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Chinese Taipei**

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## *Chinese Taipei*

1. This paper explains the legal bases and practical approaches regarding access to files of ongoing investigations conducted by the Fair Trade Commission (hereinafter referred to as the “CTFTC”), which has sole responsibility for enforcing competition law provisions in Chinese Taipei. The paper also outlines applicable laws and measures to ensure the security and safety of confidential information obtained by the CTFTC.

### **1. Legal bases and practical approaches regarding access to files**

2. The Administrative Procedure Act (hereinafter referred to as the “APA”) is the fundamental statute governing all activities of administrative agencies in Chinese Taipei. It encompasses rendering administrative dispositions, entering into administrative contracts, issuing legal orders and administrative rules, determining administrative plans, giving administrative guidance and dealing with petitions. Its legislative purpose is to ensure that any administrative act complies with a fair, transparent and democratic process on the basis of the principle of administration by law. Such legal compliance can effectively protect the rights and interests of individuals and ultimately enhance administrative efficiency.

3. The APA is designed to ensure rights of defense for parties during administrative procedures, and to enable them to acquire sufficient information relevant to investigations, in which they are involved, in order to properly defend themselves<sup>1</sup>. To fulfill these objectives, Paragraph 1, Article 46 of the APA provides that the party or an affected person (i.e., an interested third party) may apply to an administrative authority to examine, transcribe, copy or take photographs of relevant materials or records. In addition to this, Article 9 also states that an administrative authority shall take into consideration all circumstances favoring or hindering the parties in applicable administrative procedures.

4. The materials and files that parties or interested third parties are granted by administrative authorities to access are limited to the extent necessary to claim or protect their legal interests<sup>2</sup>. On the other hand, administrative authorities cannot deny any application for access to files without justification. A request for documents and information can be refused only if it meets one of the following circumstances<sup>3</sup>: (1) where drafts and other preliminary operational documents are prepared before an administrative authority adopts its decision; (2) where information concerns national defense, military, diplomacy and any other official secrets, which is legally required to be kept confidential; (3) where information concerns personal privacy, professional confidentiality and trade secrets, which is legally required to be kept confidential; (4) where the disclosure of information is likely to infringe any right of a third party, and (5) where the disclosure of information is likely to interfere significantly with performance of official duties

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<sup>1</sup> Furthermore, Paragraph 4, Article 46 of the APA provides that “Where a party finds any error in the materials or records referred to in paragraph 1, concerning the party himself, he is entitled to request the administrative authority to make correction upon producing proofs of the facts.”

<sup>2</sup> The proviso to Paragraph 1, Article 46 of the APA.

<sup>3</sup> Paragraph 2, Article 46 of the APA.

concerning social security, public safety and the public interest. It is permissible to examine any part of the information specified under (2) and (3), which need not be kept confidential<sup>4</sup>. In practice, where any document or material in a case file is required to be kept confidential, it will be removed, sealed or redacted from the party requesting to examine it.

## 2. Procedures and practices associated with access to files during investigation

5. Given the importance of transparency and fairness throughout the investigation procedure, from the initiation of an investigation to the adoption of a decision made by the CTFTC, the parties involved will be given opportunities to make statements and defend themselves from accusations against them as well as access evidence in relevant files. The parties will also be informed of the CTFTC's competition concerns in order to guarantee the parties' rights of defense. In terms of determinations on requests for access to files, the CTFTC should comply with Article 46 of the APA and the rules detailed in the CTFTC's "Directions on Application for Access to Files and Documents".

6. Only parties involved in investigations and interested third parties, whose rights or legal interests will be affected by such administrative procedures, have access to materials and files. Before accessing files, an application form is required to be submitted with a case name, purposes and an intended scope of access. When an interested third party applies to access files, how his/her legal interests may be affected needs to be clarified in the application form in addition to the above requirements.

7. The CTFTC, upon receiving an application, shall notify providers of information to make comments within 10 days, except where they have agreed to provide or make the information available to the public during the investigation process. If providers of information do not reply within the timeframe, the CTFTC is able to approve or deny the access request at its sole discretion. In the case where providers of information submit comments, those comments will simply be used as non-binding reference for the CTFTC to determine the scope of files and documents available to be accessed. In general, the CTFTC will decide whether to approve such an application within 15 days from receiving the application form, or the day after the deadline for which providers of information are required to submit comments.

8. As mentioned above, the materials and files obtained from investigations can only be accessed to the extent necessary to protect the legal interests of parties or interested third parties. Based on an applicant's status and the criteria of Article 46 of the APA, the CTFTC provides a list of accessible and inaccessible materials and documents as per the table below:

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<sup>4</sup> Paragraph 3, Article 46 of the APA.

