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Criminalisation of cartels and bid rigging conspiracies – Note by Chinese Taipei

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More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/criminalisation-of-cartels-and-bid-rigging-conspiracies.htm>

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1. This report will primarily introduce Chinese Taipei's regulations on criminal and administrative liabilities of concerted actions as prescribed in Fair Trade Act, its enforcement experience and relevant discussions, along with the issue of bid rigging.

1. Evolution of Punishment

1.1. Evolution of punishment on concerted actions under the Fair Trade Act

2. Punishment on concerted actions as prescribed in laws and regulations of each country basically includes either criminal sanctions or administrative sanctions, provided, however, that tools of sanctions, degree of seriousness, institution design and designation of competent authorities may vary. Under the system of Chinese Taipei, criminal sanctions are always considered part of the judicial branch, with prosecutors in charge of investigation and prosecution, courts conducting trial, and all procedures shall be in compliance with the Code of Criminal Procedure. Administrative sanctions are under powers of administrative branch, with administrative competent authorities in charge of investigation and imposition of administrative sanctions, and in such process, relevant rules as prescribed in the Administrative Act and the Administrative Penalty Act shall be followed.

3. When Chinese Taipei's Fair Trade Act (hereinafter the "FTA") was initially enacted in 1991, a "dual track system of both administrative and criminal sanctions" to regulate liabilities of concerted actions was adopted. It means that for a same conduct, both administrative and criminal liabilities may be imposed at the same time by judicial and administrative competent authorities respectively in accordance with their own powers and duties. At that time, relevant criminal provisions regulated that any natural person who engaged in concerted actions shall be sentenced to imprisonment for not more than 3 years, short-term imprisonment; in lieu thereof, or in addition thereto, a criminal fine not more than one million NT dollars (hereinafter the same) may be imposed, and a criminal fine may also be imposed on an enterprise juristic person, which is not a natural person. As to administrative liabilities, the first time violator may only be ordered to cease illegal conduct or make required improvement within a specified period of time, and only after expiration the violator failing to cease illegal conduct or make required improvement may be fined not more than one million dollars, continuously and independently for each failure, until the violator actually ceases illegal conduct or makes required improvement.

4. When the FTA was amended in 1999, the legislative approach of "administrative sanction prior to the criminal one" is adopted instead, and administrative sanctions may be imposed directly without a prior order to cease or make required improvement. When an enterprise conducts illegal concerted actions, the competent administrative authority, the Fair Trade Commission (hereinafter the "FTC") will designate a period of time for the enterprise to cease illegal conduct, make improvement, or take necessary correction measures, and at the same time an administrative fine not less than 50,000 and no more than 25 million dollars may be imposed. If after expiration the violator does not obey the order and fail to cease illegal conduct, make improvement, adopt necessary correction measures, or conduct the same or similar illegal activities after cease, not only the amount of administrative fine may be doubled, but also criminal liabilities may be imposed. In this situation, the natural persons who engage in concerted actions may be sentenced to

imprisonment for not more than 3 years, short-term imprisonment; in lieu thereof, or in addition thereto, a criminal fine not more than one hundred million dollars, and also a criminal fine may be imposed on an enterprise juristic person. The maximum of the criminal fine increased.

5. In 2005, the Administrative Penalty Act was enacted. In accordance of Article 26 of that Act, if one and single act constitutes simultaneously a criminal offense or offenses as well as a breach of duty under administrative law, it shall be punishable under the criminal law. Therefore, rule of priority of criminal punishment is established. Under such rule, the FTC may not impose administrative liabilities when the concerted actions are not ceased or improvement is not made, or when same or similar concerted actions are engaged in for the second time. Instead, the FTC must refer such cases for investigation by prosecutors. However, at that time, such cases were very few and did not have substantial impact on FTC's administrative enforcement practice.

