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## Global Forum on Competition

### COMPETITION AND COMMODITY PRICE VOLATILITY

#### Contribution from Chinese Taipei

-- Session I --

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## COMPETITION AND COMMODITY PRICE VOLATILITY

-- Chinese Taipei --

### 1. Introduction

1. Chinese Taipei will focus on issues related to agriculture commodities. In this report, agricultural commodities are taken as an example to illustrate Chinese Taipei's position, regulations and competition law enforcement and formal investigation for price increase as well as to point out advocacy opportunities and a related competition law case involving dairy products in Chinese Taipei.

### 2. Background

#### 2.1 *The Fair Trade Commission's Position*

2. The rise and fall, or fluctuation, of prices is a general expression of overall economic activities. Currently no legal emergency price control framework has been instituted in Chinese Taipei; rather, an approach consisting of monitoring and responding has been adopted, wherein various competent agencies adopt appropriate measures to monitor prices and respond to fluctuations in line with statutory regulations and organizational authority.

3. The Fair Trade Commission (FTC) is in charge of the Fair Trade Act and has the responsibilities to protect the effective operation of market mechanisms, ensure fair competition, and investigate and tackle any conduct in violation of the Fair Trade Act. In the monitoring of prices, pursuant to its tasks and responsibilities the FTC actively investigates and handles, upon complaints or *ex officio*, variations in volume and pricing of commodity purchase, inventory, and delivery to prevent suspected enterprises from engaging in concerted actions by means of mutual understanding to jointly determine the price increases. It is also the responsibilities of the FTC to impose sanctions when any enterprise's competition restriction or unfair competition conduct is confirmed over the course of investigations.

4. The FTC collects market information regarding the prices of vital necessities (such as wheat, flour, soybeans, cooking oil, oil products, corn, dairy products, liquefied petroleum gas, iron products, and agricultural and animal husbandry products) and monitors the developments in the corresponding markets on a regular basis, comparing these findings with international conditions. In addition, the FTC maintains a close watch on the fluctuations in the prices of agricultural and farm products and relief materials during times of natural disasters. The imbalance of supply and demand precipitated by such outside factors as typhoons or other natural disasters causes prices to rise. This is an unavoidable phenomenon of the market regulation process; however, violations of the Fair Trade Act such as concerted actions cannot be ruled out as a factor in unusual market price fluctuations. The FTC actively investigates such circumstances, imposing sanctions where evidence of unlawful conduct is discovered. This investigation further has a deterrent effect on enterprises with unlawful intent, thereby indirectly stabilizing prices.

## **2.2 *The Applicable Provisions in the Fair Trade Act for Price Increase Enforcement***

5. Subparagraph 2, Paragraph 1, Article 10 of the Fair Trade Act states, “No monopolistic enterprises shall improperly set, maintain or change the price for goods or the remuneration for services.”

6. Article 14 of the Fair Trade Act states, “No enterprise may have any concerted action.” The term “concerted action,” as defined in Article 7 of the Fair Trade Act, means the conduct of any enterprise, by means of contract, agreement or any other form of mutual understanding, with any other competing enterprise, to jointly determine the price of goods or services, or to limit the terms of quantity, technology, products, facilities, trading counterparts, or trading territory with respect to such goods and services, etc., and thereby to restrict each other’s business activities. The act of a trade association to restrict activities of enterprises by means of its charter, a resolution of a general meeting of members or a board meeting of directors or supervisors, or any other means, is also deemed as horizontal concerted action.

7. Article 19 of the Fair Trade Act states, “No enterprise shall have any of the following acts which is likely to lessen competition or to impede fair competition: ... 4. causing another enterprise to refrain from competing in price, or to take part in a merger or a concerted action by coercion, inducement with interest, or other improper means.”