Source	Category	Item	Accessibility
Information obtained from parties involved in investigations	Identification of complainants or respondents (i.e., enterprises alleged to violate the Fair Trade Act)	Certificates of business registration and/or identity documents	Inaccessible
	Factual materials provided by complainants or respondents	Information on production and sales, written and/or oral statements and other information relevant to investigations	Factual materials can generally be accessed unless otherwise specified in the following circumstances where: such information is regarded as being of a confidential nature. the CTFTC considers that the request for confidentiality made by any of the complainants or respondents can be justified. disclosure of information is likely to interfere with performance of the CTFTC's official duties concerning the public interest.
		Information irrelevant to investigations (simply in connection with other laws and regulations)	Inaccessible
Information obtained from related parties	Background information of related parties	Certificates of business registration and/or identity documents	Inaccessible
	Factual materials of related parties	Information on production and sales, written and/or oral statements and other information relevant to investigations	Factual materials can generally be accessed unless otherwise specified in the following circumstances where: the CTFTC considers that the request for confidentiality made by any of the related parties can be justified. disclosure of information is likely to interfere with the performance of the CTFTC's official duties concerning the public interest.
		Information irrelevant to investigations (simply in connection with other laws and regulations)	Inaccessible

Source	Category	Item	Accessibility
Information obtained from the CTFTC's investigation	Records of oral statements		Accessible in general except that: such information is classified as confidential. the CTFTC considers that the request for confidentiality made by the respondent can be justified. disclosure of information is likely to interfere with the performance of the CTFTC's official duties concerning the public interest.
	Expert opinions	Expert testimony	Accessible in general except that: experts or providers of professional opinions request confidentiality. disclosure of information is likely to interfere with the performance of the CTFTC's official duties concerning the public interest.
		Professional opinions	
		Identification of experts	Inaccessible
	Opinions from discussion fora	Records of individual attendees' opinions	Accessible in general except that: attendees request confidentiality. disclosure of such opinions is likely to interfere with the performance of the CTFTC's official duties concerning the public interest.
		Summary of conclusions	Accessible
	Opinions obtained from business associations or other organizations		Accessible
	Opinions or materials provided by other government agencies	Agencies' written opinions or oral statements made by their representatives	Accessible in general except that: agencies request confidentiality. disclosure of information is likely to interfere with the performance of the CTFTC's official duties concerning the public interest.
	Materials relating to identities of applicants who apply for immunity or reduction of fines	Conversation records and original documents with identities of the applicants, as well as other documents that are more likely to reveal identities.	Inaccessible

9. To ensure reasonable opportunities for enterprises involved in investigations to defend themselves, the CTFTC usually allows them to examine relevant evidence and materials obtained from investigations. Nevertheless, the CTFTC has discretion to disclose information in part in any of the following circumstances: 1) where such information concerns personal privacy, professional confidentiality and trade secrets, which is legally required to be kept confidential; 2) where the disclosure of such information is likely to infringe any right of a third party; 3) where the disclosure of such information is likely to interfere significantly with the performance of official duties concerning social security, public safety and other duties in the public interest. Upon requests for confidentiality made by providers of information, the CTFTC can also approve or deny such requests after taking into consideration the reasons for seeking access to files, the need for confidentiality and parties' rights of defense on a case-by-case basis.

10. Any party, to whom approval to access specific documents enclosed in a case file is given, must go to the CTFTC's office on the designated date. It will then be able to examine, transcribe, copy or photograph the accessible materials in the CTFTC's inspection room after its identity has been verified. Any inaccessible materials will be removed or sealed by CTFTC staff to keep them separate from the rest of the documents in the case file. The party is prohibited from adding comments to, tampering with, removing and replacing, marking or defacing the documents. The CTFTC can withdraw its approval and stop access if a party ignores the on-site instructions of the responsible official(s) and any prohibited conduct continues. Any information and materials obtained from examining case files may not be used for any other purpose but for the case itself.

### 3. Legal requirements in relation to rights of defense for enterprises subject to investigations

11. In other jurisdictions, including the EU, access to documents and information in a case can only be granted after the competition authority carries out an investigation and then issues a Statement of Objections on the basis of its preliminary findings. After receiving the Statement of Objections, the parties under investigation can request access to the case file and defend themselves effectively. By contrast, in Chinese Taipei, the APA does not impose limits as to when parties or interested third parties can make requests to access files and the number of times they are allowed to access them, nor does the CTFTC impose such limits during the investigation. Parties and interested parties can access materials and documents in case files at any time until the corresponding investigations are closed or completed.