6. When the FTA was amended in 2011, the leniency program was introduced, and the amended Act prescribed, for serious concerted actions, an administrative penalty up to 10% of the total sales income of the violating enterprise in the previous fiscal year may be imposed. And then when the FTA was amended again in 2015, the amount of fine for general concerted actions is doubled to be not less than one hundred thousand, and not more than 50 million dollars. And in order to prevent administrative liabilities from being blocked and administrative enforcement from being impacted due to afore-mentioned rule of priority of criminal punishment, criminal liabilities are adjusted. When concerted actions are not ceased or improvement is not made, or when same or similar concerted actions are engaged in for the second time, the criminal liabilities go to natural persons and administrative liabilities go to enterprises juristic persons.

7. In sum, in Chinese Taipei's FTA, currently a rule of "administrative sanction prior to the criminal one" is adopted for imposing sanctions on concerted actions. The FTC will at first impose administrative liabilities to order cease of illegal conduct, improvement, or necessary correction measures, and at the same time an administrative fine may be imposed. If the enterprises do not comply or conduct same or similar violation, the FTC will again impose administrative sanctions at juristic persons, and then refer to judicial authorities to impose criminal sanctions at natural persons.

1.2. Evolution on sanctions against bid rigging

8. Essentially, bid rigging is a type of concerted actions and often occurs in government procurement projects. After the FTA was enacted, the FTC had dealt with quite a few government procurements cases, including big rigging, bidding by borrowing other enterprises' identities, improper restrictions imposed by tendering agencies. Among these there are about a dozen of bid rigging cases. However, considering there were numerous government procurements cases, in order to create a fair and open procedure of government procurements, the Government Procurement Act was enacted in 1998, and the Public Construction Commission under the Executive Yuan was organized and specifically authorized to handle government procurement cases, and after that the FTC no longer dealt with government procurement cases including bid rigging.

9. Before the Government Procurement Act was enacted, bid rigging is sanctioned in accordance with regulations when the FTA applied a "dual track system of both administrative and criminal sanctions". Under regulations of such era, criminal sanctions for bid rigging includes imprisonment not more than 3 years, short-term imprisonment; in lieu thereof, or in addition thereto, a criminal fine not more than one million dollars, and as to administrative liabilities for the first time violator, competent authorities may only

specify a period of time and order violators to cease illegal activities or make improvement. After enactment of the Government Procurement Act, criminal liabilities shall be imposed, which includes imprisonment not less than 6 months and not more than 5 years, and in addition thereto, a criminal fine not more than one million dollars. Such liabilities are higher.

10. And under the Government Procurement Act, besides bid rigging, all disputes and handling of government's procurements projects belong to authority of the specifically appointed the Public Construction Commission, the Executive Yuan. For enterprises and all related persons, the channel to submit complaints and comments is very clear and specific. Therefore, after enactment of the Government Procurement Act, no opinion is provided that bid rigging shall be handled by competition authorities.

11. As to private enterprises' public tendering other than government procurements, if there is bid rigging, it still shall be dealt in accordance with the FTA in theory. However in practice, private enterprises have greater incentives and capability to control the risk of bid rigging for its own tendering projects, and private enterprises will design every possible mechanism to prevent bid rigging. Even if bid rigging happens, there would be internal disciplinary systems and accountability mechanisms to mitigate the impact. Hence, the FTC seldom receives complaints of such cases.

2. Effectiveness Evaluation of Sanction Methods

2.1. From the point of view of deterrence in theory, criminal sanctions are better

12. Weighing illegal earnings against sanctions is always critical issue when enterprises decide whether to conduct concerted actions. In theory, criminal liabilities include both custodial sanction and property-oriented sanction. Criminal sanctions may restrict personal freedom and deprive illegal earnings, and the sentenced persons also suffer loss of reputation due to social evaluation. Therefore, criminal liability is a more efficient deterrent than administrative liability.

13. When the comments for draft amendment were requested before amendment of the FTA in 2015, there was discussion on whether to adopt criminal sanctions against concerted actions in lieu of administrative sanctions, and in the industries, many people voice their strong objections, and some business owners frankly say that they prefer for severer administrative liabilities rather than criminal sanctions. It is obvious that criminal sanctions have greater deterrence on the people.

