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Please contact Ms. Despina Pachnou if you have any questions about this document.

Email: Despina.Pachnou@oecd.org

JT03447306

Chinese Taipei

This report will explain the standard and viewpoints adopted by administrative courts in Chinese Taipei in the review of administrative litigation cases associated with the Fair Trade Act and the law enforcement experiences of the Fair Trade Commission.

1. The review system and standard adopted by administrative courts in the review of administrative litigation cases involving the Fair Trade Act

1.1. Review of the legality of administrative dispositions from the Fair Trade Commission by administrative courts

1. In light of the increasing maturity of the industrial structure and pressure from trade liberalization in the 1980s, the Executive Yuan instructed the Ministry of Economic Affairs to draw up the Fair Trade Act (hereinafter referred to as the FTA). After discussions and revisions that took more than a decade, the FTA, an economic administrative law in nature, was finally promulgated on Feb. 4, 1991 and enforced on Feb. 4, 1992. In the past 25 years, it has been amended eight times. The legislation regarding administrative laws in Chinese Taipei is influenced by the civil law system. Therefore, the Fair Trade Act enforcement system is different from the adversarial system adopted in common law countries.

2. Sanctions imposed by the FTC on enterprises for violations of the FTA and decisions made by the FTC with regard to merger notifications or applications for the approval of concerted actions are administrative dispositions as stated in the Administrative Procedure Act. Hence, an enterprise finding the administrative disposition made by the FTC to be unacceptable may act according to the Administrative Litigation Act and file an administrative lawsuit with an administrative court to apply for revocation of the administrative disposition¹. The administrative court will then review the legality of the administrative disposition. As for administrative settlement contracts² that the FTC establishes with enterprises or approvals of concrete commitments³ made by enterprises, if an enterprise finds the decision of the FTC unacceptable, the enterprise may also file an administrative lawsuit with the administrative court. In the early days, the FTC did process

¹ On Feb. 4, 2015, an article was added to the FTA to allow concerned parties to take the administrative litigation procedure directly and apply to judicial agencies for remediation of dispositions decided by the FTC according to the FTA without the need to have the appeals reviewed by the Petitions and Appeals Committee of the Executive Yuan first. The new article could help maintain the professional capacity and public credibility of the FTC as an independent agency as well as reduce unnecessary administrative interventions from the Executive Yuan.

² According to Article 136 of the Administrative Procedure Act, if the FTC is unable to determine the facts or the legal relations to be the basis for an administrative disposition even after completing investigations, it may enter into an administrative settlement contract with the concerned enterprise, replacing the disposition.

³ As set forth in Article 28 of the FTA, when the FTC conducts investigations into an enterprise's conduct, if the enterprise makes the commitment to take specific measures to cease and rectify its illegal conduct within a period prescribed by the FTC, the FTC may suspend the investigation.

certain cases involving patent licensing and establish administrative settlement contracts with enterprises, but such cases have not been common in recent years.

3. As specified in Article 107 of the Administrative Litigation Act, when reviewing administrative litigation cases associated with the FTA, an administrative court is required to first examine the legality factors (including jurisdiction, the qualification of the litigation agent, whether the prosecution has been made beyond the statutory duration, etc.) before looking into whether the assertions and arguments of the plaintiff (the enterprise finding the administrative disposition unacceptable) and the defendant (the FTC) are reasonable, and in the end make the decision by going through the preliminary proceedings and the oral argument procedure.

4. The main items to be reviewed by an administrative court include: (1) the legality of the administrative procedure taken to achieve the original disposition (e.g., whether the investigation has been conducted according to normal administrative principles); (2) the appropriateness of recognition of facts before finalizing the original disposition (e.g., whether recognition of facts has been made according to investigation findings); (3) the appropriateness of application of law to establish the original disposition (e.g., whether application of law has been decided according to recognized facts); and (4) the appropriateness of the legal effect of the original disposition (e.g., the appropriateness of the fine or fines imposed). In practice, the focus of arguments presented in administrative litigation is normally on whether the findings of the FTC's investigation are able to prove the illegal conduct of an enterprise. The FTC is required to explain the relations between the evidence and facts yet to be proven, especially the ones associated with market definition, the confirmation of mutual understandings established on concerted actions, the impact on market supply and demand, and the amount of the fine imposed.