8. Article 24 of the Fair Trade Act states, “In addition to what is provided for in this Act, no enterprise shall otherwise have any deceptive or obviously unfair conduct that is able to affect trading order.” Further, Article 7 of the Guidelines on the Application of Article 24 of the Fair Trade Act states, “the ‘obviously unfair’ described in Article 24 refers to engaging in competition or commercial transactions by obviously unfair means...most common types include: 1) where an enterprise provides imperfect substitutes for basic necessities or services or does business in a manner contrary to business ethics or public order and good morals during a time when market mechanisms failed and market supply and demand are not in equilibrium.” As the legislative purpose of the Fair Trade Act respects the market mechanism and places emphasis on free competition in the market, the FTC will only investigate enterprises that engage in transactions that breach business ethics or public order and good morals during short-term, emergency, unexpected unusual circumstances under which the market mechanisms failed and market supply and demand are not in equilibrium.

## **2.3 *Delineation of Authority and Responsibilities between FTC and Other Government Agencies***

9. Under the free market, enterprises must take market acceptance into consideration, and are subject to the constraints of market forces when setting pricing; the market will inevitably eliminate deliberately high prices. If the rise and fall of commodity prices is determined by the natural operation of the laws of market supply and demand, there is no room for the intervention under the Fair Trade Act concerning price issues.

10. Similarly, under the free market, an individual enterprise cannot make excessive profit through hoarding, as the purpose of hoarding is to remove a commodity offered for sale from the market to cause artificially induced scarcity as the basis for raising its price. However, under the pressure of market competition, while individual enterprises reduce supply through hoarding, the resultant rise in price induces other competitors to increase their supply. Consequently, the hoarder not only fails to yield excessive profit, but must also bear the risk of lower sales volume. In other words, market competition can serve a self-adjusting mitigating function toward hoarding of materials and price gouging.

11. The purpose of the Fair Trade Act is to allow the market’s self-adjusting functions to work smoothly by protecting competition. The price determination and high or low inventory levels made by individual enterprises does not regulate under the scope of the Fair Trade Act, except where excessive prices from monopoly enterprises are concerned, or jointly setting of prices or limits to production among horizontal competitors by means of contracts, agreements, or other means.

12. Regulation of such conduct as hoarding, price gouging, and market manipulation is governed by the legal codes of the respective competent industry authorities, or by specialized statutes for handling emergencies. For example, Article 6 of the Agriculture Products Market Transaction Act states, “The transaction of agricultural products shall not be monopolized, price manipulation, or purposely change the quality/quantity, to obtain an unjustified profit.” As the Presidential Decree on Emergency issued in response to the biggest earthquake of the past half a century on 21 September 1999, Paragraph 1, Article 11 of that Decree punishes those who interfere with disaster rescue efforts, hoard goods, or engage in price gouging with a criminal liability of imprisonment of no less than one year and no more than seven years. At the same time, violators may be fined up to 5 million New Taiwan Dollars.

13. In accordance with the Hoarding Enforcement Plan for Price Stabilization passed by the Cabinet on 29 May 2008, in addition to continued adherence to existing procedures for strengthening interdiction by concerned government agencies and prosecutorial and police units, competent agencies across various industries shall follow regulations and organizational authority, and with reference to the standard of judgment in the Ministry of Justice’s explanatory letter<sup>1</sup> on Hoarding, and deem in accordance with its duties and responsibilities whether the information gathered during investigation constitutes hoarding, and adopt appropriate measures accordingly. The local district court prosecutor shall refer cases suspected of criminal culpability for investigation and prosecution. In other words, if unlawful conduct is ascertained, the agency responsible for hindering daily necessities from hoarding shall make its own decision in accordance with governing regulations and authority, with reference to the standard of judgment in the Ministry of Justice’s explanation letter on Hoarding.

