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ROUNDTABLE ON COMPETITIVE NEUTRALITY IN COMPETITION ENFORCEMENT

-- Note by Chinese Taipei --

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CHINESE TAIPEI

1. This paper addresses Chinese Taipei's government intervention in economic activities as well as the Fair Trade Act (FTA) and its enforcement respecting government intervention in these activities. In preparing this submission, the Fair Trade Commission (FTC) consulted with other government agencies, including the Ministry of Economic Affairs (MOEA), the Ministry of Finance (MOF), the Ministry of Transportation and Communications (MOTC), the National Communications Commission (NCC) and the Financial Supervisory Commission (FSC). All these competent authorities reported currently no legal or administrative measures applied to distort market competition under their respective jurisdictions.

1. The Role of Government in Markets

2. Public enterprises have been one of the most important measures for the government to intervene in markets in Chinese Taipei. As set forth in Article 144 of the Constitution, public utilities and other nature monopoly shall, in principle, be under public operation. In cases permitted by law, they may be operated by private. For the sake of looking after the needed, the government operates various public utilities to provide universal and steady services at reasonable prices. Hence, public utilities such as water, power supply, post, and railroads are placed under the management of public enterprises. Public enterprises, especially state-owned enterprises (SOEs) once played a very significant role in economic development. Before the 1980s, the government largely relied on public capital and government intervention in markets to promote economic growth and development. SOEs were the major players or leaders in markets such as public utilities, sugar, salt, alcohol and tobacco, fertilizer, steel, etc.

3. The government began to implement economic reforms and started to promote market liberalization and internationalization since the 1980s. One of the major reforms was to reduce the role of government in economic activities and to build a sound market competition mechanism. In July 1987, an inter-agency "Task Force for Facilitating Privatization of Public Enterprises" was created to promote the privatization of public enterprises. In 1996, the objectives of such privatization were publicly announced to "adjust the role of government, exert market functions, stimulate industrial competition, and increase effective use of resources." Furthermore, in November 2000, the Legislative Yuan amended the Statute of Privatization of Government-Owned Enterprises and its Article 1 provides explicitly that the primary objective of privatization is to maximize market functions and to enhance the operational efficiency of enterprises.

4. The term "public enterprise" is in principle defined as a business entity in which the government owns more than 50% of its capital¹. After the aforementioned privatization process, there are still ten SOEs left today in Chinese Taipei. They continue to take the responsibility of achieving different policy goals and providing requisite resources or services to the people. According to the definition mentioned above, the number of public enterprises has dropped drastically. However, the

¹ Definitions of "public enterprises" can be seen in the Administrative Law of State-Owned Enterprise, the Audit Act and the Statute of Privatization of Government-Owned Enterprises. The ranges covered are not entirely the same but they all include (1) businesses solely owned and operated by the government and (2) public-private joint ventures in which the government owns over 50% of the capital.

government remains as the biggest shareholder in some privatized companies and still has a certain influence on the management of these companies.

5. To reduce undue advantages taken by public enterprises in the market, Article 6 of the Administrative Law of State-Owned Enterprise states that, “Unless otherwise specified in applicable regulations, the rights and responsibilities of state-owned enterprises shall be the same as those of private enterprises of similar categories.” In other words, SOEs as well as private companies have to abide by general commercial regulations, such as the Company Act. In addition, there are also industry regulatory laws such as the Electricity Act, the Petroleum Administration Act and the Natural Gas Enterprise Act, to regulate the operations of different SOEs. In terms of finance and taxation, SOEs and private companies all have to pay income tax, business tax and customs duty according to tax regulations. There are no tax preferences or favorable regulatory treatment for SOEs.

6. Furthermore, the Executive Yuan (Cabinet) announced in 2003 the “Policy Framework and Action Plan for the Strengthening of *Corporate Governance*” and set up a cross-ministerial task force to strengthen the system of cooperate governance. It set forth therein that the competent authorities of public enterprises, such as the MOEA, would follow these six rules for strengthening corporate governance of SOEs and ensuring transparency and accountability: “enhancing internal control and auditing systems,” “enhancing accounting systems and ensuring the independence of CPAs,” “strengthening the board of directors’ function and the efficacy of shareholders meeting” “strengthening the public information disclosure system,” “protecting shareholders’ rights and interests” and “considering stakeholders’ rights and interests.” This policy is also conducive for SOEs to comply with the principle of competitive neutrality to underpin fundamental business operations and prevent unfair competition in relevant markets.