1.2. Agreement of administrative courts that the FTC has the administrative discretion in the recognition of facts

5. Administrative courts recognize that the FTC is an independent agency created according to law to operate through the committee system. Since the definition of the market status of enterprises, the legitimacy of competition practices and whether competition restraints will be created involves interpretation of the indefinite legal concepts of the FTA, while the collection of evidence associated with the competition restriction practices of enterprises is also difficult, an independent agency able to observe market structure and competition and the actual management conditions in various industries is therefore needed.

6. Therefore, in the collection and analysis of the information needed to decide on the administrative dispositions and regulations to apply, the FTC can exercise its discretionary power according to its competition law expertise. As long as the FTC fulfills the obligation of explaining clearly the reasons for its judgments and decisions and also lists out necessary evidence based on the facts recognized, administrative courts normally review the FTC's decisions by adopting less rigorous standards as a token of respect. However, if any administrative disposition of the FTC crosses the boundaries of discretionary power tolerable in indefinite legal concepts or is concluded based on erroneous facts, with matters irrelevant to competition order being taken into account or without following normal principles in administrative laws, the legality of such an administrative disposition will not be sustained. In recent years, there has been a tendency to increase the intensity of judicial review when administrative courts examine cases involving the definition of relevant markets associated with concerted actions and the imposition of large fine amounts.

2. Viewpoints adopted by administrative courts in recent years when reviewing administrative litigation cases associated with the FTA

2.1. The viewpoint of administrative courts toward the feasibility of application for revocation of remedies imposed to merger decisions

7. In the merger case involving Company M being assigned the mobile device and service departments of Company N⁴, the FTC made the decision to not prohibit the merger with remedies imposed. The merging parties found the remedies unacceptable and applied to an administrative court for revocation. During the review process, the FTC explained to the administrative court that the remedies were to ensure that the overall economic benefit could outweigh the likely disadvantages resulting from competition restraints and the merger decision and remedies were inseparable. If the administrative court revoked the remedies, the post-revocation merger decision would not be consistent with the original intention of the FTC when making the overall assessment. As a consequence, the administrative discretion of the FTC would be compressed.

8. The administrative court thought that the merging parties applying for revocation of the remedies by asserting that the merger decision and the remedies could be separated was tantamount to asserting that no remedies should have been attached. Nevertheless, it was the administrative discretion of the FTC to assess related factors in accordance with its professional capacity to decide whether or not remedies should be imposed in merger cases. Moreover, remedies were imposed only when the FTC did not prohibit the merger; the imposition of remedies and the merger decision were mutual conditions. If it were deemed necessary to make changes to the remedies, the FTC would still have the discretion to assess whether the merger decision should be altered. It would be inappropriate for the administrative court to make the decision.

2.2. The viewpoint of administrative courts toward the definition of relevant markets in concerted action cases

9. When defining the relevant markets in a review of the case involving a joint increase in the prices of freshly brewed coffee by convenience store chains⁵, the FTC took into consideration the diversity of products and services, outlet density, 24-hour operations and the high accessibility of convenience stores and defined the product market as the “convenience store freshly brewed coffee market” and the geographic market as the “entire territory.” However, the product market definition was questioned and negated by the administrative court which thought that the definition of relevant markets in this case had to be conducted in two stages, by defining the range of consumers of the product first by assessing it from the angle of demand before defining the range of suppliers according to the choices of product consumers. The administrative court also considered that the FTC’s prompt definition of a product market based on written information lacked empirical evidence and suggested that the testing method of a small but significant and non-transitory increase in price (SSNIP) could be adopted to understand the range of consumers of the

⁴ FTC Merger Decision Kung-Jie-Tzu No. 103001 dated Feb. 19, 2014, Supreme Administrative Court Judgment Pan-Zi No. 403 dated Aug. 3, 2016. (the FTC won in the final judgment.)

⁵ FTC Disposition Kung-Ch’u-Tzu No. 100220 dated Nov. 9, 2011, Supreme Administrative Court Judgment Pan-Zi No. 195 dated Apr. 18, 2014. (the FTC lost in the final judgment.)

product. Competition law scholars were surprised that an administrative court made such a strict request with regard to the definition of relevant markets in a concerted action case⁶.

