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**Roundtable on the Extraterritorial Reach of Competition Remedies - Note by
Chinese Taipei**

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More documentation related to this discussion can be found at

www.oecd.org/daf/competition/extraterritorial-reach-of-competition-remedies.htm

Please contact Ms. Despina Pachnou if you have any questions regarding this document
[phone number: +33 1 45 24 95 25 -- E-mail address: despina.pachnou@oecd.org]

JT03423413

Chinese Taipei

Summary

1. The Fair Trade Act (hereinafter referred to as the “Act”) is a domestic law and its contents are mainly administrative regulations for control. The Act serves as the basis for the Fair Trade Commission (hereinafter referred to as the “FTC”) and the court for imposing administrative dispositions, convicting and sentencing.
2. Besides conducting investigations and imposing administrative dispositions in accordance with the Act, the FTC’s administrative actions in principle must comply with the Administrative Procedure Act and Administrative Penalty Act. Since the Administrative Penalty Act already sets forth the principle for the jurisdiction of administrative penalties imposed by administrative agencies, the Act does not separately specify whether or not extraterritorial acts of enterprises are under the jurisdiction of the FTC. In practice, the FTC takes into consideration the consequences of the applicable law and feasibility of executing competition remedies for each case, and then decides on an administrative disposition for the case.
3. An extraterritorial merger of enterprises does not necessarily result in a breach of duty in accordance with the Act. When faced with an extraterritorial merger case, the FTC first considers its jurisdiction in accordance with Point 3 of the Fair Trade Commission Disposal Directions (Guidelines) on Extraterritorial Mergers. As for the extraterritorial monitoring and execution of administrative penalties under the Act, according to Articles 8, 10 and 17 of the Fair Trade Commission Guidelines for Cases that Involve Foreign Enterprises, the FTC may seek assistance from domestic enterprises to obtain information that may be disclosed, send letters to foreign enterprises to request data, send letters to overseas locations of the Ministry of Foreign Affairs or Ministry of Economic Affairs to assist in the collection of evidence and data overseas, and collect evidence and data through non-government organizations or industry associations for the extraterritorial monitoring and execution of competition remedies.
4. The FTC of Chinese Taipei has actively participated in activities related to issues of international competition law since it was established, and has also established reliable exchange and communication channels with the competent authorities of competition law in other countries. Competition law cooperation agreements signed with various countries in recent years are the result. The FTC has also worked with the competent authorities of competition law in other countries in the case of concerted actions by capacitor companies. The FTC will maintain its position as it continues to engage in exchanges with various countries to jointly maintain free and fair competition in the market.
5. This report introduces the provisions of the Fair Trade Act (hereinafter referred to as the “Act”) of Chinese Taipei concerning the extraterritorial reach of competition remedies, and also shares law enforcement experiences in specific industries.

1. Provisions of the Fair Trade Act for Extraterritorial Cases

6. The Act is a domestic law and its contents are mainly administrative regulations for control. The Act serves as the basis for the Fair Trade Commission (hereinafter

referred to as the “FTC”) and the court for imposing administrative dispositions, convicting and sentencing. Its effectiveness, in principle, applies to facts that occur to citizens and within the territory, which are known in legal terminology as *jus sanguinis* and *jus soli*, respectively. Applicable to facts within the territory is the inter-territorial effect of the Act.

7. The FTC is a level-two independent administrative agency subordinate to the Executive Yuan. Besides conducting investigations and imposing administrative dispositions in accordance with the Act, the FTC’s administrative actions in principle must comply with the Administrative Procedure Act and Administrative Penalty Act. Paragraph 1 of Article 6 of the Administrative Penalty Act stipulates that the act shall be applicable to any act in breach of duty under administrative law that is committed within the territory of Chinese Taipei and is punishable. Paragraph 3 of the same article stipulates that where either the commission of an act in breach of duty under administrative law or the consequence resulting therefrom takes place within the territory of Chinese Taipei, it shall constitute a breach of duty under administrative law committed within the territory of Chinese Taipei. Therefore, the FTC has jurisdiction over any act or consequence within the territory of Chinese Taipei that is in breach of duty as set forth by the Act. Hence, even if the act of an enterprise that violates the Act is outside the territory of Chinese Taipei, the FTC may intervene in accordance with the Act as long as the consequence of the act affects the competition order in the domestic market.

