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SANCTIONS IN ANTITRUST CASES

Contribution by Chinese Taipei

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Ms Lynn Robertson, Global Relations Co-ordinator, OECD Competition Division,
Tel: +33 1 45 24 18 77, Email: Lynn.Robertson@oecdg.org.

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SANCTIONS IN ANTITRUST CASES

-- Chinese Taipei --

1. This report explains the criteria and considerations adopted by the Fair Trade Commission (the FTC) of Chinese Taipei when imposing sanctions in antitrust cases.

1. Sanction-related provisions under the Fair Trade Act

1.1 Administrative sanction

2. The term “enterprise” used in the Fair Trade Act (FTA) refers to a company, a sole proprietorship or partnership, any individual or organization (such as a business association) engaging in transactions through the provision of goods or services. In other words, all natural persons and juristic persons engaging in transactions by providing goods or services are subject to the FTA.

3. Anticompetitive conducts prohibited under the FTA includes abuse of monopoly power (Article 9), horizontal concerted action (Article 15), unjustified resale price maintenance (Article 19), and boycotting or tie-in sales as well as other unlawful vertical restraints (Article 20). Under Paragraph 1, Article 40 of the FTA, the FTC can impose an administrative fine on the above infringements, ranging from a minimum of NT\$ 100,000 up to NT\$ 50 million (approximately equivalent to US\$ 3,175 to US\$ 1,587,300 at the exchange rate 31.5 of NTD/USD in October 2016). In addition to administrative fine, the FTC can also order the offender to cease or rectify its conduct or take necessary corrective action.

4. If the enterprise fails to follow the FTC’s decision to cease or rectify its conduct or take any necessary corrective action in the prescribed period, except for subsequent orders to cease or rectify the conduct, the FTC can further impose an administrative fine ranging from NT\$ 200,000 to NT\$ 100 million (approximately equivalent to US\$6,350 to US\$3,174,600 at the exchange rate 31.5 of NTD/USD in October 2016) until the company that engaged in anti-competitive conducts ceases or corrects its unlawful conduct.

5. In certain serious violations, nevertheless, the profits that enterprises obtained from such unlawful conduct far exceeded the limit for administrative fines set forth in Paragraph 1, Article 40 of the FTA. To ensure such unlawful conduct would be given severe punishments and to deter future attempts, a large amount of administrative penalties will be imposed on the violators engaging in abusing dominant positions or concerted actions. In accordance with Paragraph 2, Article 40 of the FTA, the FTC may impose an administrative fine of up to 10% of the total sales income of an enterprise in the previous fiscal year without being subject to the limit of the administrative fine set forth in the preceding paragraph if the enterprise is deemed by the FTC as being in serious violation of Articles 9 and 15 (referred to as abuse of monopoly power and concerted actions).

1.2 Criminal Sanction

6. Article 34 of the FTA provides that, any enterprise violated Article 9 or Article 15 is ordered by the FTC to cease or rectify its conduct or take necessary corrective action and then fails to comply with the order within the period given or have the same violation again, its legal representative or responsible

person shall be punished by imprisonment for not more than three years or detention, or by a criminal fine of not more than NT\$ 100 million, or by both such fine and imprisonment.

7. In terms of vertical restraints such as resale price maintenance and anti-competitive vertical agreements (Article 19 and Article 20), sanction for refusal to comply with the order by the FTC or recidivist includes a maximum 2 years sentence of imprisonment or detention, or/and a criminal fine of not more than NT\$ 50 million, according to Article 36 of the FTA.

8. As mentioned above, criminal prosecution is possible, but only for failure to comply with the FTC's cease and desist order, or a repeat offender. The FTC and Ministry of Justice reached a cooperation arrangement accordingly in 1997 for facilitating mutual coordination and collaboration between two agencies. From February 1992 to August 2016, the FTC referred 28 cases to prosecutor offices. In eight of those cases, the persons involved were convicted and most of them were ordered to pay fines and only few were also sentenced to prison terms of up to eight months.

1.3 Civil Liabilities

9. In addition to administrative and criminal sanctions, enterprises may be held responsible for civil liability. Chapter V of the FTA specifies that an injured party may request the removal and prevention of damage, damage compensation and publication of the content of the verdict in newspapers¹. When the injured party files a claim for compensation for the harm caused by any intentional violation of the FTA, the court may determine the amount of compensation exceeding the actual harm, up to treble damages though, on the basis of the seriousness of the violation.

2. Determination of administrative fines by the FTC

10. The main legal basis for the FTC to determine the amounts of fines are the Administrative Penalty Act, the Enforcement Rules of the Fair Trade Act (Enforcement Rules) and the "Regulations for Calculation of Administrative Fines for Serious Violations of Articles 9 and 15 of the Fair Trade Act". The Administrative Penalty Act and the Enforcement Rules apply to all violations of the FTA (both anticompetitive and unfair competition conduct prohibited under the FTA), and the "Regulations for Calculation of Administrative Fines for Serious Violations of Articles 9 and 15 of the Fair Trade Act" apply only to serious violations of abusing monopoly power and concerted actions.