10. When reviewing a case⁷ in recent years, an administrative court expressed its opinions about the constituent elements of a concerted action, such as whether the markets defined in concerted action cases really existed, whether the enterprises involved belonged to the same market, whether competition existed between the enterprises involved, and whether any mutual understanding was really established and whether it had any effect on trading order, by saying: “The matters in question do not simultaneously involve technology, environmental protection, medicine, capability and academic achievement tests, and the decisions are not unalterable, professional or experience-based.” It was clear that the administrative court thought that contrary decisions could be made against the original decisions if there were enough reasons to change the original dispositions. The administrative court also further commented that the high-intensity judicial review of the case indicated that there was a mistake in the definition of relevant markets in the original disposition.

2.3. The viewpoint of administrative courts toward whether the statements acquired during the investigation process may be used as evidence to conclude on the violation of an enterprise

11. In the case associated with the concerted action of asphalt concrete suppliers in the Chiayi district⁸, the seven offenders all admitted that they had met irregularly to discuss and request that each of them would not engage in price competition in order to reflect the cost reasonably and subsequently raised the price of asphalt concrete consistently. The FTC’s investigation indicated that the business scales of the seven offenders were different, their material costs were dissimilar, while their management strategies, sales approaches and profit targets also varied. However, they increased the price of asphalt concrete during the same period and by the same margin several times. Therefore, the only reasonable explanation was that a mutual understanding on a concerted action had been established.

12. The administrative court concurred that it was indeed difficult for the FTC to acquire direct evidence to prove that the suppliers had achieved a mutual understanding on a concerted action. If the analysis of the circumstantial evidence obtained, such as most suppliers making price adjustments at the same time and at the same rate without supply-demand changes taking place in the market to justify the practice, it could have been reasonably deduced that a mutual understanding had been achieved on the concerted price adjustments. In addition, the excerpts from the statements of the suppliers established during the investigation and recordings provided by the FTC served as key facts that proved the suppliers had indeed established a mutual understanding on a concerted action. There was no doubt.

⁶ Market Definition and Market Effects of Concerted Actions as Compared with the Japanese Antimonopoly Act by Liu Tsu-Zu, p. 42, Issue 3, Volume 25, Fair Trade Quarterly, Jul. 2017.

⁷ Taipei High Administrative Court Judgment Su-Geng-Yi-Zi No. 64 dated May 25, 2017.

⁸ FTC Disposition Kung-Ch’u-Tzu No. 103045 dated Apr. 16, 2014, Taipei High Administrative Court Judgment Su-Zi No. 1461 dated Aug. 19, 2015, Supreme Administrative Court Judgment Cai-Zi No. 157 dated Jan. 22, 2016. (the FTC won in the final judgment.)

13. Nonetheless, in the case associated with the concerted action of asphalt concrete suppliers in the Tainan district⁹, which was similar to the case in question, the FTC reached the conclusion that all 16 offenders had met to discuss and achieve the mutual understanding to collect charges from their clients for the stabilizing fund and the concerted practice pushed up the price of asphalt concrete. With the Tainan case, however, the administrative court thought that the FTC had included one of the suppliers as a participant in the concerted action based on the statements from the persons in charge of the other asphalt concrete businesses and hearsay evidence. The statements could not directly or indirectly prove that the aforesaid supplier had been part of the mutual understanding. In other words, the decision went against the rules of evidence and the administrative court therefore revoked the administrative disposition for the supplier.

14. The aforementioned cases indicated that the administrative court did affirm the efforts of the FTC to use its experience and related theories to deduce the existence of mutual understandings by analyzing the circumstantial evidence such as market structure, product characteristics, cost and profit, etc. and by comparing the management scales, business strategies and profit targets of the enterprises involved when direct evidence was difficult to acquire. However, the administrative court also suggested that the FTC had to make sure that there were no facts remaining to be proved before concluding on the existence of mutual understandings on a concerted action based on circumstantial evidence.

