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REMEDIES AND COMMITMENTS IN ABUSE CASES – Contribution from Chinese Taipei

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Remedies and Commitments in Abuse Cases

- Contribution from Chinese Taipei -

1. Regulations against the Abuse of Market Position by Monopolistic Enterprises

1. In the Fair Trade Act (“CTFTA”), there are administrative sanction regulations that give the CTFTC the authority to fine enterprises in violation of the CTFTA or order them to stop or rectify their conduct or take necessary corrective measures. In other words, such enterprises have to bear their administrative responsibility after violating the CTFTA. To “rectify” means that such enterprises are required to remove the illegal or inappropriate condition resulting from their unlawful acts and make the condition become a legal one. In other words, the offender is ordered to “do” something appropriate. As for the term “correct,” it may be similar to “rectify” in meaning, but it means more than just removing the illegal or inappropriate condition resulting from an unlawful act. The offender needs to clearly express in writing and clarify the facts or take necessary and legal or appropriate measures. Therefore, the effect is greater than that of “rectify.” This paper discusses the corrective measures that the CTFTC expects offenders to adopt when making administrative decisions to attach conditions or undertakings and the CTFTC’s acceptance of commitments by enterprises to eliminate concerns regarding further illegal conduct. The objective is to make enterprises rectify their conduct or adopt necessary corrective measures.

2. The regulations governing the abuse of market position by monopolistic enterprises set forth in the CTFTA are as follows: As specified in Article 9, “Monopolistic enterprises shall not engage in any of the following conduct: 1) directly or indirectly preventing any other enterprises from competing by using unfair means; 2) improperly setting, maintaining or changing prices of goods or remuneration for services; 3) making a trading counterpart give preferential treatment without justification; or 4) engaging in other abusive conduct by using its market power.” Meanwhile, it is prescribed in Article 40, “The competent authority may order any enterprise that violates Article 9, Article 15, Article 19 and Article 20 to cease therefrom, rectify its conduct or take necessary corrective action within the time prescribed in the order; in addition, it may assess upon such enterprise an administrative penalty of not less than one hundred thousand nor more than fifty million New Taiwan Dollars. Shall such enterprise fail to cease therefrom, rectify the conduct or take any necessary corrective action after the lapse of the prescribed period, the competent authority may continue to order such an enterprise to cease therefrom, rectify the conduct or take any necessary corrective action within the time prescribed in the order, and each time may successively assess thereupon an administrative penalty of not less than two hundred thousand nor more than one hundred million New Taiwan Dollars until its ceasing therefrom, rectifying its conduct or taking the necessary corrective action.”

2. Administrative Decisions Regarding Attaching Conditions or Undertakings

3. The administrative decisions regarding attaching conditions or undertakings made by the CTFTC usually occur in merger cases. The purpose is to remove concerns about the creation of competition restraints as a result of mergers in order to ensure that the overall economic benefit is greater than the disadvantages resulted from competition restraints. The types of conditions or undertakings attached include 1) structural measures requesting

that merging parties dispose of shares or assets in their possession, assign part of the business or step down from certain positions; and 2) behavioral measures requesting that merging parties continue to supply key equipment to or invest important elements in non-merging parties, license non-merging parties to use their intellectual property rights as well as not to make exclusive dealings and engage in differential treatment or tie-in sales.

4. Take the PX Mart-RT-Mart merger for example. PX Mart intended to acquire the shares of RT-Mart to gain control of the management and personnel appointment and dismissal of the latter, and the merger had to be filed with the CTFTC according to the CTFTA. The top three businesses in the hypermarket market together accounted for over 76% of the total share, whereas the two merging parties claimed more than 20% of the market. As described in Point 10 of the Fair Trade Commission Disposal Directions (Guidelines) on Handling Merger Filings, the case could be considered likely to lead to concerns about competition restraints and the overall economic benefit had to be evaluated. The results of scrutiny conducted according to the gross upward pricing pressure index, compensating marginal reduction analysis and merger simulation analysis showed that the merging parties had the incentive to raise product prices arbitrarily or reduce promotional special offers after the merger. Meanwhile, as a consequence of the increase in the market share of the merging parties and concentration of retail businesses after the merger, the countervailing power of suppliers would be eliminated.

