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**Roundtable on Safe Harbours and Legal Presumptions in Competition Law - Note  
by Chinese Taipei**

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More documents related to this discussion can be found at [www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm](http://www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm)

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## *Chinese Taipei*

1. This report explains the provisions in the Fair Trade Act of Chinese Taipei on safe harbours and legal presumptions, and also describes the Fair Trade Commission's law enforcement experiences and cases.

### **1. Safe Harbours and Legal Presumptions in the Fair Trade Act**

2. Conduct regulated by the Fair Trade Act (FTA) includes restrictive competition and unfair competition. Monopolies, mergers, concerted actions, and vertical restrictions are all categorized under restrictive competition. The purpose of regulation is to eliminate conduct that impedes competition and to promote free competition in the market. The Fair Trade Commission (FTC) applies the safe harbours and legal presumptions in relation to the above-mentioned actions that restrict competition, in order to determine whether or not the competitive practices of the enterprises involved have violated the FTA. Monopolistic enterprises, merger controls, concerted actions, and vertical restrictions are further explained below.

#### **1.1. Safe Harbours for Monopolistic Enterprises**

3. Whether or not an enterprise is a monopolistic enterprise is a prerequisite and key element in determining whether or not it has abused its market power. According to Article 8 of the FTA, an enterprise shall not be deemed a monopolistic enterprise if none of the following circumstances exists: (1) the market share of the enterprise in the relevant market reaches one half of the market; (2) the combined market share of two enterprises in the relevant market reaches two thirds of the market; and (3) the combined market share of three enterprises in the relevant market reaches three fourths of the market. Furthermore, in considering the overall scale of individual enterprises, where the market share of any individual enterprise does not reach one tenth of the relevant market or where its total sales in the preceding fiscal year are less than the threshold amount as publicly announced by the FTC (the current threshold amount is NT\$2 billion), such enterprise shall not be deemed to be a monopolistic enterprise.

4. However, if the establishment of an enterprise or any of the goods or services supplied by an enterprise to the relevant market is subject to legal or technological restraints, or there exists any other circumstance under which the supply and demand of the market are affected and the ability of others to compete is impeded, the FTC may still determine an enterprise to be a monopolistic enterprise based on the facts of the case, even if the enterprise's market share or sales amount does not reach the above-mentioned threshold.

#### **1.2. Safe Harbours for Merger Control**

5. The FTA adopts the pre-merger notification system for merger control, and only regulates the merger of enterprises that reach a certain scale. The safe harbours for merger control use the "market share" and "sales amount" of the merging enterprises as the threshold for filing a pre-merger notification. According to Paragraph 1 of Article 11 of

the FTA, any merger that falls within any of the following circumstances shall be filed with the FTC in advance: (1) as a result of the merger the enterprise(s) will have one third of the market share; (2) one of the enterprises in the merger has one fourth of the market share; (3) sales for the preceding fiscal year of one of the enterprises in the merger exceeds the threshold amount publicly announced by the FTC.

6. According to the “Thresholds and Calculation of the Sales Amount which Enterprises of a Merger Shall File with the FTC”, there are 3 thresholds for the sales amount of enterprises in the merger: (1) The combined worldwide sales in the preceding fiscal year of the enterprises in the merger exceed NT\$40 billion and the domestic total sales of each of at least two of the enterprises in the merger in the preceding fiscal year also surpass NT\$2 billion. (2) The enterprises in the merger are not financial institutions and the domestic total sales of one of the merging parties in the preceding fiscal year exceed NT\$15 billion while the domestic total sales of one of the other merging parties in the preceding fiscal year also surpass NT\$2 billion. (3) The enterprises in the merger are financial institutions and the domestic total sales of one of the merging parties in the preceding fiscal year exceed NT\$30 billion while the domestic total sales of one of the other merging parties in the preceding fiscal year also surpass NT\$2 billion.

7. The FTC also established the “FTC Disposal Directions (Guidelines) on Handling Merger Filings” to control mergers. Paragraph 1 of Point 10 of the Disposal Directions stipulates that the FTC shall further assess the overall economic benefits when reviewing horizontal mergers that involve one of the following situations: (1) The aggregate market share of the merging parties accounts for half of the total market. (2) The top two competitors in the relevant market account for two thirds of the total market share. (3) The top three competitors in the relevant market account for three quarters of the total market share. However, in order to prevent small enterprises participating in the merger from being mistakenly regarded as restricting competition due to competitors not participating in the merger reaching the above-mentioned thresholds, Paragraph 2 of Point 10 of the Disposal Directions provides the safe harbour that excludes merging parties whose aggregate market share does not amount to 20% of the total market.