2.2. From the point of view of practical effectiveness in enforcement

2.2.1. As about means of investigation and evidence search, criminal sanctions are better.

14. Under the command of prosecutors, judicial police officers conduct criminal prosecution. And during investigation, direct compulsory means such as search and seizure may be utilized to obtain evidence relevant with concerted actions. Further, when specific conditions are met, even suspects may be detained. Therefore, it has more efficient and direct tools to find evidence. Administrative investigation procedure conducted by the FTC includes majorly interview, written communication and request for production of documents. Although there are regulations about administrative seizure in the Administrative Procedure Act, objects that may be seized do not include confidential evidence (such as destruction of locked devices, and premises and body search, etc.). And

when the persons being investigated do not cooperate or even react violently, the FTC staff actually may not adopt any compulsory measure to respond immediately as police officers.

15. When the FTA was amended in 2015, the original draft amendment proposed by the administrative authority included powers of search and seizure. It was envisaged that through procedures of application to courts for search warrants, cooperation with prosecutors and investigation agencies, and enhancement of training on staff, necessary evidences about concerted actions and other conducts restricting competition may be obtained by the FTC through means such as search and seizure. However, judicial professionals have diverse opinions on such proposal. Those who object this proposal argue that judicial investigation shall be clearly differentiated with administrative investigation, and for matters irrelevant with criminal liabilities, no powers of search or seizure shall be granted. Those who support this proposal argue that recidivist of concerted actions shall also undertake criminal liabilities. Therefore, even the first time violation that only administrative liabilities may be imposed, necessity to collect evidence through such compulsory measures cannot be negated, and it only requires courts to conduct a review procedure. Though this proposal of the administrative authority once was approved in review by Legislative Yuan, relevant provisions were still deleted before third reading. Therefore, currently the FTC still does not have powers to make search and seizure and may conduct investigation only utilizing usual administrative investigation methods to find out relevant evidence.

2.2.2. As about efficiency of sanctions imposition, administrative procedures are better.

16. Because competition laws intrinsically involves economic analysis, and competition activities of enterprises vary and are diverse, understanding of practical situations in different industries is must to reasonably determine whether the FTA is violated. And to acquire such understanding, high degree of professional knowledge and experience is required. The FTC staff must pass exams or review of relevant disciplines to acquire qualification of employment. And after employed, they are specifically assigned matters relevant with the FTA, so they usually may accumulate certain degree of expertise. They also may continually be acquainted with trends and evolution of competition laws through international exchange to conduct proper enforcement.

17. At the same time, due to hierarchical check and control of administrative authorities, citizens' requirement on administrative efficiency, and limitation of administrative sanctions (limitation of concerted actions was 3 years before 2015, and currently it is 5 years), etc., the FTC internally introduces many kinds of performance management mechanism for the processing time of cases. Generally cases shall be closed between 6 months and 1 year, and complex cases shall be closed within 2 years with best efforts. In practice, some concerted actions cases were investigated completely, and sanctioned accordingly within a period less than 6 months. As of the end of 2019, the FTC issued sanctions at 212 cases of concerted actions, and the total amount of administrative fine is about 26 billion dollars, which is half of the total amount of fine imposed on all cases.

18. Instead, cases relevant with criminal liabilities are handled by prosecutors' indictment and courts' trial. Prosecutors and judges not necessarily understand theories of competition laws and industry practice. There are so many kinds and types of criminal cases, and the concerted action is just a peripheral part of them, which is not the area of focus and priority. And criminal procedure requires stricter evidence to find a defendant guilty, and therefore, the findings of the FTC may be different with findings of courts. During the period of "dual track system of both administrative and criminal sanctions",

which is before 1999, within 7 years, the FTC found 18 cases of concerted actions, but courts reached verdicts only in 5 cases.

