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**INVESTIGATIVE POWER IN PRACTICE – Breakout session 2: Requests for
Information – Limits and Effectiveness - Contribution from Chinese Taipei**

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This contribution is submitted by Chinese Taipei under Session IV of the Global Forum on Competition to be held on 29-30 November 2018.

More documentation related to this discussion can be found at: oe.cd/invpw.

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Investigative Powers in Practice

Breakout session 2 - Requests for Information: Limits and Effectiveness

– Contribution from Chinese Taipei –

This report introduces the regulations regarding requests for information in Chinese Taipei and also shares the experience of law enforcement associated with specific industries.

1. Regulations regarding the collection of evidence and requests for information in the Fair Trade Act

1. The Fair Trade Commission (FTC) is an independent administrative agency under the Executive Yuan (the cabinet). The FTC conducts investigations and decides administrative sanctions in accordance with the Fair Trade Act, but all of its administrative practices must be in line with the Administrative Procedure Act in principle. Article 39 of the Administrative Procedure Act stipulates, “Where it is necessary for the purpose of inquisition into facts and evidence, an administrative authority may give any related person a written notification, requiring that he appear to give his opinions. The notification shall give such details as the purpose of the inquiry, the time and place where the person notified is required to appear, whether or not he is allowed to appoint another person to appear on his behalf, and the consequence for failure to appear.” Meanwhile, it is also set forth in Article 40 of the same act, “An administrative authority may request the parties or third parties to provide documents, information and other materials as may be necessary for the purpose of inquisition into facts and evidence.” In other words, the guidelines for the investigation of facts and collection of evidence by administrative agencies are provided in the Administrative Procedure Act.

2. Since any investigation of violations of law must be conducted in accordance with due process, further regulations on investigation procedures are specified in the Fair Trade Act. As stipulated in Article 27 of the Fair Trade Act, for instance, when conducting investigations, the FTC may notify the parties and related parties to appear to make statements, notify the parties and third parties to submit books and records, documents, and any other necessary materials or evidence, as well as dispatch personnel for any necessary onsite inspection of the office, place of business, or other locations of the parties and any related third party. In the meantime, it is further specified in Paragraph 3 of Article 27 of the same act that any party to be investigated by the FTC according to Paragraph 1 may not evade, obstruct, or refuse to cooperate without justification. In Article 44, it is also prescribed that the FTC may impose an administrative penalty of no less than NT\$50,000 and no more than NT\$500,000 on any party violating Article 27 Paragraph 3. If such a party continues to evade, obstruct or refuse to cooperate without justification upon another notice, the FTC may continue to issue notices of investigations and consecutively impose an administrative penalty of no less than NT\$100,000 and no more than NT\$1 million each time until the party accepts the investigation, appears to respond, or renders related books,

documents, or evidence. In other words, when the FTC investigates cases to obtain necessary information, the concerned parties or related parties have the obligation to cooperate. However, due to the fact that the concerned parties are often in possession of more information associated with the purposes, approaches and subjects of violations of law than related parties, their cooperation throughout the investigation is naturally more necessary and important. Since the FTC was established, there have been 24 cases in which sanctions were imposed on the parties and third parties for refusing to provide related information or refusing to appear to give their statements. The fines ranged from NT\$20,000 to NT\$250,000.

3. As for information not associated with confirmation of violation, such as information related to product substitutability and market definition, the FTC can also request that related parties provide information with regard to the number and amounts of transactions, or industrial survey reports. Sometimes related parties (including trading counterparts, competitors and market survey institutions) refuse to provide such information, but whether such related parties should be penalized is determined in accordance with the conditions of each case.

4. According to Article 18 of the Freedom of Government Information Law, the availability of government information has its limits, such as restricted access to the public or the provision of information about the trade secrets or business operations of a person, legal person or group if making available to the public or the provision of such information will hamper the rights, competitive position or just interests of such a person, legal person or group. In practice, when encountering situations in which related parties have the obligation to keep information confidential and are not willing to or refuse to provide information, the FTC will explain to them that government agencies are also obligated to keep information confidential. Afterwards, concerned parties and third parties will normally be more willing to cooperate with the FTC's requests for information.

2. Contents and Application of Information Requested

5. Normally, the FTC decides the object (parties or third parties) from which to request information, the approaches and the content after taking into consideration the type of violation, the characteristics of the industry involved, the market structure and the level of complexity of the case. Therefore, the procedure for the investigation may differ from case to case.

