Statute, the FTC was a collegial body² with nine (9) full-time commissioners, including one Chairperson and one Vice Chairperson, who all were recommended by the Premier and appointed by the President. Each commissioner should serve a term of three years and might be re-appointed³. Every appointed commissioner had to have knowledge and experience in law, economics, finance, tax, accounting, or management⁴.

5. It was set forth in Article 28 of the FTA, "The Fair Trade Commission shall carry out its duties independently in accordance with the law and may dispose of cases in respect of fair trade in the name of the Commission." Meanwhile, it was also prescribed in Article 11 of the Organic Statute, "The number of commissioners with the same political party shall not be more than one-half (1/2) of the total number of commissioners". Article 13 stated that "Commissioners of the Commission shall be beyond party affiliations and shall act independently in performing their duties under the law." All the aforementioned provisions were designed to protect the independence of the commissioners as well as the agency from intervention of political parties or other agencies in the policy formulation and law enforcement of the FTC.

¹ The Organic Statute had been amended in 2000 and 2002, respectively, and was repealed on May 20, 2015 due to government structural reform.

² Article 15 of the Organic Statute.

³ Article 11 of the Organic Statute.

⁴ Article 12 of the Organic Statute.

6. Article 15 of the Organic Statute also stipulated, “The Commission shall meet once a week and special meetings may be held if necessary. To adopt a resolution at the meeting of commissioners, a majority of the commissioners is required to be present at the meeting and a majority of the commissioners present shall vote in favor thereof.” Furthermore, Article 15-1 stated that, “A Commissioners’ Meeting is not open to the public. However, the minutes of the Commissioners’ Meeting shall be made public, except for matters that are required to be kept confidential. All participants, attendants and record keepers present at a Commissioners’ Meeting shall refrain from divulging the processes of pros and cons of the Meeting’s resolutions and any other particulars that a Commissioners’ Meeting resolves to be kept confidential.” These provisions were designed to ensure that the commissioners could feel free to express their opinions without any interference or pressure from any specific party or specific group. Moreover, commissioners would not necessarily worry about being accused of their personal views and thus they were able to carry out their duties independently.

7. From the above-mentioned points, while the FTC was part of the administrative system under the Executive Yuan, its organization was designed to provide high-level protection for its independence: 1) as a collegial body-every decision was made by a majority vote of the commissioners; and 2) each commissioner’s term was fixed and the commission was therefore not subject to the change of ruling parties.

8. Nevertheless, the design was not fully safeguard the FTC’s independence. Firstly, commissioners nominated by the Premier would be appointed directly by the President; the procedure was not checked by the Legislative Yuan (i.e., the Congress). Moreover, in addition to judicial review, the FTC’s decisions could be appealed on the merits to the Appeal and Petition Committee of the Executive Yuan. This had been the major challenge to the independence of the FTC. Fortunately, these challenges were addressed when the FTC was restructured in 2012 and the FTA was amended in 2015.

2. The independence of the FTC after government restructuring in 2012

9. Chinese Taipei began to develop its government restructuring reform in the 1990s for building a more “streamlined, flexible and effective government” and enhancing its competitiveness. The “Basic Code Governing the Central Administrative Agencies Organizations” (hereinafter referred to as the Basic Code) promulgated by the Legislative Yuan on June 23, 2004, set forth meaning of an “independent agency” clearly.

10. The term “independent agency” is defined in Article 3 of the Basic Code as “a commission-type collegial organization that exercises its powers and functions independently without the supervision of other agencies, and operates autonomously unless otherwise stipulated.” Article 4 states that the organization of an independent agency has to be governed by laws. As for the composition of an independent agency and the appointment and dismissal of its members, Article 21 provides as follows: “The term of office, and proceedings for the appointment, suspension and discharge of commission members of independent agencies shall be clearly stipulated. Nominations for full-time commission members of second-level independent agencies must be submitted to the Legislative Yuan for approval. For other independent agencies, commission members shall be appointed by the head of the first-level agency. When making appointments mentioned in the preceding paragraph, the head of the first-level agency shall designate one of the members as head of the agency and another member as deputy head. The number of commission members referred to in Paragraph 1 shall be five to eleven in principle unless otherwise required. The number of members belonging to the same political party shall not exceed a certain proportion.”