### **3. Competition Law Enforcement and Formal Investigation**

#### **3.1 General Issues**

14. Chinese Taipei has a free-market economic system. With the exception of a small number of controlled commodities or services, such as water and electric power utilities for which the government controls prices, the price of other general products is determined autonomously by individual enterprises in consideration of operating costs and the competitive environment. This is the market mechanism at work. Consequently, if price fluctuations result from the decisions of individual enterprises in consideration of such factors as operating cost, market supply and demand, revenues, and marketing strategy, commodity price adjustments cannot be deemed unlawful. Only when enterprises are involved in jointly price increase, disrupting the competition mechanism, and damaging the interests of consumers, can the FTC intervene to address the situation under the Fair Trade Act.

#### **3.2 *In 2008 the FTC Conducted its Own Study and Published a Report Entitled “A Study on Chinese Taipei’s Vegetable Production Structure, Marketing Channels, and Transaction System”***

15. Motivations and purpose of study: due to the seasonal nature of rotation growing and climatic conditions, vegetable production in Chinese Taipei has long been beset with the issue of surplus production and resultant price collapses during the winter, and the instability of supply unable to meet demand during the summer months. In particular, following each typhoon or heavy rain, wholesale and retail vegetable markets at all levels exhibit an undersupply and galloping prices, placing high expectations in the FTC to

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<sup>1</sup> An explanatory letter issued by the Ministry of Justice on 9 November 2000 provided that the government shall consider whether there are non-merchants or merchants not in their main business who are purchasing large quantities of commodities needed by people in disaster regions, or whether the merchants in their main business are purchasing, storing, and holding from sales, or sales at prices patently above reasonable profits for those commodities.

respond appropriately in a timely fashion. Accordingly, the FTC conducted a comprehensive survey of the production structure, marketing channels, and trading system in vegetable markets, and strengthened cooperation with competent agricultural agencies to gain thorough and timely information of supply and demand at wholesale vegetable markets in growing and consumption areas in order to quickly respond in an appropriate manner following natural disasters such as typhoons and other emergency situations.

16. Scope and methodology: The study covered domestic vegetable production, vegetable import and export trade, the farmers' organization cooperative marketing system, fruit and vegetable wholesale market functions and price setting methods, as well as information on competition laws and regulations governing agriculture products market transaction in foreign countries to aid analysis. Research methodologies include: 1) collecting and studying foreign and domestic contributions related to the topic; 2) consulting with scholars and competent agricultural agencies for their views to better understand vegetable market marketing conduct, the transaction system, and industry policies of competent agricultural authorities; 3) conducting interviews at wholesale markets to learn about practices such as transaction flow, price negotiation, and auctions.

17. Study findings are as follows:

18. Due to the seasonal nature of produce production and sales and its inherent instability of supply and demand due to susceptibility to changing natural conditions, the produce market supply chain from upstream to mid- and downstream involves numerous producers and consumers. As a result, generally speaking the production region markets and end consumption markets are largely close to perfect competition. The exception herein is the distribution channel market at the wholesale state, which tends to be concentrated, so that the concentration of the upstream, midstream, and downstream markets take on an hourglass shape. Compounded with the limited production volume of individual producers and resultant reduction in consumption volume, both farmers and general consumers become weak competitors in the produce market, bearing the brunt of the damage and gaining nothing during times of dramatic price fluctuation. Governments around the world institute various degrees of protection policies in response, and have set certain conduct exempted from applying their respective competition laws.

19. Currently there are generally two types of exemption codes governing agricultural products market in advanced countries' competition laws. The first type consists of explicit exemptions in the competition laws; additionally, the provisions of competition laws shall not apply to any acts performed by an enterprise in accordance with other laws.

20. In the effort to expand production and scope of distribution, reduce distribution costs, and improve the capacity of cooperative agricultural organizations to negotiate market prices, legislation from advanced countries should be emulated, to provide a suitable degree of exemption in the interest of striking maximum balance between the competitive order and the state's obligations to safeguard citizens' existence.