6. Initially, the parties from which information is to be requested are decided according to the facts of the violation. Besides informers and offenders, the FTC also investigates all trading counterparts and competitors affected by the violation and requests that they provide related information. The content of the information that the FTC requests includes the transaction process, product prices, the quantity transacted, trading counterparts, the amount of sales, industrial characteristics, conventional business practices and competitors. The approaches adopted to obtain information include 1) sending written requests for the parties and third parties to provide books, documents and other necessary information or evidence, 2) requesting that concerned parties and third parties appear to make statements, 3) conducting onsite investigations, 4) holding meetings, and 5) administering questionnaire surveys. The manpower and time invested in investigations depends on the investigation approaches that the competition agency takes. For example, at least two staff members are needed each time and it takes hours to record the party's statement. In practice, the investigation approaches are applied flexibly in accordance with

the number of parties involved, the characteristics of the industry concerned, the level of complexity of the case and the cooperativeness of the parties from which the FTC requests information. Although the FTC does not have the authority to conduct a dawn raid, for important cases that involve cross-border concerted actions, the FTC can cooperate with foreign competition authorities that have the authority to search enterprises and seize objects. Both sides will share information on the progress of the investigation as well as exchange experiences with regard to the collection of evidence and investigation of cases.

7. After obtaining information, the FTC has to confirm its authenticity and properly use the information to clarify facts, the condition of the industry involved and the level of impact of the violation on competition and order in the relevant market. In addition to the parties and third parties, the FTC will also send written requests for the competent authority of the industry involved or related trade associations or groups to provide information regarding the process and characteristics of transactions in the industry, market structure, output value, productivity, as well as descriptions of the violation in question or related facts. The FTC can also consult with the Ministry of Finance to acquire information about the sales and business scope of concerned enterprises. After the investigation is concluded, the information from informers, offenders, related parties (such as trading counterparts and competing businesses) and descriptions and related data from the competent authorities of related industries are compared for consistency to assess the authenticity of the information acquired. Then, based on experience or the results of economic analysis, the FTC evaluates the level of impact of the violation on competition and order in the market.

3. Case Examples

3.1. Case of channel agents (vertical restriction)

8. In 2016, the FTC imposed a fine of NT\$40 million on a channel agent for engaging in unjustifiable discriminatory treatment likely to lead to competition restraints by offering different transaction terms to cable TV services.

9. During the investigation, the FTC issued written requests for the offender and seven cable TV services to explain the standard for calculation of channel licensing fees and to provide the licensing agreement, numbers of subscribers and related information. At the same time, the FTC also requested that the National Communications Commission provide its opinion about the condition of the industry and disputes over channel licensing fees.

10. In addition, the FTC also made requests for information from others to understand whether cable TV services had the need to purchase channels which the offender offered and whether not acquiring such licensing had any effect on the competitiveness of cable TV services in getting trading counterparts (consumers). In this case, the FTC requested that TV rating survey companies provide the average results of rating surveys on all cable and wireless TV channels. The information that the FTC obtained indicated that nine of the 11 channels that the offender represented ranked among the top 50 in channel ratings. Reports from both the National Communications Commission and cable TV channel rating surveys showed that “news” channels were the most popular, including two news channels that the offender represented. In the meantime, the questionnaire survey administered by the FTC revealed that given that cable TV fees remained the same, when the cable TV services pulled out the channels that the offender represented, 71% of consumers would switch to other cable TV services. In addition, it was also indicated that there existed a rather large gap in the number of subscribers between cable TV services that had acquired

licensing from the offender and others that had not. Hence, the FTC concluded that not acquiring licensing from the offender had a certain level of influence on the capacity of cable TV services to find trading counterparts (consumers). In other words, cable TV services did have the need to purchase channels that the offender represented, so that they could have more comprehensive channels to gain subscribers.

3.2. Case of KTV operators (merging parties concealing important information)

11. In 2004, the FTC fined Holiday KTV for providing false information in the merger notification that the company filed regarding its intention to merge with Cash Box KTV, a horizontal competitor. The FTC looked into the case after receiving complaints from private citizens and karaoke operators that Yang Sheng company (a supplier of karaoke products for Holiday KTV) was actually controlled by Holiday KTV and the person in charge at the time, but Holiday KTV did not disclose the information in the merger notification. During the investigation, the FTC 1) issued written requests for independent KTV operators to make their statements with regard to their business relationships with karaoke tape agents and fill out the questionnaire, 2) requested that Yang Sheng company and Holiday KTV come to the FTC to explain the relationship between the two companies, 3) requested that the Taipei City Government provide the business registration information of Yang Sheng company, 4) requested that banks provide data regarding the capital flows of Yang Sheng company, and 5) requested that music companies provide proof of payment of licensing fees from Yang Sheng company.