7. However, some scholars² believe that public enterprises may enjoy undue competitive edges as a result of government support in their operations. The sources of these may be related to:

- Direct government aid: This can be direct funding from the government budget, tax exemptions or preferential access to land.
- Advantages of debt financing: With the government serving as the guarantor or sponsor, public enterprises may obtain financing at interest rates lower than market rates or even acquire preferential financing directly from government-owned financial institutions.
- Advantages of monopolistic and incumbent enterprises: Take Chunghwa Post Co., Ltd. for example. According to the Postal Act, it has the exclusive right to operate postal services of some specific mail items, yet this company also provides express courier services to compete with private enterprises in the same market. Thus, the concern of the cross subsidization practice may give rise to certain competition issues. In addition, in recently liberalized markets, such as telecommunications, the incumbent enterprise that has existed before market liberalization may have more competitive advantages than private enterprises that are new entrants to the market.

8. Except public enterprises, the government can attract private capital to public infrastructure projects. The “Statute for Encouragement of Private Participation in Transportation Infrastructure Projects” and the “Act for Promotion of Private Participation in Infrastructure Projects” were enacted respectively in January 1994 and January 2000 to provide legal grounds for public-private partnerships to conduct public projects under private management, including incinerators, waste collection, sewer construction, and so forth. To some extent these private enterprises may enjoy some

² E.g., Li Chun, “The Competitive Neutrality of Public Enterprises and Its Connotation of National Economic and Trade Policies,” Chung-Hua Institution for Economic Research (CIER) WTO e-Paper, Issue 341, November 30, 2012.

competitive advantages because they are commissioned or delegated by the government to provide public service.

9. The FTC also pays attention to the regulatory measures of industrial regulators to prevent such regulatory measures from affecting market competition. Examples of such measures include restriction on geographic area of cable TV services and the number of services operating in each area (before 2013), and some public policies encouraging financial institutions mergers to pursue operational efficiency.

2. The FTA Respecting on Government Commercial Activities

2.1 *The FTA may apply to government agencies under certain circumstances*

10. When the FTA took effect on February 4, 1992, Article 46 at the time stipulated that, “The provisions of this Law shall not apply to any act performed by an enterprise in accordance with other laws. The acts of a governmental enterprise, public utility or communications and transportation enterprise approved by the Executive Yuan shall not be subject to the application of this Law until the elapse of five years after the promulgation of this Law.” The main reason was that at the onset of the legislation process, legislators considered that any business practice governed by other law was permitted by such special laws and supervised by other competent authorities; hence, there was no need to place them under scrutiny of the FTC. Meanwhile, as public enterprises, public utilities and transportation and communications businesses had taken responsibility for implementing economic policies for years, it would be difficult for them to adjust in the short time. In this regard, a five-year transition period was granted to the practices that the aforementioned enterprises carried out with the approval of the Executive Yuan in line with national policies.

11. In the early stage of enforcing the FTA, many government agencies questioned about whether the FTA applied to their commercial activities, especially whether they were the “enterprises” referred to in Article 2 of the FTA. The Environmental Protection Administration (EPA), for instance, once raised a question of whether it would violate the FTA when a government agency, the Water Corporation or a private enterprise produced bottled water and sold it at a price close to the cost with funding from the government in order to improve the quality of drinking water for the public. The FTC’s response was that, regardless of different types of organizations the recipient who obtained the initial startup funds from the government was an enterprise under the FTA as long as its purpose was to produce and sell drinking water. Moreover, since the drinking water plant was set up with government funding, costs would be relatively lower and the source of the water would be more plentiful. Under these favorable conditions, the drinking water plant would have certain advantages when competing with rivals in the relevant market. This would affect producers of bottled water, manufacturers and distributors of water purification equipment and the water companies, and might result in market distortions. Consequently, the FTC requested the Environmental Protection Administration to consider the matter carefully.

12. The FTC also issued the “Criteria for Applying the Fair Trade Act to Commercial Activities by the Government Agencies” in 1993. It specifies therein that the government agencies supply products or services that have market value, such conducts should be subject to the FTA.

2.2 *In principle, the FTA applies to all competition-related conducts of enterprises (public or private)*

13. On February 3, 1999, the amended Article 46 of the FTA stated that: “Where there is any other law governing the conduct of enterprises in respect of competition, such other law shall govern, provided that it does not conflict with the legislative purposes of this Act.” The main reason for the amendment was to remove the exemption under the FTA to public enterprises, public utilities and transportation and communications enterprises. Furthermore, it gave the FTA the status of a

fundamental economic law and changed the priorities in the application of other laws and the FTA on the same matter.