### **3.3 *FTC Response to Requests for Price Reduction***

21. Paragraph 1, Article 41 of the Fair Trade Act states that the FTC may order any enterprise that violates any of the provisions of this Act to cease therefrom, rectify its conduct or take necessary corrective action within the time prescribed in the order, and that it may assess upon such enterprise an administrative penalty of not less than fifty thousand nor more than twenty-five million New Taiwan Dollars. An enterprise that fails to cease therefrom, rectify the conduct or take any necessary corrective action after the lapse of the prescribed period, the Fair Trade Commission may continue to order such 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 one

hundred thousand nor more than fifty million New Taiwan Dollars until its ceasing therefrom, rectifying its conduct or taking the necessary corrective action. To ensure adherence to the administrative measures under the Fair Trade Act, the FTC has the power to order an enterprise to cease or rectify certain conduct, or take necessary corrective action within a prescribed period, imposed fines, and successively assessed fines. In addition, where the unlawful conduct of an enterprise whose unlawful conduct infringes upon the rights and interests of consumers or competitors, the injured party may appeal for ordinary courts pursuant to Articles 30 and 31 of the Fair Trade Act.

22. Concerning whether a price should be reversed to the pre-violation level after firms engaging in collusive or abusive pricing behavior having been sanctioned by the FTC, should be addressed by returning to market supply and demand, rather than being subject to direct price controls by government. Owing to the fluidity of the market, the “original price” is not always the most reasonable price at any given time, not to mention the government cannot calculate the “proper” price for businesses. In order to inform the general public about which related merchandise are not impacted by price increases, government departments may list businesses that have not raised prices to allow consumers to make comparisons and make wise choices. At the same time, publication of related market information can facilitate market competition and help businesses set more reasonable prices. Further, the purpose of enforcing the Fair Trade Act is to eliminate factors that impede market operation, not for the government to decide for the market what price certain products are sold for. The government must nevertheless monitor market variations, and in the event that a sanctioned enterprise continues to engage in jointly price increase agreements, the FTC may continue to impose fines and initiate legal action in a court of law.

23. The Fair Trade Act empowers the FTC to take actions against cartels, but it does not allow the FTC to order enterprises to adjust pricing. If the FTC extends its power to set the prices for industries, such actions will contravene the purpose of the Fair Trade Act. How to regulate commodity pricing could be addressed in two ways. First, investigation of cartel cases by the competition authority tends to sanction existing cartels and deter other cartels from forming. Beyond this approach, it is difficult to expect the competition authority to directly stabilize prices. Second, where a cartel results in price increase, making price adjustment necessary, the competent industry authority should step forward to address the situation. The potential issue of harmonizing competition policy and industry policy could be resolved via the design of the legal system or inter-agency interaction and communication.

### **3.4 Case Study: Milk**

24. On 5 September 2011 the National Animal Industry Foundation announced an increase in the purchase price of raw milk of NT\$1.9 per kilogram, effective from October 1. In response, the FTC immediately initiate investigation, issuing letters two times to dairy companies to inform them and provide related information, and notify sales channel operators and the domestic three largest dairy companies to appear and make statements at the FTC regarding matters that could lead to major controversies.

25. After investigation, the FTC found that three largest dairy companies, namely Wei Chuan Corp., Uni-President Enterprises, and Kuangchuan Corp., had 80 percent market shares in the domestic fresh milk supply market. Although the price increase of NT\$1.9 per kilogram in the purchase price of raw milk exerted pressure on cost, the three largest dairy companies jointly and consistently increase the recommended retail price of fresh milk and the extent of increase in the retail price reflected the raw milk cost increase to an excessive degree. Taking a 1-liter carton of fresh milk as an example, the price of Wei Chuan’s Lin Feng Ying milk grew from NT\$77 to NT\$83, while Uni-President’s Rui Swei milk increased from NT\$76 to NT\$82 and Kuang Chuan’s Ru Hsiang Shih Chia milk rose from NT\$76 to NT\$82. All three products set pricing differently and all three dairy companies offered different reasons for their increases, but all underwent a price hike of the same scale of NT\$6 per liter.