11. In the Organization Act of the Executive Yuan promulgated on February 3, 2010, the FTC is defined as one of the second-level independent agencies⁵ under the Executive Yuan. On the basis of the above-mentioned laws, the FTC drew up the draft “Organic Act of the Fair Trade Commission” (hereinafter referred to as the Organic Act). It was passed by the Legislative Yuan on October 28, 2011 and went into effect on February. 6, 2012. After the reform, the title of the FTC was also changed from the original “Fair Trade Commission, Executive Yuan” to “Fair Trade Commission.” The FTC remained a politically impartial agency and became more independent.

12. Before 2012, FTC’s commissioners as prescribed in the Organic Statute were recommended by the Premier and appointed by the President. Under the 2011 Organic Act, commissioners nominated by the Premier are subject to consent by the Legislative Yuan. The FTC is still an administrative agency under the Executive Yuan, but the new organizational design gives the Premier only the power to nominate the commissioners and the approval of the Legislative Yuan is required before the nominees can be appointed. In other words, the Congress is able to review candidates nominated by the Premier so as to diminish the Executive Yuan’s influence and thus ensure the commission’s impartiality and independence.

13. After restructuring in 2012, the number of commissioners has been reduced from nine to seven and the office term has been extended from three years to four years. At the same time, staggered terms of office have also been adopted to make it possible for old commissioners to pass on their experiences to new ones and ensure consistency and continuity of the FTC’s decisions⁶. All commissioners must have the knowledge and experience with regard to law, economics, accounting or management⁷ and commissioners shall also be politically impartial and prohibited from participating in political party activities and they shall perform their duties independently according to law⁸. In addition, the Organic Act provides that the Premier may dismiss commissioners under one of the following situations: 1) too ill to perform their duties; 2) committing illegal acts, reckless disregard of duties, or other misconducts; and 3) held in detention or indicted for criminal commitments⁹. This provision aims to ensure that each commissioner is a man with integrity required by his duty.

14. After the Legislative Yuan approved the nominations, the Premier shall designate one of the commissioners as the Chairperson and another as the Vice Chairperson. If both the Chairperson and the Vice Chairperson have left the positions or are unable to exercise their duties, the Premier has to designate one of the commissioners as the acting chairperson¹⁰. As mentioned previously, the FTC is a collegial body. All policies and case decisions are made by majority vote through full discussion among the commissioners in order to prevent any decision from being made upon the inclination of one single individual. Each commissioner has one vote in a case and every decision requires majority attendance of the commissioners and the consent of the majority of the attending commissioners¹¹. Under such circumstances, the Chairperson is unable to make a decision alone at Commissioners’ Meeting. As a

⁵ Article 9 of the Organizational Act of the Executive Yuan: “The Executive Yuan establishes the following independent administrative institutions equivalent to the second-level agencies of the Central Government: (1) Central Election Commission; (2) Fair Trade Commission; and (3) National Communications Commission.”

⁶ Article 4 of the Organic Act.

⁷ Article 6 of the Organic Act.

⁸ Article 8 of the Organic Act.

⁹ Article 7 of the Organic Act.

¹⁰ Paragraph 1 of Article 4 and Article 5 of the Organic Act.

¹¹ Article 10 of the Organic Act.

consequence, the Executive Yuan can't give instructions on or interfere with the policy-making or case investigations and decisions of the FTC by designating the Chairperson.

3. The decision-making independence of the FTC has been strengthened since the 2015 FTA amendment

15. The amendment to the FTA enacted on February 4, 2015 was a significant overhaul of competition law in Chinese Taipei. The most important change for agency independence in this amendment is the direct application of the administrative litigation procedure when a concerned party appeals the FTC's decision. This helps maintain the professionalism and credibility of the FTC as an independent agency and prevent unnecessary administrative intervention.

16. Before the 2015 amendment, the administrative sanctions or decisions made by the FTC could be appealed to the Appeal and Petition Committee of the Executive Yuan, according to Subparagraph 7 of Article 4 of the Administrative Appeal Act. As a result, the sanctions or decisions made by the FTC would be reviewed by the Executive Yuan to decide whether they were legal and appropriate. Statistics showed that, between February 1992 and January 2015, 5.5% of the administrative decisions of the FTC were revoked after the Executive Yuan reviewed the cases. The percentage was not high. Given that the administrative appeal decision can't be appealed by the FTC, administrative reviews had a certain impact on the independence of the FTC.