5. To remove concerns about the unilateral effects of the merger, the applicant took the initiative and made the commitment that arbitrary price increases would not take place and also promised to maintain the pricing strategies of the outlets of each of the two brand names by taking into consideration the management differences between supermarkets and hypermarkets. At the same time, the prices of all outlets throughout the relevant market would be consistent. However, since the intensities of competition in different areas varied, the company agreed to lower the prices of specific products after taking into account the prices of competitors. The promise could thus reduce the concerns about the unilateral effects. In addition, the applicant also made the commitment that the additional fees imposed on suppliers would be arbitrarily increased after the merger went through. Furthermore, the applicant made the commitment that, during the first three years following the merger, within the range of existing business and services, annual supply-marketing system changes and transaction condition revisions would not be any more disadvantageous to suppliers. As for new charges derived from new services, suppliers would be given the liberty to choose whether they would use such services, whereas the agreement of suppliers to pay such new charges would be obtained in advance. The company would not arbitrarily deduct such charges from amounts payable. The commitment was considered sufficient to ensure that the countervailing power of suppliers would not be eliminated. Therefore, the CTFTC concluded that the commitment could help ensure that the overall economic benefit would be greater than the disadvantages from competition restraints.

6. In the case regarding the Taiwan Stock Exchange Corporation being in violation of the CTFTA by adopting inappropriate charging standards for the use of trading information, the CTFTC attached corrective measures to be taken by the offender in the disposition. The Taiwan Stock Exchange Corporation was a monopolistic business providing securities trading information. The company concealed cost information and improperly increased the cost burden of information vendors without reaching a consensus with them in advance. Besides requesting that information vendors transmit “fixed fees” on a monthly basis, the company also charged each of them an additional “variable fee” of NT\$100,000. The practice was deemed to be exploitation of the achievements of the efforts of information vendors in order to obtain an exorbitant profit. The conduct also had an effect on the

information vendors' pursuit of effective competition. It was in violation of Subparagraph 2 of Article 10 of the CTFTA before the act was amended.

7. In relation to the above-mentioned unlawful act, the CTFTC requested that the Taiwan Stock Exchange Corporation 1) fully disclose to the securities authority and information vendors the details of its departmental costs and benefits that complied with accounting principles and were certified by CPAs before deciding, maintaining or changing the charging standards for the use of information; 2) fully consult with information vendors before deciding, maintaining or changing the charging standards for the use of information; and 3) cancel the currently adopted approach of separating the fees for the use of information into "fixed fees" and "variable fees" and charge each information vendor a fixed amount instead.

8. As indicated in the report of the Taiwan Stock Exchange Corporation on the execution of the aforesaid corrective measures, the company commissioned CPAs after receiving the disposition from the CTFTC to certify the cost benefit details associated with different departments and also held meetings to consult with information vendors. However, the Petitions and Appeals Committee of the Executive Yuan decided that the "fixed fees" did not necessarily have to be evenly apportioned by information vendors. The Taiwan Stock Exchange Corporation could charge each information vendor a lower fixed amount to attract information vendors to enter and compete in the market or it could be flexible and charge a higher fixed amount. In other words, the CTFTC's request that the Taiwan Stock Exchange Corporation was to collect fixed amounts had no basis; therefore, the original sanction was revoked.

9. How the CTFTC has handled other cases, such as those associated with computer software, game credit cards and mobile communications chips, involving enterprises abusing their market position and making commitments to stopping and rectifying their unlawful acts, will be explained in the sections below.

3. The Computer Software Case

3.1. Settlement according to administrative procedures

10. As set forth in Article 136 of the Administrative Procedure Act, "Where an administrative authority is unable to determine the facts or the legal relationship as the basis for an administrative disposition notwithstanding an investigation process having been conducted ex officio, it may enter into a settlement or an administrative contract with a citizen in lieu of administrative disposition in order to settle the dispute and to effectively achieve the purpose of administration."

11. Before beginning the consultation process to establish a settlement agreement, the CTFTC should assess the following elements: 1) the legitimacy and appropriateness of the mutual concession between the CTFTC and the enterprise involved, 2) the protection of the public interest, and 3) the potential harm to stakeholders as a result of the settlement agreement.

12. The CTFTC usually agrees to settle according to administrative procedures in cases involving more significant public interest in order to solve the case quickly by establishing an administrative settlement agreement. Take Intel Corporation as an example. When accused of adopting patent-licensing practices that were in violation of the CTFTA, the company realized that the practices had had a considerable impact on competition order and, therefore, proposed an improvement plan to the CTFTC. Taking into consideration of the development of domestic motherboard and personal computer industries and the public

interest, the CTFTC accepted the Intel plan with regard to licensing principles and temporarily suspended the investigation of the case. Later, when the French company Matra Transport Corporation was accused of refusing to provide maintenance services and restricting its subcontractors from providing maintenance services in violation of the CTFTA; Sanyang Motor Co. Ltd. was accused of forcing its motorcycle parts suppliers not to supply its competitors and spreading false information in violation of the CTFTA; and American company RCA Thomson Licensing Corporation was accused of inappropriately collecting licensing fees in violation of the CTFTA, all three cases were closed through the signing of administrative settlement agreements.