2.4. The viewpoint of administrative courts toward the appropriateness of amounts of administrative fines imposed

15. In the case associated with the concerted action of pet shops in Tainan City to refrain from price competition¹⁰, the FTC concluded that the seven offenders had jointly decided not to engage in price competition during a Tainan City pet shops meeting and also requested that upstream suppliers exert pressure on or cut supply to businesses refusing to cooperate. After assessing the motive, level of involvement, market status and sales of the offenders as well as the seriousness of harm to trading order and the duration of the unlawful conduct, the FTC imposed fines on the offenders.

16. The administrative court concluded that the FTC had decided on the fine amounts by taking into account the factors specified in Article 36 of the Enforcement Rules of the Fair Trade Act and the amounts were within the statutory range of fines to be imposed. Although the offenders contested that they had not convened the alleged meeting to discuss and adjust the price of pet food and products and, therefore, had not gained any profit, the court thought the concerted action taken by the seven offenders after the meeting had indeed weakened the intensity of price competition in the pet food and products market in Tainan City. Even if the offenders had not made price adjustments, they could still have enjoyed the economic benefits brought by the decrease in market competition. Hence, the

⁹ FTC Disposition Kung-Ch'u-Tzu No. 103044 dated Apr. 16, 2014, Taipei High Administrative Court Judgment Su-Zi No. 1676 dated Nov. 19, 2015, Supreme Administrative Court Judgment Cai-Zi No. 1524 dated Nov. 25, 2016. (the FTC lost in the final judgment.) Taipei High Administrative Court Judgment Su-Zi No. 1733 dated Jan. 21, 2016, Supreme Administrative Court Judgment Pan-Zi No. 366 dated Jul. 15, 2016. (the FTC won in the final judgment.)

¹⁰ FTC Disposition Kung-Ch'u-Tzu No. 104100 dated Oct. 14, 2015, Supreme Administrative Court Judgment Cai-Zi No. 1276 dated Oct. 6, 2016. (the FTC won in the final judgment.)

court decided that the fines imposed had not involved the abuse of discretionary power or negligence and therefore sustained the original sanctions.

17. When the administrative court reviewed whether the fine amounts imposed by the FTC were appropriate, Article 36 of the Enforcement Rules of the Fair Trade Act served as the legal basis for the FTC to apply its discretionary power conferred by law and make decisions according to the facts of violation. However, when exercising such power, the FTC should still abide by the principle of equality and principle of proportionality. When violating such legal principles, the decisions would be at fault and would have to undergo judicial review. If it were to be found that the FTC had exceeded its given authority or abused its power, the administrative court would revoke related decisions.

18. In recent years, administrative court judges have carefully examined the market definition, constituent elements of violation (such as a mutual understanding on a concerted action, or influence on the market supply-demand function), the definition of the validity period of sanctions and the standard for calculation of fine amounts to be imposed when reviewing cases involving large fine amounts (over NT\$10 million or fines imposed in accordance with the Regulations for the Calculation of Administrative Fines for Serious Violations of Articles 9 and 15 of the Fair Trade Act). If significant calculation errors are found or any oversight occurring in the investigation process has resulted in a failure to acquire positive evidence, the original sanctions will be revoked.

3. Ways for administrative courts to acquire professional knowledge about the FTA

3.1. Administrative courts accumulating professional knowledge about competition law through the review of administrative litigation cases associated with the FTA

19. The Fair Trade Act is not included as a subject or specialized course in examinations and training to be taken for individuals to become judges, and they are also not a required course in law departments in university. Normally, they are part of financial and commercial laws. For this reason, judges have to study on their own and learn from the experience of reviewing related cases to build up their knowledge of Fair Trade Act.

20. When enterprises find the administrative dispositions of the FTC unacceptable, they can file a case with the Taipei High Administrative Court, the Intellectual Property Court (cases involving intellectual property rights) or the Administrative Litigation Division of the Taipei District Court (cases involving fines under NT\$400,000) for administrative remediation. So far, no administrative court has set up a specialized division to review administrative litigation cases involving the FTA. Judges can only gradually accumulate their knowledge of competition law from the experience of reviewing administrative cases associated with the FTA.