12. Soon after the CTFTC initiates an investigation ex officio or upon a complaint(s), an inquiry with the alleged infringements will be sent to respondents<sup>5</sup>. The inquiry not only takes into account the alleged violations and applicable provisions of the Fair Trade Act, but also requires respondents to reply to questions listed in the inquiry and provide relevant

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<sup>5</sup> Article 39 of the APA provides as follows:

“Where it is necessary for the purpose of inquisition into facts and evidence, an administrative authority may give any related person a written notification, requiring that he appear to give his opinions.

The notification shall give such details such as the purpose of the inquiry, the time and place where the person notified is required to appear, whether or not he is allowed to appoint another person to appear on his behalf, and the consequence for failure to appear.”

documents<sup>6</sup>. During the early stages of investigations, respondents or related parties are usually required to submit written responses, while the CTFTC can directly request that they appear and make oral statements to the extent necessary to clarify the facts. Such oral statements will be recorded in a uniform format in compliance with applicable regulations. Later the CTFTC may make further inquiries and ask respondents to submit supplementary information or appear to make oral statements again if it is necessary. Before a conclusion on the investigative findings is reached in the Commissioners' meeting, the CTFTC may inform respondents of competition concerns and suspected violations in a timely manner and provide them with opportunities to exercise their rights of defense<sup>7</sup>. Consequently, respondents can access materials in the case file in order to examine evidence obtained therefrom and then submit supplementary information to elucidate themselves. Each respondent can be protected by due process of law any time before an investigation closes.

13. Prior to a substantive decision (a final determination of violations) being made by the CTFTC, its decision to approve or refuse access to files during the investigation cannot be appealed against. This procedural decision can only be challenged when the party or the interested third party appeals against the associated substantive decision<sup>8</sup>, which has an adverse impact on them.

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<sup>6</sup> Paragraph 1, Article 104 of the APA provides as follows:

“When offering the person subject to the disposition an opportunity to state his opinions, the administrative authority shall give such person a written notice containing the following particulars and shall cause it to be published if necessary: 1. the name of the person subject to the disposition and his place of domicile or residence and business office or business establishment; 2. The cause in fact for and the legal basis on which the administrative disposition restraining or taking away a particular freedom and right is rendered; 3. explanation to the effect that a written statement may be submitted under Article 105 hereof; 4. the time limit within which the written statement, if any, must be submitted and the consequence of non-submission of the statement; 5. other matters as may be necessary.”

In addition, Paragraph 1, Article 105 provides that “A person subject to the administrative disposition who presents a written statement under the preceding article shall state therein the facts and his point of law”.

<sup>7</sup> Article 102 of the APA provides as follows:

“An administrative authority shall, before rendering an administrative disposition to impose restraint on the freedom or right of a person or to deprive him of the same, give the person subject to the disposition an opportunity to state his opinions, unless a notice has been given to the person subject to the disposition under Article 39 hereof to enable him to state his opinions or it has been decided that a hearing will be held, except where it is otherwise prescribed by law”.

<sup>8</sup> Article 174 of the APA provides as follows:

“If the party or an affected person is dissatisfied with the decision made or the action taken by an administrative authority in conducting the administrative procedure, he may file a statement to this effect only if and when he is also dissatisfied with the substantive decision and files a statement therefor; provided that this does apply where the decision made or the action taken by an administrative authority is enforceable or it is otherwise provided for in this Act or any other law or regulation.”

## 4. Definition of confidential information

14. Confidential information can be classified as “national security information”<sup>9</sup> and “general official information”<sup>10</sup>, which are respectively subject to the National Security Information Protection Act (hereinafter referred to as the “NSIPA”) and other applicable laws. Information classified as “general official information” means any information held or maintained by a government agency with a statutory duty of confidentiality (except for that required by the NSIPA) – for example, trade secrets, public procurement information, personal information or complaints about infringements. Furthermore, the CTFTC has developed an internal guidance<sup>11</sup> on the classification of confidential information, which may include information provided by enterprises involved and the related parties; internal investigative process or decision-making process; materials not yet resolved in Commissioners’ meetings; information obtained from industrial inquiries; identities of complainants and trade secrets received through investigations.

## 5. Provisions to safeguard confidential information in Chinese Taipei

### 5.1. Appropriate measures to protect confidential information

15. Once any information obtained by the CFTFC is classified as “official”, specific regulations apply to each stage of handling such information, from receiving, distributing, using, maintaining, copying and transferring it in accordance with relevant laws and the “Guidance on Handling Official Documents”. When materials submitted by foreign companies are considered as trade secrets, they will be protected under applicable laws in the same manner as those submitted by domestic companies<sup>12</sup>.