3.2. Case background

13. Between April and May 2002, there were quite a few complaints about Microsoft Taiwan using its monopolistic position in the domestic software market to set unreasonable prices and engage in tie-in sales to market the Microsoft Office software. Therefore, the CTFTC created the Software Market Monopolization Investigation Task Force according to Article 26 of the CTFTA on May 2, 2002 and launched an investigation. After six months of investigation, Microsoft Taiwan asked for administrative settlement by presenting letter of administrative settlement offer. On Feb. 23, 2003, the CTFTC decided during the Commissioners' Meeting that the offer letter complied with the public interest and agreed to sign an administrative settlement agreement with Microsoft Taiwan and its affiliates.

3.3. Commitments made as part of the settlement and follow-up supervision

14. Besides Point 7 regarding the mechanism for administrative settlement agreement consultation and Point 8 concerning the agreement duration and validity, the agreement stipulated that Microsoft Taiwan and its affiliates had to fulfill the following six obligations: 1) to set the prices of software products for consumers and educational users, 2) to promote consumer benefits, 3) to stimulate intra-brand competition, 4) to improve after-sales service, 5) to reasonably share software codes, and 6) to act appropriately according to the content of the settlement agreement.

15. After the agreement took effect, the CTFTC created the Task Force for Follow-up Supervision of the Microsoft Administrative Settlement to monitor the execution of the agreement and ensure that it was effectively implemented. The CTFTC checked the fulfillment of the agreement item by item and requested that Microsoft Taiwan present over 50 written reports. The representatives of the company visited the CTFTC on four occasions to report the results of the implementation. The company also promised to present an achievement report to the CTFTC before the end of the year starting from 2005 as well as provide an end-of-year report to explain the fulfillment of the administrative settlement agreement and implementation results before the end of 2007.

16. The administrative settlement agreement expired on Feb 27, 2008, but Microsoft Taiwan promised to continue to promote and carry out measures helpful to the improvement of domestic industries and the protection of consumer interests. The company also made a commitment to apply all of its international compliance practices in Chinese Taipei to make concrete contributions to domestic hi-tech industries. In response, the CTFTC requested that Microsoft Taiwan observe the regulations set forth in the CTFTA to maintain trading order and protect consumer interests.

4. The Game Credit Card Case

4.1. The investigation suspension system

17. This system allows the competent authority to decide to suspend an investigation into the violation of an obligation or obligations specified in administrative regulations after the enterprise being investigated makes a commitment to taking concrete measures to undo the violation within the period given by the competent authority. After making the investigation suspension decision, the competent authority is required to monitor whether the enterprise actually fulfills the commitment. If the commitment is fulfilled or the enterprise has taken concrete measures to stop and rectify the unlawful conduct, the competent authority can terminate the investigation and close the case.

18. According to Paragraphs 1 and 2 of Article 28 of the CTFTA, “In conducting investigations into an enterprise’s conduct that may violate the provisions of the Act, if such enterprise makes commitments to take specific measures to cease and rectify its alleged illegal conduct within the time prescribed by the competent authority, the competent authority may suspend the investigation. In the situation referred to in the preceding paragraph, the competent authority shall monitor whether such enterprise fulfills its commitments.” Meanwhile, it is also prescribed in the first section of Paragraph 3 of the same article, “If the enterprise has fulfilled its commitments by taking specific measures to cease and rectify its alleged illegal conduct, the competent authority may decide to terminate the investigation.”

4.2. Case background

19. Y Game Credits Company (X, Y and Z are not real company or product names) was a developer of prepaid products in association with gifts, wireless services, games and music and reloadable debit cards. The company had signed contracts with physical retail stores, including the four major convenience stores in Chinese Taipei, to sell its “Z Game Credit Cards” there. However, the contract included an exclusive dealing clause which restricted the retail stores from selling any game credit cards from other companies using the same technology. The informant X Game Credits Company had made investments to develop technologies and systems similar to those of Y Game Credits Company, but as a result of the exclusive dealing provision between the four major convenience stores and Y Game Credits Company (the game credit cards sold through the four major convenience stores accounted for over 80% of the total number of cards sold through brick and mortar retail stores, according to X Game Credits Company), unless X Game Credits Company used the systems of Y Game Credits Company, it could not sell game credit cards using the same technology through convenience stores. For this reason, X Game Credits Company thought the conduct of Y Game Credits Company was in violation of the CTFTA.