8. Based on the above, since the Administrative Penalty Act already sets forth the principle for the jurisdiction of administrative penalties imposed by administrative agencies, the Act does not separately specify whether or not extraterritorial acts of enterprises are under the jurisdiction of the FTC. In practice, the FTC takes into consideration the consequences of the applicable law and feasibility of executing competition remedies for each case, and then decides on an administrative disposition for the case.

9. The Act adopts the pre-merger notification system for merging enterprises, and emphasizes pre-control of the market structure. The purpose of pre-notification is to prevent those mergers that may result in an anti-competitive effect by means of ex-ante regulation of the market structure. Hence, an extraterritorial merger of enterprises does not necessarily result in a breach of duty in accordance with the Act, and the FTC has thus established the Fair Trade Commission Disposal Directions (Guidelines) on Extraterritorial Mergers (hereinafter referred to as the “Disposal Directions”) to handle the issue of whether the Act is applicable to specific extraterritorial merger cases.

10. According to Point 2 of the Disposal Directions, an “extraterritorial merger case” as referred to in the Guidelines means a merger of two or more foreign enterprises outside of the territory of Chinese Taipei under any of the circumstances enumerated in Paragraph 1, Article 10 of the Act. Point 3 stipulates that: “The following factors shall be taken into account while determining the Fair Trade Commission’s jurisdiction over extraterritorial merger cases: (1) whether the merger will have a direct, substantial, and reasonably foreseeable effect on the domestic market; (2) the relative importance of the merger’s effects on the relevant domestic and foreign markets; (3) the residence and main business places of the combining enterprises; (4) the degree of explicitness and the possibility of a foreseeable consequence on the impact of the market competition in the Republic of China; (5) the likelihood of creating conflicts with the laws or policies of the home countries of the combining enterprises; (6) the feasibility of enforcing administrative dispositions; (7) the impact of enforcement on the foreign enterprises; (8)

what the rules of international conventions and treaties, or the regulations of international organizations say; (9) whether any of the combining enterprises has production or service facilities, distributors, agents, or other substantive sales channels within the territory of the Republic of China; (10) other factors deemed important by the Fair Trade Commission.” This shows that the FTC uses the principle of effect as the basis for its law enforcement in extraterritorial merger cases (subparagraphs 1 and 2), and then limits the applicability of the principle of effect while giving consideration to the comity of nations, principle of interest balancing, and principle of reasonable jurisdiction (subparagraphs 2-10). It is clear from Subparagraphs 5, 7 and 8 of the Disposal Directions that the FTC gives consideration to potential conflicts with foreign laws or policies when determining jurisdiction over extraterritorial merger cases.

11. Summarizing the above, when faced with an extraterritorial merger case, the FTC first considers its jurisdiction in accordance with Point 3 of the Disposal Directions. If the FTC decides that it does not have jurisdiction, then there naturally will not be any competition remedies for the merger, and it is not possible to discuss the monitoring or execution of competition remedies under extraterritorial jurisdiction. According to statistics, the FTC did not exercise its jurisdiction in over 100 extraterritorial merger cases between January 2012 and September 2017, and decided to not prohibit 5 merger cases; only 1 merger case that was not prohibited had imposed conditions or undertakings. The undertakings of that merger case were behavioral measures of remedial actions that require the merging enterprises not to engage in the restraint of competition, such as by means of a boycott, treating another enterprise discriminatively without justification, and so on.