### 1.3. Safe Harbours and Legal Presumptions of Concerted Actions

8. In principle, the FTA prohibits concerted actions. According to Paragraph 1 of Article 14 of the FTA, a “concerted action” means that competing enterprises at the same production and/or marketing stage, by means of a contract, agreement or any other form of mutual understanding, jointly determine the price, technology, products, facilities, trading counterparts, or trading territory with respect to goods or services, or any other behavior that restricts each other’s business activities, resulting in an impact on the market function with respect to production, trade in goods or the supply and demand for services.

9. A “mutual understanding” between enterprises to restrict business activities is the element needed to establish a concerted action. However, direct evidence of a “mutual understanding” is extremely hard to obtain in practice, and Paragraph 3 of Article 14 of the FTA was thus added on February 4<sup>th</sup>, 2015 to effectively regulate concerted actions, by stipulating that: “The mutual understanding of the concerted action may be presumed by considerable factors, such as market condition, characteristics of the good or service, cost and profit considerations, and economic rationalization of the business conducts.” On this basis, if a mutual understanding between enterprises can be reasonably suspected after considering the facts of a case based on the above-mentioned factors, the FTC may

presume the existence of a mutual understanding based on relevant evidence and considerable factors. Enterprises are responsible for producing strong evidence to overturn this legal presumption.

10. In light of the significant effect that concerted actions have on market trading order, the FTA has always taken the position of viewing a concerted action as a violation of the law. However, if the enterprises participating in a concerted action have minimal market power, there is little concern that they will restrict competition and legal control is unnecessary. Investigation of a concerted action is difficult, so it would be more appropriate to concentrate law enforcement resources in the investigation of concerted action cases that have a severe effect on competition order in the market. The FTC thus referred to foreign legislation and practical law enforcement experiences and issued an interpretation of the “Standard for Determining Concerted Actions of Minor Importance” on March 1<sup>st</sup>, 2016. Besides defining the content of concerted actions between enterprises as restricting the price, quantity, trading counterparts or trading territory of goods or services, whether or not the total market share of enterprises participating in the concerted action reaches 10% is used as the standard for determining “sufficient to impact the market function with respect to production, trade in goods or the supply and demand for services” in Paragraph 1 of Article 14 of the FTA. Hence, if the concerted action limits price, quantity, trading counterparts, or trading territory, the concerted action is the “hardcore cartel” and is highly hazardous to market competition. Therefore, regardless of the market share of the involved enterprises, the concerted action is deemed sufficient to affect the function of market supply and demand.

#### **1.4. Safe Harbours and Legal Presumptions of Vertical Restrictions**

11. The FTA divides vertical restrictions into price restrictions and non-price restrictions. For vertical price restrictions, according to Paragraph 1 of Article 19 of the FTA: “An enterprise shall not impose restrictions on resale prices of the goods supplied to its trading counterpart for resale to a third party or to such third party for making further resale. However, those with justifiable reasons are not subject to this limitation.” In principle, the FTA prohibits any restriction on resale prices, and enterprises are responsible for proving the legitimacy of their restrictions on resale prices. The FTC will then review the reasonable evidence produced by the enterprise.

12. For vertical non-price restrictions, Article 20 of the FTA covers boycotting, discriminative treatment, improperly preventing competitors from participation in competition, improperly causing other enterprises to refrain from competition, and improperly imposing restrictions on the business activities of trading counterparts. When determining whether or not the above-mentioned actions are in violation of the FTA, the elements are actions that may restrict competition. In this regard, the FTC first examines whether the enterprises have the market power in the relevant markets. If the enterprises’ market share in the relevant market does not reach 15%, then the enterprises are deemed not to have market power and, in principle, there are no concerns that competition is being restricted. However, with consideration to practices of market operations, even when the market share of the enterprises involved does not reach 15%, if trading counterparts cannot be realistically expected to deviate from the enterprises, then dependence between the enterprises can be determined and the enterprise has a relatively dominant position. Hence, their conduct that restricts competition may still be regulated by Article 20 of the FTA.

## 2. Cases in Which the FTC Has Applied the Safe Harbours and Legal Presumptions in Recent Years

### 2.1. Six companies including Baoren Quarry Development Co., Ltd. engaged in a concerted action to raise the price of gravel<sup>1</sup>

13. Facts of the case: The Ready-Mixed Concrete Industry Association notified the FTC that it received a written notice from gravel companies in Taichung in April 2013 to raise the prices of gravel. Taking into consideration that gravel is an important construction material, the FTC opened an investigation to maintain market order. The products in this case are sand and stone, and are processed from river grade or construction surplus sand and gravel. The product is a basic material required for construction, and serves different purposes than other construction materials, such as cement, ceramic bricks, and glass; the materials cannot serve as substitutes. Hence, “gravel” is the product market. Since gravel is a heavy object, supply should be as close as possible, but adjacent counties and cities will trade gravel in practice. If there is a shortage of gravel in central district, then relatively cheap gravel in adjacent counties and cities will be sold to the area. Hence, the central district gravel market is the geographic market.