16. Considering the balance among rights of access to files, the public interest and confidentiality of information provided by parties and interested third parties, confidential information is generally not accessible, and will be either redacted or removed from a case file. The identity of a leniency applicant shall also be kept confidential, unless otherwise agreed by the applicant in advance, to minimize the risk of identity disclosure during an investigative process and/or appeal process and avoid retaliation. The identity disclosure may lead to difficulties in collecting additional evidence to establish a cartel case and reduce incentives to apply for leniency. Conversation records and original documents with identities of leniency applicants, as well as other documents that are likely to reveal identities, need to be sealed separately using special file covers. Such records and

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<sup>9</sup> Article 2 of the National Security Information Protection Act states that “The term *classified national security information* referred to in this Act means information that is owned by, or under the control of the Government and that has been determined pursuant to this Act to require protection against unauthorized disclosure, and that is so designated according to its level of classification for the purpose of safeguarding national security or the national interest.” It may include classified official information relating to military plans, weapon systems, military operations, diplomatic matters and ICT in the public sector.

<sup>10</sup> “General official information” is defined under Point 51 of the “Guidance on Handling Official Documents” issued by the Executive Yuan.

<sup>11</sup> The “Classification of Confidential Information held by the CTFTC”.

<sup>12</sup> Point 12 of “Directions on Cases Involving Foreign Enterprises”.

documents cannot be accessed by or provided to any agencies, groups or individuals other than prosecution and judicial agencies unless otherwise stipulated under applicable laws<sup>13</sup>.

## 5.2. Liabilities for breaches of confidentiality

17. To prevent confidentiality breaches, relevant administrative laws and criminal laws impose administrative or even criminal sanctions on civil servants who breach confidentiality obligations. Civil servants are required to carry out an unconditional duty of confidentiality under Article 4 of the Civil Service Code. The provision serves as an overarching principle and any specific responsibility or sanction for a failure to maintain confidentiality is provided for under different laws, such as the NSIPA or Criminal Act.

18. First, a sentence may be imposed on a civil servant, who intends to disclose, deliver, pry into or collect classified national security information and classified general official information<sup>14</sup>. In terms of administrative responsibilities, when civil servants reveal classified information and such a breach constitutes a dereliction of duty, they may face disciplinary dispositions<sup>15</sup> and receive demerits<sup>16</sup> (the most severe breach can lead to dismissal). Furthermore, civil servants may be liable for damages claims arising from their intentional or negligent breach of confidentiality under the Civil Code<sup>17</sup>. When civil servants breach confidentiality in performing their duties and in the exercise of public functions, any person whose rights have been violated by such behaviors may be entitled to claim compensation from the government<sup>18</sup>. A list of liabilities and their legal basis that may apply to civil servants who reveal confidential information is provided below:

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<sup>13</sup> Article 20 of “Regulations on Immunity and Reduction of Fines in Illegal Concerted Action Cases”.

<sup>14</sup> Articles 32- 34 of the NSPIA; Articles 109-112, 132, 317, 318 of the Criminal Code; Article 13-1 and 13-2 of the Trade Secrets Act.

<sup>15</sup> Article 2 of the Civil Service Disciplinary Code states that “If necessary, a disciplinary action against a civil service employee may be appropriate for one of the following types of conduct: 1. illegal performance of public duties, dereliction of duty and other omissions; 2. illegal conduct irrelevant to public duties, resulting in severe damage to the Government’s reputation and credibility”.

<sup>16</sup> Subparagraph 2, Paragraph 3, Article 12 of the Civil Service Performance Evaluation Act states that “When a civil servant does not make his/her best efforts to implement a national policy, or performs his/her duties neglectfully or reveals confidential information obtained from work, which may result in severe damage to the Government, he/she will immediately receive two demerit points and, in the most severe cases, he/she may be dismissed.”

<sup>17</sup> Article 13-1 and 13-2 of the Trade Secrets Act; Paragraph 1, Article 12 of the Trade Secrets Act.

<sup>18</sup> Paragraph 2, Article 2 of the State Compensation Law provides that “The State shall be liable for any damage arising from the intent or negligent act of any employee of the Government acting within the scope of his or her office or employment which infringes upon the freedom or right of any person. The same shall be applied when the damage results from the omission of any employee of the Government.”