21. In addition, both the plaintiff and the defendant can apply to the administrative court for permission to invite experts and witnesses to testify in court. Thus, the administrative court can also examine the assertions of both parties according to the statements of the experts and witnesses. An offender once presented an opinion letter from a law professor and applied for permission to invite the professor to testify in court. However, the administrative court thought the opinion letter already provided enough

related legal details and decided there was no need for the professor to restate his opinion in court¹¹.

3.2. The FTC organizes seminars and workshops to enable judges from courts of various levels to obtain professional knowledge about competition law

22. Tax cases are the most common administrative litigation cases reviewed by administrative courts. For this reason, the Judicial Yuan organizes professional courses and on-the-job training associated with taxation for judges. Since administrative litigation cases involving the FTA account for only a small percentage of the total number of administrative litigation cases, judges intending to acquire professional knowledge about competition law have to resort to other sources for learning and the exchange of knowledge.

23. The FTC often organizes seminars and workshops related to competition law and invites judges from courts of various levels and people from different sectors to attend. Sometimes, judges or lawyers are invited to serve as report presenters or commentators. Meanwhile, the FTC also publishes the Fair Trade Quarterly and the FTC Newsletter, both of which include important cases processed by the FTC and international developments in competition law, and sends copies to courts of various levels for judges to be aware of related issues. At the same time, the law enforcers of the FTC will exchange ideas with judges, lawyers and individuals from related fields through the aforementioned approaches to increase each other's professional knowledge in relation to competition law.

4. Conclusions

24. The FTC enforces the FTA, which belongs to the administrative competition enforcement system. Enterprises finding the administrative dispositions unacceptable can act according to the Administrative Litigation Act and file a lawsuit with administrative courts for revocation. In subsequence, administrative courts will review the legality of the dispositions. The standard and viewpoints adopted by administrative courts in the review of such cases in recent years are as follows:

1. The FTC is an independent agency operating through the committee system and has the administrative discretion to make decisions. However, if the FTC makes decisions by adopting erroneous facts or by taking matters irrelevant to competition order into account, the administrative courts will intervene and review such decisions. In recent years, the administrative courts have increased the intensity of judicial review of the definition of relevant markets in association with concerted actions and cases in which large fine amounts are imposed.
2. It is the administrative discretion of the FTC to decide whether remedies are to be imposed to merger decisions. Administrative courts can only review the legality afterwards. They cannot make decisions for the FTC.
3. When having enough reasons, administrative courts may still intervene through appropriate measures to review the facts adopted by the FTC in the definition of relevant markets.

¹¹ Taipei High Administrative Court Judgment Su-Zi No. 1046 dated Jun. 17, 2015. (the FTC won in the final judgment.)

4. Administrative courts believe that if the FTC merely relies on statements from concerned enterprises, it will face the challenge of rules of evidence when proving whether the information collected through investigations can serve as evidence that a mutual understanding on a concerted action has been established.
 5. Administrative courts concur that the decision regarding the fine amounts belongs to the administrative discretion of the FTC, but they will closely review cases involving large fine amounts. If significant calculation errors are found or there is not enough evidence, the original dispositions will be revoked.
25. The advantage of the administrative court review system is that the legality of an administrative disposition can be inspected again and gives enterprises the right to seek remediation. However, the disadvantage is that certain cases are sent back and forth between administrative courts as a result of the remand court procedure. Sometimes no final judgments are made in such cases even after more than ten years have gone by, while the industrial environment and market structure have gone through significant changes during such a period. As a consequence, the rights of concerned parties are not safeguarded.
26. In general, the time taken for administrative courts to review administrative litigation cases averages between one and two years, depending on the complexity of the case and the review progress of the judge assigned. With important cases that involve large fine amounts, transnational corporations, or complicated facts and legal relations, the reviewing time will be even longer.
27. In conclusion, although competition law is not professional knowledge needed for individuals to pass examinations to become judges or complete related training, judges can still study on their own and accumulate knowledge about competition law through the experience of reviewing related cases. To enhance interaction between law and economics and between theory and practice, the FTC often organizes seminars and academic workshops and invites judges from courts of various levels to participate by presenting reports or giving opinions. The FTC also publishes the Fair Trade Quarterly and the FTC Newsletter on a regular basis and sends copies to courts of various levels for judges to be aware of related issues. It is the intention of the FTC that diverse means can be made available for different sectors to obtain professional knowledge about competition law.