19. After 1999, for concerted actions, system of “administrative sanction prior to criminal one” is adopted instead, only recidivist shall bear criminal liabilities. During this period, the FTC referred 3 cases to courts, and courts reached verdicts in all these 3 cases. It is found that because the persons conducting concerted actions will be sanctioned with administrative punishment by the FTC at first, therefore, such violators will be more cautious in avoiding concerted actions or in hiding relevant evidence. Hence it will be more difficult to find recidivists. And once recidivists are found, it is easier for courts to reach a verdict because evidence is more concrete.

3. Discussion on Criminalization of Concerted Actions’ Liabilities

3.1. Dispute on coexistence of criminal and administrative liabilities

20. The FTA continually prescribes both criminal and administrative liabilities for concerted actions. And there are different competent authorities and procedures assigned for these two kinds of liabilities. No matter under earlier “dual track system of both administrative and criminal sanctions” or current system that “administrative sanction prior to the criminal one”, there are always issues on interaction and coordination between judicial and administrative powers, which include:

1. In a criminal case, there is a stricter standard on evidence to reach a verdict. Proof “beyond a reasonable doubt” is necessary for a verdict. But for an administrative disposition, generally “high probability” is sufficient, which means “clear and convincing evidence”. Therefore, findings of the FTC and courts on the same conduct and the same case may vary. And, as afore mentioned, in the era of “dual track system of both administrative and criminal sanctions” before 1999, among 18 cases where the FTC concluded to constitute concerted actions, courts only reached verdict in 5 cases. Although in theory findings of administrative and judicial authorities do not need to be the same, such discrepancy undoubtedly will make people suspicious at credibility and correctness of administrative authorities’ enforcement.
2. Even under current system that “administrative sanction prior to the criminal one”, similar issue still exists. For violator’s first-time concerted action, the FTC will make an administrative disposition, and only recidivist may have criminal liabilities. However, should prosecutors or criminal courts be bound by findings in administrative dispositions made by the FTC? If prosecutors or criminal courts disagree with FTC’s finding of concerted actions on the first conduct, may they make their own different findings? Besides that, if prosecutors or criminal courts concur with FTC’s finding of concerted actions on the first conduct, but such administrative disposition is still disputed under administrative relief procedure, should prosecutors or criminal courts respect administrative courts’ decisions, and decide whether to prosecute or make criminal decisions only after decisions of administration litigation procedure are made?
3. When the FTA was amended in 2015, in order to avoid the rule of priority of criminal procedure excludes application of administrative liabilities, repeated violations recognized of natural persons and juristic persons are different. Criminal liabilities will be imposed at natural persons, and administrative liabilities will be

imposed at juristic persons. Therefore, judicial authorities and the FTC may still have different findings on repeated violations.

3.2. FTC's research and discussion on amendment of the FTA

21. Since established the FTC had for several times discussed with prosecutors and investigation agencies about coordination of investigation, due to FTC's lack of powers of search and seizure. In 1997, the FTC began to consider setting the grant of power of search and seizure as one of its long-term goals on laws amendment. In 2007, the FTC announced draft amendment and requested comments. However, as mentioned above, this draft was opposed by industries and some judicial professionals. And there is also a dispute on coexistence of criminal and administrative liabilities as mentioned above, and some scholars make their comments and argue that criminal liabilities shall be adopted to improve deterrence. Therefore, in 2010, the FTC began to examine whether concerted actions shall be punished only by criminal liabilities. Also the reference to Japan system was discussed, under which the FTC shall be authorized as a specialized agency to investigate and make overall evaluation, and then decide whether to make indictment of criminal matters.