20. The CTFTC immediately launched an investigation after receiving the complaint from X Game Credits Company. Besides requesting that both parties come to the CTFTC to present evidence on several occasions, the CTFTC also interviewed a number of convenience stores as well as several game and digital content businesses. While the investigation was in progress and the CTFTC was yet to make the final decision, Y Game Credits Company acted according to Article 28 of the CTFTA and the Fair Trade Commission Disposal Directions (Guidelines) on Cases of Suspended Investigation and presented a written commitment to adopt concrete corrective measures. The CTFTC asked X Game Credits Company and brick and mortar retailers for their opinions regarding the concrete measures presented by Y Game Credits Company. After Y Game Credits Company made revisions, the final concrete measures included shortening the effective

period of exclusive dealing clause in the contracts. After the expiration of the exclusive dealing period, the company would not prohibit, restrict or impede brick and mortar retail stores from cooperating with other businesses to sell game credit cards using the same technology applied to produce the Z Game Credit Cards. In addition, when the company renewed contracts or signed new contracts with existing brick and mortar retail stores, there would be no exclusive dealing requirement to restrain the stores from cooperating with competitors of Y Game Credits Company.

4.3. The commitment made in exchange for investigation suspension and follow-up supervision

21. From the time that the CTFTC received the complaint from X Game Credits Company to the time when Y Game Credits Company made the commitment, before the CTFTC decided whether or not to impose a sanction, while the investigation was still in progress, issues associated with market definition and the impact of the exclusive dealing clause on market competition made it difficult to determine whether Y Game Credits Company had violated the law based on existing evidence. Therefore, the CTFTC decided to apply the investigation suspension regulation in Article 28 of the CTFTA in this case.

22. Y Game Credits Company promised to shorten the exclusive dealing period. The commitment would allow X Game Credits Company to cooperate with convenience stores or other retail stores to sell its game credit cards produced by using the same technology applied to make the Z Game credit cards. If the negotiations with the convenience stores proceeded smoothly, X Game Credits Company (or any potential competitor) would soon be able to compete with Y Game Credits Company. At the same time, it could also enable X Game Credits Company and other new competitors to obtain stable marketing channels to facilitate their deployment. The measures that Y Game Credits Company promised to adopt could create competition opportunities and stimulate competition.

23. After evaluation, the CTFTC considered that the concrete measures proposed by Y Game Credits Company could eliminate the unlawful act and the case complied with the investigation suspension regulation in Article 28 of the CTFTA. Hence, the CTFTC decided during the Commissioners' Meeting to accept the concrete measures that Y Game Credits Company promised to take and suspended the investigation.

24. Within the period specified by the CTFTC, Y Game Credits Company presented evidence of its fulfillment of the commitment. The company sent written notices to inform the brick and mortar retail stores under contract that the exclusive dealing period was shortened and that they could discuss with other businesses about the opportunity to cooperate and sell their game credit cards that had been produced by using the same technology used to make the Z Game Credit Cards. Although there were currently no significant changes in the domestic market for prepaid or reloadable products for gamers, Y Game Credits Company was requested to present photocopies to the CTFTC each time it renewed or signed new contracts with existing contract stores, so that the CTFTC could keep track of the execution of the measures that the company had promised to take. The CTFTC would continue to keep an eye on the market situation and on how Y Game Credits Company fulfilled the promises. When discovering that Y Game Credit Company breached the commitment or engaged in the same conduct again, the CTFTC would increase the sanction once the violation was confirmed after investigation.

5. The Mobile Communications Chip Case

5.1. Settlement according to the Administrative Litigation Act

25. As specified in Paragraph 1 of Article 219 of the Administrative Litigation Act, “Where a party has the authority in disposing of the right of the claim and a settlement causes no harm to the public interest, the administrative court may seek settlement at any time irrespective of the phase of the proceeding reached. A commissioned judge or an assigned judge is also authorized to do so.”

26. Settlement during an administrative litigation requires the following elements: 1) The party of concern has the right of disposition. 2) The public interest may not be jeopardized. 3) The concession is mutual, not unilateral. 4) The settlement statement is in writing. 5) The settlement must be conducted at the court of litigation according to statutory procedures. 6) The parties to the settlement has to be the parties of the litigation.