2. Monitoring and Execution of the Act's Competition Remedies

12. According to the Act, the FTC may order any enterprise that violates the provisions on monopoly, concerted actions, the imposition of restrictions on resale prices, and other restrictive and unfair competition practices to cease therefrom, rectify its conduct, and take necessary corrective action within the time prescribed in the order. In addition, it may assess upon such an enterprise an administrative penalty. In practice, the main disposition of the FTC for enterprises that violate the Act is to order the enterprise to cease the illegal practice and impose a fine. Regardless of whether they are domestic or foreign, enterprises that do not pay the fine within the specified period are subjected to compulsory enforcement by the Administrative Enforcement Agency in accordance with Article 11 of the Administrative Execution Act. With regard to ceasing, rectifying or taking necessary corrective action, the FTC usually sends letters of inquiry to the sanctioned parties, complainant, upstream and downstream trading counterparts, and the competent authorities of other industries or conducts on-site visits to monitor the sanctioned parties to determine whether they ceased engaging in the unfair practices, rectified their wrongdoings, or took necessary corrective action. As for the extraterritorial monitoring and execution of administrative penalties under the Act, according to Articles 8, 10 and 17 of the Fair Trade Commission Guidelines for Cases that Involve Foreign Enterprises, the FTC may seek assistance from domestic enterprises to obtain information that may be disclosed, send letters to foreign enterprises to request data, send letters to overseas locations of the Ministry of Foreign Affairs or Ministry of Economic Affairs to assist in the collection of evidence and data overseas, and collect evidence and data through non-government organizations or industry associations for the extraterritorial monitoring and execution of competition remedies.

2.1. Extraterritorial Merger between Microsoft Corporation and Yahoo! Inc.

13. Microsoft Corporation and Yahoo! Inc. planned to merge outside the territory of Chinese Taipei. Their agreement to cooperate in the search and keyword advertisement business matched the merger pattern specified in the Act as “where an enterprise operates jointly with another enterprise on a regular basis or is entrusted by another enterprise to operate the latter’s business,” and the subsidiaries of the merging enterprises, Microsoft Taiwan Corporation and Yahoo! Taiwan, thus filed a pre-merger notification in accordance with the law in December 2009. After receiving the notification, the FTC made the decision to not prohibit the merger but imposed undertakings. The merging enterprises were prohibited from using their market position after the merger to engage in actions that would restrict competition, and were required to provide the scale of operations of their keyword advertisements, the number of employees and researchers, and changes in market share in Chinese Taipei to the FTC at the end of December each year for 3 years after the merger actually took place.

14. Microsoft Corporation and Yahoo! Inc. completed merger procedures for their search and keyword advertisement businesses in December 2013, and the FTC monitored the execution of competition remedies by Microsoft Corporation and Yahoo! Inc. by requiring the two subsidiaries in Taiwan to provide the above-mentioned industry data for 3 years starting in 2014. After examining the industry data provided by the Taiwan subsidiaries of Microsoft Corporation and Yahoo! Inc., the FTC did not find evidence of an increase in the market share of the two enterprises in the search and keyword advertisement market, and also did not receive any complaints regarding the two enterprises violating imposed conditions and undertakings. Hence, after the period of attached conditions and required undertakings expired, the FTC used the other approach of continuing to monitor changes in industry structure from a market perspective.

3. Collaboration with Competent Authorities of Competition Law of Other Countries

3.1. Signing Bilateral or Multilateral Competition Law Agreements

15. Chinese Taipei and Australia signed the Cooperation and Coordination Arrangement of the Competition and Fair Trading Laws in 1996. It was the first formal cooperation agreement signed between Chinese Taipei and other countries for law enforcement and exchanges concerning competition law. Chinese Taipei and New Zealand signed the Cooperation and Coordination Arrangement of the Competition and Fair Trading Laws in 1997; Chinese Taipei, Australia and New Zealand signed a trilateral agreement of the Cooperation and Coordination Arrangement of the Competition and Fair Trading Laws in 2002; Chinese Taipei and France signed the Cooperation Arrangement of Regarding the Application of their Competition Rules in 2004; Chinese Taipei and Mongolia signed the Memorandum of Understanding Regarding the Cooperation of Competition Law Implementation and Memorandum of Understanding on Cooperation in 2007 and 2012; Chinese Taipei and Canada signed the Memorandum of Understanding Regarding the Application of Competition Laws in 2009; Chinese Taipei and Hungary signed the Co-operation Agreement Regarding the Application of Competition and Fair Trading Laws in 2010; Chinese Taipei and Panama signed the Agreement Regarding the Application of Competition Laws in 2013; Chinese Taipei and France signed the Memorandum of Understanding Regarding the Application of Competition Laws in 2014; Chinese Taipei and Japan signed the Memorandum of Understanding Regarding the

Application of Competition Laws in 2015. Based on the above-mentioned cooperation agreements signed with different countries, the FTC engages in exchanges regarding mutual notification, the coordination of law enforcement activities, information request, consulting, and information confidentiality. The cooperative relationship between the competent authorities of competition law promotes the effective enforcement of competition law within their respective fields.