11. According to Paragraph 1 of Article 18 of the Administrative Penalty Act, considerations for determining the amount of fine include the culpability of the act in breach of duty under administrative

¹ Article 29 of the FTA: "If any enterprise violates any of the provisions of this Act and thereby infringes upon the rights and interests of another, the injured may request the removal of such infringement; if there is a likelihood of infringement, prevention may also be claimed."

Article 30 of the same act: "Any enterprise that violates any of the provisions of this Act and thereby infringes upon the rights and interests of another shall be liable for the damages arising therefrom."

Article 31: "In response to the request of the person being injured as referred to in the preceding article, a court may, taking into consideration of the nature of the infringement, award compensation more than the actual damages if the violation is intentional; provided that no award shall exceed three times of the amount of damages that is proven. Where the infringing person gains from its act of infringement, the injured may request to assess the damages exclusively based on the monetary gain to such infringing person".

Article 32: "No claim for damages as prescribed in this Chapter shall be allowed unless the right is exercised within two years after the claimant knows the act and the person liable for the damages; nor shall the claim be allowed after the lapse of ten years from the time of infringing conduct is committed."

Article 33: "In filing a suit with a court in accordance with this Act, the injured may request the content of the judgment to be published in a newspaper at the expenses of the infringing party."

law, the impact resulted therefrom and the benefits gained from such an act. Additionally, the financial ability of the person penalized may also be taken into account. Meanwhile, the more specific factors to be taken into account when assessing a fine as stipulated in Article 36 of the Enforcement Rules include:

1. Motivation, purpose, and expected improper benefit of the acts.
2. The degree of the act's harm to market order.
3. The duration of the act's harm to market order.
4. Benefits derived on account of the unlawful act.
5. Scale, operating condition, and market position of the enterprise.
6. Types of, number of, and intervening time between past violations, and the punishment for such violations.
7. Remorse shown for the act and attitude of cooperation in the investigation.

12. Aggravating circumstance set forth in Paragraph 2 of Article 6 of the "Regulations for Calculation of Administrative Fines for Serious Violations of Articles 9 and 15 of the Fair Trade Act" where:

1. The enterprise in concern has organized or encouraged the unlawful conduct.
2. The enterprise in concern has implemented supervision or sanctioning measures to ensure that the concerted action is upheld or executed.
3. The enterprise in concern has been sanctioned for violation of Article 9 or 15 of the Act within the past five years.

The reasons for a fine reduction stated as follows:

1. The enterprise in concern has immediately ceased the unlawful act when the competent authority began the investigation.
2. The enterprise in concern has shown real remorse and cooperated in the investigation.
3. The enterprise in concern has established compensation agreements with the victims or has taken remedial measures.
4. The enterprise in concern has participated in the concerted action under coercion.
5. Fine reduction is encouraged or approved by other agencies or can be granted in accordance with other Acts.
6. As described above, the FTC will decide the most appropriate amount of the fine in each case by taking into consideration the factors specified in the aforesaid laws and regulations as well as by referring to similar cases in the past.

3. Practical issues on ability to pay

13. After receiving the FTC's sanction decision, the enterprise that is unable to pay the fine in one lump sum due to its current financial condition or natural disasters or unforeseen incidents, may provide the FTC relevant documents, such as balance sheet, income statement or record of sales and tax declarations for the two most recent years, to prove its inability to pay the fine at once and provide reasonable collateral or checks for seeking the FTC's approval of installment payment. When a fine is more than NT\$ 10 million, the FTC can also permit the up to 60 monthly installments. However, for enterprises that fail to pay any such installments, the FTC will investigate the property of such enterprises and make requests to the Administrative Enforcement Agency of the Ministry of Justice for administrative enforcement. As of August 31, 2016, the percentage of fine received was respectively 95.28% in 2011, 95.63% (including checks yet to be cashed) in 2012, 97.75% in 2013, 99.84% in 2014 and 99.80% in 2015. According to Article 116 of the Administrative Litigation Act, upon the offender's request, the court may seek the opinion of the FTC to determine the existence of irredeemable damage and urgency, and then decide whether the request for suspending the enforcement is justified and ensure the suspension will not have a significant impact on the public interest.

4. Case example: Nine independent power producers (IPPs) in violation of the Fair Trade Act

14. In March 2013, the FTC fined nine independent power producers (IPPs) for concerted action. This was the first case after the 2011 FTA amendment increased the administrative fine up to 10% of the total sales income in the previous fiscal year for those serious violations. The FTC, after assessing the market status of each independent power producer, the level of harm to the relevant market, the sales of each company and the degree of cooperation throughout the investigation, imposed total administrative fines of NT\$ 6,320 million on the 9 IPPs and ordered the IPPs to immediately cease the unlawful act. The total amount was the largest ever fine imposed by the FTC in its history.