5.2. Case background

27. On Oct. 11, 2017, the CTFTC concluded that Qualcomm Semiconductor Corporation had violated Subparagraph 1 of Article 9 of the CTFTA. The company had monopolistic position in the CDMA, WCDMA and LTE standard baseband processor market but refused to license its patented technologies and supplyships to competitors unless they signed licensing agreements that included restriction clauses, and required certain enterprises to sign exclusive dealing clauses. Overall, the conduct jeopardized competition in the baseband processor market. It was an unfair practice that directly or indirectly impeded other businesses from participating in competition. The CTFTC imposed an administrative fine of NT\$23.4 billion on the company. Later, when the case entered into the administrative litigation procedure, Qualcomm Semiconductor Corporation acted according to Paragraph 2 of Article 219 of the Administrative Litigation Act and petitioned the Intellectual Property Court for settlement. After taking into account the protection of the free and fair competition mechanism in Chinese Taipei, the interests of domestic cell phone manufacturers, chip suppliers and trading counterparts, and the development of mobile communications and the 5G industry, the CTFTC agreed to settle the matter with Qualcomm Semiconductor Corporation at the Intellectual Property Court on Aug. 10, 2018 in order to safeguard the public interest.

5.3 The commitment made as part of the settlement and follow-up supervision

28. As stated in the settlement statement, Qualcomm agreed to license standard essential patents (SEP) to Taiwan cell phone manufacturers and chip suppliers. The commitment was sufficient eliminate the concerns in the original sanction about the anticompetitive licensing practices of Qualcomm Semiconductor Corporation. The content of the settlement statement is as follows:

- Renegotiation of licensing clauses out of good intentions: If licensed Taiwan smartphone manufacturers consider that patent licensing agreements signed with Qualcomm include unreasonable licensing clauses with which they are forced to agree, Qualcomm Semiconductor Corporation promises to renegotiate the disputable clauses with the best of intentions. The smartphone manufacturers and Qualcomm Semiconductor Corporation can negotiate to determine if the dispute settlement procedure of a judicial court or a neutral third party is to be adopted.

- No chip supply refusal during the negotiation: During the renegotiation period of the dispute settlement procedure, if Taiwan smartphone manufacturers continue to fulfill obligations as specified in the licensing agreement and renegotiate out of good intentions, Qualcomm Semiconductor Corporation agrees not to terminate or threaten to terminate the supply of mobile modem chips.
- No Discriminatory treatment in SEP licensing: Qualcomm Semiconductor Corporation promises not to engage in any discriminatory treatment when licensing Taiwan and non-Taiwan smartphone manufacturers.
- Relationships with Taiwan smartphone manufacturers: Qualcomm Semiconductor Corporation agrees to offer a contract at the request of any Taiwan smartphone manufacturer. If Qualcomm does not propose to chip suppliers any fair, reasonable and non-discriminatory (FRAND) licensing clauses with regard to SEP claims in advance, the company may not file any lawsuit against chip suppliers in accordance with any SEP claims.
- No signing of exclusive dealing discount agreements: Qualcomm promises not to include any licensing fee discount agreement in chip supply contracts to force chip clients to accept the condition of using mobile modem chips from Qualcomm Semiconductor Corporation. Neither will the company adopt the condition that chip clients have to purchase a certain percentage of the chips they use from Qualcomm Semiconductor Corporation to receive licensing fee discounts.
- Provision of regular execution reports to the CTFTC: Qualcomm Semiconductor Corporation promises to report its fulfillment of the commitment to the CTFTC every six months within the five following years. Qualcomm Semiconductor Corporation will also report to the CTFTC within 30 days each time after the company revises or signs a new contract with any Taiwan chip supplier.

29. In addition, Qualcomm agreed not to seek refund of the fine of NT\$2.73 billion already paid in installments. The company also promised to execute a five-year industrial plan to invest in Taiwan and cooperate with local businesses. The investment would include 5G cooperation, new market expansion, collaboration with startups and universities, and the establishment of a Taiwan operation and manufacturing engineering center. Qualcomm Semiconductor Corporation will remain in close touch with the CTFTC, Ministry of Economic Affairs and Ministry of Science and Technology to carry out the plan and the investment. The CTFTC hopes the case can help shape a well-functioned competition environment in the mobile communications industry and have a positive influence on the development of semiconductors, mobile communications and 5G technologies.