12. Cross-checks made to the above-mentioned evidence and other information revealed that while Holiday KTV or any of its affiliates had never been in possession of any shares of Yang Sheng company, the father of the person in charge of Holiday KTV at the time had transferred money to Yang Sheng company and the land that Yang Sheng company had provided as collateral for the company's bank loan had also come from an affiliate of Holiday KTV. All the aforesaid financial aid had way exceeded the capital of Yang Sheng company, proving that Holiday KTV had already gained direct or indirect control of the rights of management of Yang Sheng company by providing the company with financial and business support. Once Holiday KTV merged with Cash Box KTV, it would account for 60% of the karaoke tape licensing market (the karaoke tape buyer market) and gain significant market status. At the same time, as a result of its controller-affiliate relationship with Yang Sheng company, Holiday KTV could influence the business of karaoke tape agents through Yang Sheng company as well as the licensing practices of music companies. Apparently, because the relationship between Holiday KTV and Yang Sheng company could have affected the FTC's overall assessment of the merger application, the FTC concluded that the merger notification from Holiday KTV contained false information and decided to sanction the company.

4. Conclusions

13. The purpose of the competition policy in Chinese Taipei is to maintain trading order and consumers' interests, ensure free and fair competition, and promote economic stability and prosperity. Whenever any enterprises violate the Fair Trade Act, the FTC will launch investigations in accordance with Article 27 of the Fair Trade Act to collect information needed to assess an act in breach of duty under administrative law or the resulting consequence (effect). Besides requesting that informers, offenders and related parties (trading counterparts and competitors) make their statements and provide the books,

documents and other necessary information or evidence, the FTC will also issue written requests to the competent authority of the industry and related trade associations and groups to obtain their opinions and related information.

14. The parties and third parties have the obligation to accept the FTC's investigations. The FTC has imposed sanctions on the parties and third parties refusing to provide information with regard to facts about the violation in question. Nonetheless, the FTC has never imposed sanctions on parties failing to provide information not associated with the confirmation of facts of violation (such as the substitutability of related products and information related to market definition). Furthermore, in principle, government agencies have the obligation to keep information involving the business or management secrets of individuals, legal persons or groups confidential. In practice, related parties are willing to cooperate and provide information in most cases after finding out that government agencies are obligated to keep information confidential.

15. After an investigation is concluded, the FTC makes cross reference to the explanations and data from the parties, third parties (including trading counterparts and competitors) and competent authorities of different industries to judge the consistency and authenticity of the information acquired to clarify related facts and the condition of the industry in question. Experience and economic analysis are applied to evaluate the level of impact of the unlawful act on competition and order in the relevant market. Investigation does have its limitations because requests for information and the verification of such information require the investment of large amounts of manpower and time, especially in merger cases which involve statutory review periods¹. Moreover, the availability of related evidence concerning the unlawful act may gradually dwindle as time passes, and for this reason the FTC can adopt a flexible approach so that it can determine from whom to request information and how to request it in accordance with the complexity of each case in order to increase the effectiveness of such requests for information.

16. Since the FTC was established, it has made active efforts to participate in activities associated with international competition issues and established reliable channels of exchange and communication with the competition authorities of different countries. In recent years, cooperation with the competition authorities of other countries has enabled both sides to have a firm grasp of each other's investigation progress and exchange experience regarding the collection of evidence and case investigation via cooperation agreements or the Recommendations Concerning International Cooperation on Competition Investigations and Proceedings. The FTC will adhere to the same principle and continue to exchange information and experiences with other countries to protect market freedom and maintain fair competition order.

¹ As set forth in Paragraph 7 of Article 11 of the Fair Trade Act, "Enterprises shall not proceed to merge within a period of 30 working days starting from the date the competent authority accepts the complete filing materials, provided that the competent authority may shorten or extend the period as it deems necessary and notifies in writing the filing enterprise of such change." Again in Paragraph 8 of the same article, it is specified, "Where the competent authority extends the period in accordance with the proviso of the preceding paragraph, such extension may not exceed 60 working days." In other words, once a filed merger notification enters the review period, the FTC, in principle, has to decide whether it objects to the merger within 30 working days. Even if the review period is extended, the total period may not exceed 90 working days.