17. As defined in the Basic Code, an independent agency is to exercise its powers and functions independently without the supervision of other agencies and operates autonomously unless otherwise stipulated. If the sanctions and decisions made by the FTC had to be reviewed by the Executive Yuan, it would affect to some extent the independence of the FTC. Considering the FTC's decision-making independence, Article 48 of the 2015 amendment states that the Administrative Litigation Act shall apply directly and such cases will be reviewed by judicial courts, rather than the Executive Yuan. The amendment has made it possible for the FTC to fulfill its duties as a real independent agency and its autonomy so that unnecessary administrative intervention is minimized.

4. FTC's staff employment and budget

18. As an administrative agency, the FTC only can recruit employees who passed civil service examinations. The professional backgrounds of employees at the FTC include those majored in law, economics, management, accounting, and so on. Promotions of staff members are conducted by an internal committee of the FTC according to civil service regulations. The FTC also designs a number of training programs for all staff to cultivate the expertise the FTC needs. As all civil servants, all FTC staff members have to abide by the administrative impartiality regulation.

19. In terms of the FTC's budget, as a subordinate agency of the Executive Yuan, the FTC requires the approval of the Directorate-General of Budget, Accounting and Statistics of the Executive Yuan for its budget plans and expenditure verification. In the meantime, the central government general budget needs to be reviewed by the Legislative Yuan, and the Legislative Yuan may invite the Chairperson of the FTC to answer questions when it reviews the FTC's budgets or draft amendments to the FTA. In addition to funding from the central government, the FTC was given right to set up its own fund under Article 47-1 of the FTA¹² in 2015 amendment proposed by legislators. The most important sources of this fund is from

¹² Article 47-1 of the FTA: "To strengthen the investigation and sanction over concerted actions and promote the healthy development of market competition, the competent authority may set up an anti-trust fund.

Capital sources of the preceding anti-trust fund are as follows:

30% the sanctions imposed by the FTC under the FTA and the fund can only be used strictly on the purposes articulated by Article 47-1.

20. The Executive Yuan and the Legislative Yuan may sometimes request that the FTC investigate certain industries or enterprises. The FTC will evaluate whether the requests for such investigations involve the FTA. If they are beyond the jurisdiction of the FTC, the Chairperson will turn down the requests. Otherwise, the FTC will launch investigations and hand down sanctions according to law.

5. Conclusion

21. Although competition policy is an important means of maintaining trading order and protecting the interests of consumers, the government has to take other policy targets into consideration as well, particularly when the characteristics of certain industries causes contradictions between industrial and competition policies. As for law enforcement of the FTA, the fundamental economic law has to be precedence in cases where competition is a concern. If there are other applicable laws, such laws may apply only when there is no contradiction with the legislative purposes of the FTA¹³. The FTC exercises its functions independently according to law, and may launch investigations upon complaints or ex officio. In other words, the FTC has discretion to make decisions to investigate and hand down sanctions to maintain its independence.

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1. 30% of the fines imposed according to the Act;
 2. Interests accrued on the fund;
 3. Budgetary allocations;
 4. Other relevant incomes.

The fund under Paragraph 1 shall be used for the following purposes :

1. Rewards for the reporting of illegal concerted actions;
2. Promotion of cooperation, investigation and communication matters with international competition law enforcement agencies;
3. Subsidies to the related expenses incurred from litigations associated with the Act and rewards reporting of illegal actions;
4. Deployment and maintenance of databases in relation to the Competition Law;
5. Research and development on the systems in association with the Competition Law;
6. Education and advocacy of the Competition Law;
7. Other necessary expenditures to maintain the market order.

The previous paragraph governing the scope of reporting reward, the qualifications of informer, the criteria of rewarding, the procedures of rewarding, the revocation, abolishment and recovery of reward, and the maintenance of confidentiality of the informer's identity shall be determined by the competent authority."

¹³ Article 46 of the FTA: "The Act has precedence over other laws with regard to the governance of any enterprise's conduct in respect of competition. However, this stipulation shall not be applied to where other laws provide relevant provisions that do not conflict with the legislative purposes of this Act."