26. Moreover, the price rises among competing branded products remained consistently within the specified price range, for example, 1-liter package of fresh milk price rose from NTD\$77 to NTD\$83 and 2-liter package of fresh milk price rose from NTD\$149 to NTD\$160. Upon careful comparison of previous documents and files, the FTC found that current increase in recommended retail prices among the concerned companies showed a high similarity, and that the extent of recommended retail price increase in fresh milk was several times higher compared to the previous raw milk purchase price increase of 2007, for which there was no rational explanation absent a mutual understanding to refrain from price competition. ( i.e. when the purchase price of raw milk was increased in 2007 by NT\$3.5 per kilogram, recommended retail prices in fresh milk rose by NT\$7 to NT\$8 per liter. But in 2011, when the purchase price rose NT\$1.9 per kilogram, recommended retail prices in fresh milk increased by NT\$6 per liter.)

27. To collect evidence, in addition to contracts or agreements, the FTC has also applied indirect evidence in the past to support its decisions against concerted actions. The supreme administrative court upheld the reasonable presumption the FTC used in determining if concerted action exists. In this case, the FTC made its decision at its Commissioners' Meeting on 19 October 2011 that the three biggest dairy companies, Wei Chuan, Uni-President, and Kuangchuan, engaged in jointly raising the recommended retail price of fresh milk in violation of Paragraph 1, Article 14 of the Fair Trade Act prohibiting concerted actions. Administrative fines of NT\$ 12 million, NT\$ 10 million, and NT\$ 8 million were imposed on Wei Chuan, Uni-President and Kuangchuan, respectively.

#### **4. Advocacy Opportunities and Challenges**

##### **4.1 *Jurisdiction Issues***

28. Pursuant to the Administrative Procedure Act, in the event of any controversy between or among different administrative authorities over the issue of jurisdiction, it shall be determined by the common superior authority thereof. When the regulatory agency amends its current laws or drafts the new law, the FTC can express its opinion during consultation meetings in order to facilitate the incorporation of competitive mechanisms and harmonize both sides' disagreements over policy objectives. In addition, where the matters provided for in the Fair Trade Act concern other authorities, the FTC could consult with the relevant authorities to deal with the conflicting issues pursuant to Article 9 of the Fair Trade Act.

##### **4.2 *Harmonization of Agricultural and Competition Policies***

29. The stated objectives of Chinese Taipei's agricultural policy are: 1) reduce agricultural product price fluctuation; 2) raise the usage efficiency of resources (especially land); 3) maintain reasonable farmers' share; 4) food security and raise self-sufficiency; 5) sustainable development.

30. The FTC's basic position on agriculture is as follows: 1) as agricultural product price fluctuation is a pure consequence of variation in supply and demand, it is deemed part of normal operation of market mechanisms; 2) supervision and management of agricultural product marketing, adjustments to supply and demand of agricultural products, or failure of agricultural product middlemen to conduct transactions in accordance with the Agricultural Products Market Transaction Act is the purview of competent agricultural supervisory agencies; 3) such unlawful means as the use of intimidation or threats to engage in transactions shall be investigated by prosecutorial agencies to ascertain criminal responsibility; 4) the FTC addresses such situations as abuse of monopolistic position by agricultural businesses, price fixing, and improper setting of resale price.

31. The FTC has organized an advocacy meeting on Regulations Governing Agricultural Product Market Transaction Conduct, during which it expressed to agricultural enterprises and competent agricultural authorities that competition policy does not conflict with agricultural policy, and that it should even be a component of agricultural policy. In line with the Fair Trade Act, the FTC may promote upstream essentials (e.g. fertilizer and feed) market competition, and prevent the concentration of the downstream market (such as merger review of the food industry), and further has the authority to investigate and sanction concerted monopolization (monopsony or monopoly) by distributors. Consequently, the use of advocacy to eliminate unnecessary regulations and restrictions can grant agricultural enterprises greater operational flexibility to ensure a win-win situation for both agricultural producers and consumers.