14. When comparing Article 46 in 1992 and 1999, the former stated that the FTA was inapplicable to enterprises that were governed by other laws, whereas the latter specified that the legislative purposes³ of the FTA were to be adopted as criteria to assess whether other laws had precedence to be applied first. The FTC needed to evaluate whether “the other applicable laws consisted with the legislative purposes of the FTA” in accordance with the conditions of each case. The factors to be taken into account included the methods of competition, relevant market, the number of competitors and market performance, the level of market concentration, market entry barriers, economic efficiency (productive efficiency, allocative efficiency and dynamic efficiency), consumer interests, transaction costs and other elements related to the legislative purpose of the FTA.

15. On February 4, 2015, Article 46 of the FTA was again amended to further strengthen the legal status of the FTA that serves as the fundamental rules for all competition-related conducts. Article 46 provides that, “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 where other laws provide relevant provisions that do not conflict with the legislative purposes of this Act.”

16. Although Article 46 of the FTA confers a strong priority to the FTA, the FTC is still cautious about enforcement when competition factors are already incorporated in other laws that specify exemptions from application of the FTA. For instance, the Financial Institutions Merger Act and the Financial Holding Company Act provide that if the financial authority determines that immediate measures are necessary and that such measures will not have any material adverse effect on competition in the financial market, merger notification of financial institutions to the FTC is not required. However, the FTC may provide its opinions about likely impacts on market competition when the regulatory agencies seek such opinions.

3. The FTC’s Enforcement Standpoint and Challenges

3.1 Intervention in market activities by government agencies through administrative measures

17. The FTC mostly relied on consultation and advocacy to resolve competition conflicts resulting from government intervention in market activities through regulations or other administrative measures. The FTC set up the “461 Special Task Force” (in accordance with Paragraph 1 of Article 46 of the FTA) shortly after its establishment to review administrative regulations that might be in conflict with the legislative purposes of the FTA and consulted with related agencies over such issues. The task force convened 13 meetings, examined over 200 regulations and held 19 coordination meetings with related agencies. Consensus was reached to revise 122 articles in 74 regulations. Under the Paragraph 2 of Article 46 in FTA (1992), the FTC only submitted applications of five exemptions⁴ to the Executive Yuan for its approval in order to reduce

³ Article 1 of the FTA (2015), “This Act is enacted for the purposes of maintaining trading order, protecting consumers’ interests, ensuring free and fair competition, and promoting economic stability and prosperity.”

⁴ The five practices approved by the Executive Yuan were: 1) Chinese Petroleum Corporation providing diesel to the Taiwan Railways Administration at preferential prices, 2) Chinese Petroleum Corporation selling fuel to the military at lower prices, 3) Taiwan Sugar Corporation selling sugar to food export product processing businesses and sugar syrup to apiary businesses at preferential prices, 4) Taiwan Sugar Corporation selling sugar to the military at preferential prices, and 5) Taiwan Cereals Co., the Taiwan Sugar Corporation, the Sugar Farmers’ Association, the Fruit Marketing Cooperative and the Tobacco and Wine Monopoly Bureau selling fertilizers they produced at the same prices throughout the country.

the impact on market competition of the five-year exemptions for public enterprises. The transition period ended on February 3, 1996. Before then, the FTC organized a special task force to consult with related ministries so that these agencies made the commitments to stop three types of conducts and modify two types of conducts to comply with the regulations in the FTA.

18. The FTC subsequently set up other special task forces, including the “Task Force for Deregulation and Market Competition Promotion” and the “Task Force for Development of the Green Silicon Island Vision and Promotion Strategy Regulations,” to review the regulations of different government agencies as well as to consult with these agencies on regulations with likely impact on competition. One of the concrete results was the amendment of the National Property Act. The Act stipulated different treatments on the acquisition of government-owned land by public enterprises and by private enterprises. The discrimination had a negative effect on a fair competitive environment. The MOF, in consultation with the FTC agreed to treat public and private enterprises equally when both applied to purchase the same piece of land for business opened to private operation. The MOF also notified the FTC of its decision.

3.2 Case Example: Abuse of market power by the government agency

19. In 2012, the FTC received a complaint that Taiwan International Ports Corporation Ltd. (TIPC) imposed discriminatory treatment without justification on downstream stevedoring companies when they used essential facilities at Taichung Port. The FTC concluded that the conduct was an abuse of market power in violation of Subparagraph 4, Article 10 of the FTA and ordered the TIPC to rectify the conduct within a given period.