22. Discussions on above mentioned issues may be summarized as following:

1. The opinion supporting concerted actions be sanctioned only by criminal punishment majorly comes from scholars. Scholars suggest that the viciousness of concerted actions is not less than other types of crimes, criminal liabilities have greater deterrence at concerted actions, and the mere increasing of administrative fine does not have sufficient effect of deterrence and sanctions. Especially, industries strongly opposed to criminal liabilities for concerted actions, and some enterprises owners clearly stated that they prefer higher administrative liabilities rather than to be imposed criminal liabilities. From such thinking, it shows the greater deterrence of criminal liabilities at people. Among these scholars, some suggested to establish a system similar to Japan system to enhance FTC's powers and flexibly strengthen effectiveness of criminal sanctions on serious anticompetitive practices.
2. However, not all scholars support adoption of criminal liabilities. Some scholars point out that the key issue is not the deterrence, but how to defeat concerted actions and really deprive illegal benefit of concerted actions. Confirmation of concerted actions is not easy, and high degree of expertise is necessary. Therefore, the FTC is better positioned to conduct such professional judgement. And some scholars refer that criminal sanctions have high degree of irreversibility, and when an erroneous judgment is made, it will not be easy to make recovery. Therefore, administrative liabilities are more flexible.
3. Many attorneys argues that because there are so many uncertain legal concepts in the elements of offense prescribed in the FTA, administrative liabilities have sooner and more direct and certain effect of sanctions. Comments from industries also point out that in practice, the scope and method of turnover assessment already caused many disputes (such as to assess by net amount or gross amount, and to assess by the single business involved with concerted actions or by total turnover of an enterprise, etc.). Whether these questions meet requirements under the principle of clarity and definiteness for essence of crime is also doubtful.
4. Staff members of the Judicial Yuan and the Ministry of Justice admit that it takes a long time from investigation by prosecutors to final decisions of courts, and Chinese Taipei's system is different from countries adopting unitary Judicial

system (such as U.S.A.). In Chinese Taipei, criminal liabilities of concerted actions are not those of felonies. Therefore, criminal liabilities imposed at concerted actions may have less deterrence than great amount of administrative fine. If the system of “administrative sanction prior to the criminal one” is maintained, and amount of fine is determined at sole evaluation and discretion of the competent administrative authority, the FTC, such system will be more efficient and flexible. For concerted actions are rational crimes committed after precise calculation of cost and efficiencies, the Judicial Yuan, the Ministry of Justice, and attorney at laws all support increasing amount of administrative fine . Costs of enterprises conducting concerted actions depend on probability of being detected and sanctioned successfully, and the amount of fine, therefore it is necessary to set up great amounts of fine to improve deterrence.

5. In addition, some also argue that even if criminal liability is considered, it is not necessary to adopt the Japan system which is very different from Chinese Taipei’s current prosecution mechanism/system. If the FTC is authorized special power of indictment, prosecutors’ powers of prosecution will be restricted. Under consideration of expertise that whether a specific conduct is illegal must be determined by the competent authority, it would be better to have prosecutors or judges consult with the competent authority in individual case to harmonize findings of the judicial branch and administrative agencies.
23. Based on above comments and enforcement necessities in practice, the FTC finally decided to keep current system “administrative sanction prior to the criminal one” and did not adopt the system that concerted actions are sanctioned only by criminal liabilities.

4. Conclusion

24. The sanction measures adopted by each country vary due to difference of circumstances and necessities in each country. As to current enforcement of Chinese Taipei, it may not be denied that administrative authorities’ conducting of administrative actions is obviously more efficient than prosecution and trial conducted by the judicial branch. Therefore, when system design is considered, it seems that administrative liabilities on concerted actions are still not easy to be completely abandoned.

25. However, deterrence arising from criminal liabilities shall not be overlooked. If the FTC includes grant of search and seizure powers as goals of legislative amendment, under current thinking of judicial professionals that criminal investigations must be differentiated with administrative investigations, whether to impose criminal liabilities at concerted actions in lieu of administrative liabilities will be an issue for continual discussion.

26. And as to bid rigging, because government procurement projects are specifically regulated by another act and controlled by another competent authority, Chinese Taipei FTC does not deal with bid rigging of government procurement projects since 1999. As to private enterprises’ public tendering, although in theory, the FTC may intervene in accordance with the FTA, in practice the FTC seldom gets involved for private enterprises have greater incentives and capabilities to create their own prevention mechanism.