Liabilities	Relevant Laws (an inclusive but not exhaustive list)
<b>Criminal</b>	Articles 32- 34 of the NSPIA Articles 109-112, 132, 317, 318 of the Criminal Code Article 13-1 and 13-2 of the Trade Secrets Act
<b>Administrative</b>	Article 2 of the Civil Service Disciplinary Code Subparagraph 2, Paragraph 3, Article 12 of the Civil Service Performance Evaluation Act
<b>Civil</b>	Article 13-1 and 13-2 of the Trade Secrets Act Paragraph 1, Article 12 of the Trade Secrets Act Paragraph 2, Article 2 of the State Compensation Law

## 6. Restrictions on sharing information with other government agencies and foreign competition authorities and practical experiences

19. In some cases in connection with other government agencies' competence or litigation proceedings, the CTFTC may provide relevant information to other administrative agencies, legislative or judicial agencies upon request. However, the CTFTC may decline such requests if any information contained in requested documents is required to be kept confidential under any of the following circumstances: 1) confidentiality is expressly stated in international treaties, agreements or MOUs; 2) it involves an on-going investigation; 3) the provision of information may impair the national interest. When confidential information concerns personal data or trade secrets, the CTFTC may provide it to the requesting agency in a sealed case file or otherwise appropriate manner, and require the requesting agency to treat it confidentially<sup>19</sup>.

20. In respect of international cooperation on competition enforcement, the CTFTC may be able to exchange information under bilateral trade agreements or MOUs, when the reciprocity principal is applied, and the counterpart agency protects information in the same manner as the CTFTC. However, the scope of information exchange between two jurisdictions is subject to respective domestic laws and regulations (for example, the NSPIA, Trade Secrets Act and Personal Data Protection Act in Chinese Taipei).

21. Considering the importance of international cooperation in reviewing cross-border merger cases and detecting international cartels, the CTFTC uses informal communication channels (emails and phone calls) to actively share its empirical experience and observations with foreign competition authorities. Such sharing is limited to non-confidential information, which may include market scope, product and geographic market definition, investigation procedures, investigative techniques and application of economic analysis. The cartel between optical disc drive makers (HP and Dell) was the first leniency case in Chinese Taipei. In this case, the CTFTC obtained voluntary confidential waivers during the investigation and then empowered itself to have discussions on this case by phone with the Canadian and EU competition agencies in order to benefit the CTFTC's further investigation<sup>20</sup>. In Chinese Taipei no confidential information will be exchanged through informal cooperation, for example during teleconferences, and no meeting minutes from any such discussions will be made available to be used as evidence.

<sup>19</sup> The CTFTC's guidance on handling requests for information from other government agencies.

<sup>20</sup> This case was presented at the "10<sup>th</sup> Anniversary Celebration and Workshop: International Cooperation in Cross-Border Competition Cases", organized by the OECD/Korea Policy Centre, Competition Programme in 2015.

## 7. Conclusions

22. It is essential for parties involved in investigations to express their opinions and answer factual questions as well as address legal issues raised by government agencies. The rights of defense are expressly stipulated in the APA. To make an appropriate decision, taking into account all circumstances favoring or hindering the parties, the CTFTC conforms with the applicable provisions of the APA, in particular in relation to access to case files. The scope and key characteristics of access are as follows:

1. To protect parties' rights of defense, information in a case file is generally accessible except for information that is required to be kept confidential under applicable laws.
2. Parties and interested parties can access materials and documents in case files at any time from the initiation of an investigation to the adoption of a decision made by the CTFTC. After examining files and relevant evidence, parties can be better equipped to defend themselves. Each party can also be protected by due process of law.
3. The procedural decision of approval or refusal of access can only be challenged when the party or the interested third party appeals to the courts against the associated substantive decision.

23. Although the right of access to files is crucial to parties under investigation, the scope of disclosure is subject to applicable laws. Information obtained from the CTFTC's investigations, including sensitive information submitted by complainants and leniency applicants and trade secrets may be classified as confidential. Therefore, the CTFTC intends to strike a balance among protection of access, collaboration with other government agencies and ensuring confidentiality by following the practical principles below:

1. Confidential information needs to be securely stored and disposed of in an appropriate manner. Civil servants are obliged to carry out their legal duties in relation to confidentiality under various laws.
2. When receiving a request for access, the CTFTC will first seek approval from the providers of the information. If any information contained in a case file is classified as "confidential", it needs to be removed, redacted or sealed prior to disclosure of the file.
3. When other government agencies require the CTFTC to provide confidential information concerning personal data or trade secrets, the CTFTC may provide it to the requesting agency in a sealed case file or otherwise appropriate manner. Other types of confidential information are usually inaccessible.
4. Subject to domestic legal restrictions, in general, only non-confidential information, including empirical enforcement experience and observations, can be shared with foreign competition authorities.