15. The IPPs filed an appeal to the Appeal and Petition Committee of the Executive Yuan². The Committee did not challenge the fact that the IPPs had engaged in a concerted action, but revoked the fines and ordered that the FTC come up with other legally appropriate sanctions within two months. The reason for this decision was that the Executive Yuan thought the duration of the conduct had begun before the 2011 FTA amendment, the fines therefore should be reassessed how the 2011 amendment applied to this case. The Committee also doubted the calculation of profits received by IPPs' unlawful conducts. On November 13, 2013, the FTC decided, according to the decision of the Executive Yuan reducing the fine for each independent power producer by NT\$30 million. The total fines was reduced to NT\$ 6,050 million.

16. The IPPs, in addition to appeal the Executive Yuan's decisions on concerted actions to the Administrative Court; also appealed the FTC's second decision on sanctions to the Executive Yuan. The Executive Yuan revoked the FTC's new sanction for the second time on the reasons that the FTC did not consider the differences in the duration of operation of each independent power producer, power rate structure, the number of meetings attended, the profitability of each company, the duration of participation in the illegal act, and the level of cooperation during the investigation as well as other statutory factors and the spirit of the leniency policy etc. Following the decision of the Executive Yuan, the FTC made the decision on the fines for the third time on July 9, 2014. Considering Paragraph 2 of Article 41 of the FTA, the "Regulations for Calculation of Administrative Fines for Serious Violations", Article 18 of the Administrative Penalty Act and Article 36 of the Enforcement Rules, the FTC reconsidered the factors in the above-mentioned regulations and reduced the fine for each independent power producer by one third or two thirds. The new amount of fines was totalled NT\$ 6,007 million.

² The decision was before 2015 FTA amendment so the decision had to be reviewed by the Appeal and Petition Committee of the Executive Yuan.

17. The IPPs filed the third appeal to the Executive Yuan for the FTC's decision on fines. Given that the substantial parts of the case (i.e., whether the alleged conduct constituted the concerted actions or not) are still under review by the Administrative Court. The Executive Yuan decided that, the sanction decision should be pending until the Administrative Court's final decision on concerted actions, according to Article 86-1 of the Administrative Appeal Act³.

5. Conclusion

18. As mentioned previously, the FTC can impose administrative sanctions on those enterprises that violate the FTA. One of such sanctions is pecuniary fine. When deciding the amount of administrative fine, the FTC will take into account considerations set forth in the FTA, the Enforcement Rules and the "Regulations for Calculation of Administrative Fines for Serious Violations of Articles 9 and 15 of the Fair Trade Act". Reasons that are both advantageous and disadvantageous (increasing or decreasing the penalty) to the offender will be clearly stated in the FTC's decision. In addition, the FTC also keeps track of offenders that have been sanctioned to see if they have rectified their conduct. The results will be reported to the FTC's Commissioners' Meetings every month. Any offender fails to cease or rectify its conduct, the FTC will issue another cease and desist order and consecutively impose an administrative fine until the offender really cease or rectify its conduct or take necessary corrective action.

19. Recently practical observations are as below:

- Since the FTC issued the "Regulations for Calculation of Administrative Fines for Serious Violations of Articles 9 and 15 of the Fair Trade Act" on April 5, 2012, the Regulations have been applied to three cases. In practice, the most common reason for a fine decrease was that "the enterprise in concern has immediately ceased the unlawful act when the competent authority began the investigation."
- To deter anti-competitive practices, the 2011 amendments not only increased the fines from NT\$ 500,000 and NT\$ 25 million to NT\$ 100,000 and NT\$ 50 million, but also entitled the FTC to impose a turnover-based fine on a serious violation of abuse of monopoly power or a concerted action. Increasing the cost of violation for enterprises, and since 2006, prison terms and fines handed down by judicial courts to offenders who repeatedly engaging in concerted actions and vertical anti-competitive conducts, are the possible reasons why the number of repeated offenses has declined in recent years. Besides, the FTC issued an internal notice on August 31, 2016 for the considerations of determining the amount of fines on repeated offenders.

³ Article 86 of the Administrative Appeal Act, "*While the decision of the administrative appeal depends on the existence or non-existence of certain relationship of law, and such relationship of law is pending in an litigation or administrative remedy proceeding, before the legal relation has been affirmed, the agency with jurisdiction of administrative appeal may cease the administrative appeal proceeding and notify the administrative appellant and intervener appellant immediately.*

When the agency with jurisdiction of administrative appeal ceased the administrative appeal proceeding stipulated in last Paragraph, the period to make the administrative appeal decision stipulated in last Paragraph shall be recalculated from the next day after the relationship of law has been confirmed."