14. After investigation, the FTC found that six companies including Baoren Quarry Development Co., Ltd. (hereinafter referred to as “Baoren”) all admitted to exchanging information on market prices during gatherings between March and May 2013. The companies separately notified downstream customers of the rise in gravel prices between April and June 2013. Gravel output in central district was roughly 12,992,257 tons between January and June 2013, and the 6 companies including Baoren produced roughly 223,092 tons. Even though the companies only had a combined market share of roughly 1.71%, the concerted action restricted prices and was classified as a “hardcore cartel”, which may potentially impede market competition and is sufficient to affect the function of market supply and demand. Hence, the FTC determined that the concerted action of the 6 companies to raise gravel prices between April and June 2013 was sufficient to affect the market function of the gravel market in central district. The concerted action was in violation of Paragraph 1 of Article 14 of the FTA and the FTC therefore imposed fines that totaled NT\$1.6 million.

15. Administrative litigation process of the case: Baoren refused to accept the disposition of the FTC and filed an administrative litigation, and the disposition was revoked by the administrative court of the Taipei District Court<sup>2</sup>. The reason for the ruling was that the 6 companies including Baoren did indeed reach a mutual understanding to jointly raise gravel prices, but their market share was too low and could be easily broken down or replaced by other competitors, and the concerted action was insufficient to affect the supply and demand function of the gravel market in central district. The FTC appealed, the original ruling was then revoked by the Taipei High

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<sup>1</sup> Disposition Kung Chu Tzu No.105019 of the Fair Trade Commission on March 4<sup>th</sup>, 2016.

<sup>2</sup> Administrative Litigation Judgment 2016 Jian Zi No.127 of the Taipei District Court on December 2<sup>nd</sup>, 2016.

Administrative Court, and the appeal by Baoren was dismissed<sup>3</sup>. The FTC won the lawsuit.

16. The Taipei High Administrative Court (the court of final appeal) believed that the mutual understanding between several enterprises to restrict each other's business activities may affect the market in several respects, and therefore determined that the concerted action was sufficient to affect the market's function. Hence, all conditions must be taken into consideration, including the market structure, product or service characteristics, industry culture, trading habits of upstream and downstream enterprises, contents of the concerted action, the number of participating enterprises, and their market position, to evaluate whether the concerted action is sufficient to affect the market supply and demand function. All of the factors must be considered to determine if the concerted action has damaged trading order in the market, and market share alone is no longer sufficient to evaluate the effect of a concerted action on the market supply and demand function. Therefore, even if the total market share of the enterprises participating in the concerted action does not reach 10%, when it involves the core factor of "restricting prices", the FTC may still determine that the concerted action is sufficient to affect the market function after considering other factors, such as product characteristics and market structure; market share is not the sole determinant.

### 3. Conclusion

17. The FTC has been in operation for over 25 years, and has accumulated a considerable amount of law enforcement experience through practical cases. The FTC has used the safe harbours and legal presumptions for enterprises involved in monopolies, mergers, concerted actions, and other actions that restrict competition, in determining whether the enterprises are in violation of the law. On the one hand, this has made enterprises aware of the FTC's standards and boundaries. On the other hand, it has reduced the costs incurred by the FTC with respect to law enforcement. The safe harbours enable cases that are relatively less severe to be screened, and also allow law enforcement resources to be concentrated in cases with a severe impact on market competition order, whereas legal presumptions are used to determine whether an enterprise's competitive practices are per se illegal, and no law enforcement resources need to be wasted proving the enterprise has broken the law.

18. The FTC has studied foreign legislation and practical law enforcement cases in recent years, specifically the application of the safe harbours and legal presumptions for determining whether a concerted action is sufficient to affect the market supply and demand function. Unless the concerted action involves prices, quantity, trading counterparts, or trading territory, and if the total market share of enterprises participating in the concerted action does not reach 10%, then it is presumed that the concerted action is insufficient to affect the market function with respect to production, and product and service supply and demand. The safe harbours and legal presumptions are already recognized by the administrative court, and they will benefit the FTC in determining whether or not enterprises are in violation of the FTA and when utilizing its law enforcement resources.

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<sup>3</sup> Administrative Litigation Judgment 2017 Jian Shang Zi No.21 of the Taipei High Administrative Court on April 27<sup>th</sup>, 2017.