20. The FTC’s investigation found that the Keelung Port Authority, Taichung Port Authority, Kaohsiung Port Authority and Hualien Port Authority merged on March 1, 2012 to become TIPC, a state-owned company. The alleged conduct in question had occurred before the restructuring. Although the Port of Taichung, governed by the Taichung Port Authority (TPA) at the time, was a public entity with the duty of supervising port operations, the facility rental business was deemed as a commercial practice in private sector which was subject to the FTA. Meanwhile, the FTC announced in June 1993 that according to Article 5 of the FTA, the TPA was a monopolistic enterprise since it possessed the essential facilities of an international port. Under such circumstances, the unjustifiably differential treatment by TPA in the collection of building rents from stevedoring companies caused new entrants to shoulder higher operating costs from paying more building rents than existing stevedoring companies. It restricted competition or impeded fair competition in the port stevedore market. The conduct was in violation of Subparagraph 4 of Article 10 of the FTA.

3.3 Anticompetitive practices of public enterprises

21. In terms of law enforcement, the FTC applies the same standards to SOEs and private enterprises. Take Chunghwa Telecom for example. It was the result of reorganization of the original Directorate-General of Telecommunications under the MOTC on July 1, 1996 in accordance with Article 30 of the Telecommunications Act. Chunghwa Telecom was sanctioned by the FTC a number of times for violating the FTA when it was still a state-owned enterprise that the MOTC had most of the shares of Chunghwa Telecom at the time. And moreover, the calculation method of the total sales is the same for public and private enterprises (to decide whether they meet the merger filing threshold or the amount of the administrative fine to be imposed).

22. Take Chinese Petroleum Corporation (CPC) as another example. It is a state-owned enterprise under the MOEA. The FTC fined the CPC several times for its unjustified discrimination and abusing its market power. In recent years, the FTC has been more concerned about the concerted actions between CPC and privately-run Formosa Petrochemical Corporation. These two companies tried to maintain same petroleum product prices and make the same price adjustments. In 2004, the FTC concluded that these two companies violated cartel prohibition in the FTA and the fines were imposed on both companies. The fines were challenged by the Petitions and Appeals Committee of

the Executive Yuan but the FTC's decision about the competition law infringement of these two companies was upheld by the Petitions and Appeals Committee of the Executive Yuan and the Supreme Administrative Court.

23. As mentioned earlier, some scholars doubted that, in a newly liberalized market, a former public enterprise that has been privatized may have certain competitive edges over private enterprises that are new in the market. Take Chunghwa Telecom (CHT) for example. Following privatization, the company maintains a dominant position in the telecommunications market not only on the basis of its longstanding experience and technologies, but also its control of telecommunication network that makes the CHT a natural monopoly. In particular, "last mile" owned by the CHT has been considered essential facility for the telecommunications industry. This is the reason why the competent authority of the industry, the NCC, includes provisions to prohibit Type 1 telecommunications enterprises from anti-competitive practices under Article 26-1 of the Telecommunications Act, based on the concept of "asymmetric regulation" and prohibition of existing telecommunications enterprises abusing market power. The FTC noted that such regulation is consistent with the legislative purposes of the FTA which are to prevent existing businesses or leading enterprises in the telecommunications market from abusing their market power to impede or eliminate competition. Accordingly, the FTC decided, after consulting with the NCC, that Article 26-1 of the Telecommunications Act will be applied to cases involving abuse of market power by Type 1 telecommunications enterprises. Nevertheless, the FTC still has authority to take enforcement action under the FTA if a Type 1 telecommunications enterprise meets the criteria of monopolistic enterprises set forth in Articles 7 and 8 of the FTA and its conduct also constitutes abuse of market power specified in Article 9⁵.

4. Conclusion

24. Public enterprises and private enterprises are both subject to the FTA. When government agencies provide products or services for profit, they will be seen as the enterprises described in Subparagraph 3 of Paragraph 1 of Article 2 of the FTA and are therefore subject to the regulation. However, if such practices of government agencies or public enterprises have their legal grounds, according to Article 46 of the FTA, the FTC has to review whether these regulatory rules comply with the legislative purposes of the FTA. If competition issue is not included in such rules, the FTC may investigate and sanction unlawful acts in order to maintain fair competition in the market. As for regulatory rules or the administrative measures of government agencies, which are likely to intervene in market competition, the FTC will resort to non-compulsory means such as consultation and advocacy to resolve the issue.

⁵ See Point 3 (Relations between the FTA and the Telecommunications Act) in the "FTC Disposal Directions (Policy Statements) on the Telecommunications Industry."