3.2. Case of Capacitor Companies

16. The FTC imposed penalties on capacitor companies that participated in concerted actions at the end of 2015. The sanctioned parties exchanged sensitive information, such as that related to prices, quantity, production capacity, and response to customers, through meetings or bilateral communications, and a mutual understanding to restrict competition was reached. The enterprises' conduct resulted in an impact on the function of the capacitor market, and the FTC therefore determined that it constituted a concerted action and imposed an administrative penalty of NT\$5,796,600,000. Due to the small number of domestic capacitor manufacturers, which have far lower output value and production capacity than foreign companies, the demand for aluminum capacitors is mainly satisfied by imports; there are no domestic manufacturers of tantalum capacitors. Downstream companies are free to select their supplier, and there are no regulatory restrictions on the import of such products, so the geographic market is the global market. In terms of the competition law jurisdiction, however, the result of the concerted action by the sanctioned enterprises had already affected competition and trading order in the domestic market. According to the Administrative Penalty Act and the Act, the FTC has jurisdiction over the actions of these enterprises.

17. With regard to the collection of evidence and data in the case of capacitor companies, one of the companies taking part in the concerted action applied to the FTC for exemption from the fine in accordance with the leniency program set forth in Article 35 of the Act, and then the FTC thus conducted an investigation. From the beginning of the investigation, the FTC worked with the competent authority of competition law in numerous countries. Besides agreeing to deliver the letter of investigation to the enterprises involved on the same day (delivered to the subsidiary of the enterprises being investigated or transferred by the Ministry of Foreign Affairs) and beginning the investigation, telephone conferences or e-mails between the competent authorities during the investigation process kept the competent authorities up-to-date on the investigation. Opinions on market definition and the applicability of laws were clarified, and they exchanged experiences with evidence gathering and case investigation. After completing the investigation, the FTC imposed penalties at the end of 2015. The entire process of the case from the beginning of the investigation to when penalties were imposed shows the results of the FTC's long-term efforts in international cooperation.

4. Conclusion

18. The purpose of Chinese Taipei's competition policy is to maintain trading order and protect consumer interests, ensuring free and fair competition, and promoting economic stability and prosperity. The Administrative Penalty Act sets forth the jurisdiction of administrative agencies of Chinese Taipei in the event of breach of duty by enterprises. According to Paragraphs 1 and 3 of Article 6 of the Administrative Penalty Act, the FTC deems a breach of duty to occur under the Act if an act or consequence of a

breach of duty takes place within the territory of Chinese Taipei and thus exercises its jurisdiction over the act. However, since the Act is a domestic law, there is no need for the FTC to intervene and exercise its jurisdiction if both the illegal act and consequence did not occur within the territory of Chinese Taipei. This can be confirmed by the contents of the Disposal Directions. If the FTC decides not to exercise its jurisdiction after all things are taken into consideration in accordance with Article 3 of the Disposal Directions, there naturally will not be competition remedies for the merger, and it will not be necessary to monitor or execute extraterritorial competition remedies. Conversely, if the illegal act or consequence occurs within the territory of Chinese Taipei, the scope of the competition remedy decided by the FTC is mainly the territory of Chinese Taipei and rarely includes extraterritorial reach. The FTC also established the Fair Trade Commission Guidelines for Cases that Involve Foreign Enterprises to handle the procedure for cases involving foreign enterprises.

19. The FTC of Chinese Taipei has actively participated in activities related to issues of international competition law since it was established, and has also established reliable exchange and communication channels with the competent authorities of competition law in other countries. Competition law cooperation agreements signed with various countries in recent years are the result. The FTC has also worked with the competent authorities of competition law in other countries in the case of concerted actions by capacitor companies. The FTC will maintain its position as it continues to engage in exchanges with various countries to jointly maintain free and fair competition in the market.