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Working Party No. 3 on Co-operation and Enforcement

USE OF MARKERS IN LENIENCY PROGRAMS

-- Chinese Taipei --

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*More documents related to this discussion can be found at:
<http://www.oecd.org/daf/competition/markers-in-leniency-programmes.htm>*

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1. Relationship between Leniency Programs and the Marker System

1.1 A Brief Description of Chinese Taipei's Leniency Policy

1. The leniency program was introduced in Article 35-1 of the Fair Trade Act (FTA), which was added in the amendment on November 23rd, 2011. Details of the leniency program are set forth in the "Regulations on Immunity and Reduction of Fines in Illegal Concerted Action Cases" (hereinafter referred to as the "Leniency Regulations"), which was enacted in accordance with Paragraph 2 of Article 35-1 of the Fair Trade Act. The Leniency Regulations were promulgated and took effect on January 6th, 2012.

2. The Leniency Regulations originally stipulated that enterprises could only apply for leniency in writing, and any applications submitted orally would not be accepted. After referring to the leniency programs of the EU and Japan, the Leniency Regulations was amended on August 22nd, 2012 to allow applications for leniency to be made either in writing or orally.

3. Corresponding to international trends in competition law:

1. The FTA imposes administrative fines on enterprises participating in concerted actions (precedence of administrative remedies over judicial adjudication). Hence, the content of Chinese Taipei's leniency program is similar to that of the leniency program adopted by the EU.

2. As described in the general provisions of the Leniency Regulations, Chinese Taipei's competition law and policy were reviewed by competent authorities of competition law from over seventy countries. The peer review report of the Global Forum on Competition of the OECD on February 9th, 2006, suggested that the FTC adopted a leniency program to fight against hard core cartels. Considering that collecting evidence on concerted actions has indeed become increasingly difficult in the years in which the Fair Trade Act has been in force, the FTC amended and promulgated Article 35-1 of the FTA on November 23rd, 2011 to correspond to international trends in competition law. The amendment introduces the leniency program/policy with a view to effectively deterring illegal concerted actions.

3. Amnesty plus is a design of the leniency program to encourage other enterprises within a cartel to come forward with evidence, which may be insufficient when the leniency program only grants full immunity to one applicant. Amnesty plus expands the scope of the leniency program and allows the competent authority to uncover other illegal concerted actions. Chinese Taipei's leniency program uses a "limited number of applicants" and a "diminishing reduction of fines" to encourage potential applicants to come forward as early as possible and provide the FTC with evidence of illegal concerted actions. Hence, although only the first applicant is granted full immunity, 4 subsequent applicants are also granted reductions in their administrative fines. The limit on the number of applicants encourages potential applicants to come forward, and enables the FTC to gather sufficient evidence on concerted actions, achieving the legislative purpose of the leniency program. Hence, Chinese Taipei's current leniency program does not offer amnesty plus.

1.2 Relationship between Leniency Programs and the Marker System

4. Relationship between Leniency Programs and the Marker System

1. The leniency program specified in the Leniency Regulations requires cartelists to come forward with evidence of illegal concerted actions before the FTC is aware of the agreement or initiates an investigation, and to assist with the investigation in return for immunity or a fine reduction. The purpose of the leniency program is to improve the results of investigations and thus deter

illegal concerted actions. In other words, enterprises participating in a concerted action may be granted immunity or a fine reduction if they come forward with evidence before the FTC is aware of the agreement or initiates an investigation, and assists with the investigation.

2. The “marker” system is a part of the leniency program that allows the first enterprise to come forward even though it has insufficient evidence to temporarily preserve its status as the first applicant, provided that it can gather sufficient evidence within a specified time period.
3. The Leniency Regulations put the “marker” system in writing in Article 11, which states that enterprises intending to apply for immunity, but that are currently unqualified to file the application as set forth in Paragraph 1 of Article 10 because they do not have the information and evidence stated in Articles 3 to 5, may first apply to preserve the priority status that they may be granted for immunity from being fined, and then gather the required information and evidence within the period specified by the FTC to gain immunity. In other words, the marker system in Chinese Taipei only applies to the applicant for full immunity, i.e., the first enterprise to come forth, and is not applicable to any subsequent applicants for a fine reduction.

2. Regulations of the Marker System

2.1 *Legislative Purpose of the Marker System*

5. Adopting the “marker” system will allow the competent authority to save on investigation costs, discover illegal actions in time, and prevent further harm from being done. It allows the competent authority to gain information on illegal concerted actions as early as possible. Enterprises may use the “marker” system to temporarily secure immunity before they obtain substantial evidence of an illegal concerted action, and are thus more motivated to voluntarily come forward.

2.2 *Application Procedures and Effects*

6. An enterprise that intends to apply for the preservation of its priority status in accordance with Article 11 of the Leniency Regulations may do so either in writing or orally, and shall state the reason for its application and the facts of the concerted action, including the product or service involved, the form of concerted action, the enterprises involved, the time and place of the agreement, the duration of the concerted action, and the geographical area influenced by the concerted action; the enterprise shall also describe the evidence that it intends to produce.

7. After the FTC receives an application from an enterprise to preserve its priority status for immunity, the FTC examines the application by focusing on the following in the order given: (1) First, the FTC checks if any other enterprises have already filed an application for the same concerted action. (2) Next, the FTC verifies whether the applicant is truly and sincerely preparing to produce the evidence. (3) Finally, the FTC considers the reason given by the applicant before deciding whether or not to approve the application for the preservation of priority status for immunity.

8. After an enterprise’s application to preserve its priority status for immunity is approved, the enterprise shall follow the FTC’s instructions in each of the following situations:

1. If the application was filed before the FTC was aware of the agreement or initiated an investigation, the applicant must describe the details of its involvement in the concerted action, and produce evidence that the FTC is unaware of or does not have. The applicant must give the FTC a general understanding of the facts of the concerted action, as well as the time, place, content, and other matters concerning the agreement between the parties to engage in the concerted action, so that the FTC may initiate an investigation.

2. If the application was filed after the FTC launched an investigation, the applicant must describe the details of its involvement in the concerted action, and produce evidence it already has during the application that can prove its involvement in the illegal concerted action. Furthermore, the statement and evidence of the applicant must be of significant help in the FTC's investigation on the concerted action in question.

9. The evidence referred to above must be produced within the period specified by the FTC. The period will be determined by the FTC based on considerations of various factors, such as the difficulty for the enterprise to acquire such evidence, but will be 30 days in principle. The specified period may be extended where necessary after gaining the FTC's approval. The enterprise's priority status that was preserved, however, will become ineffective if an application for an extension is not filed before the specified period expires.

3. "Anonymity" in the "Marker System"

3.1 Regulations on "Anonymity" in the Leniency Regulations

10. Considering that disclosing the applicant's identity during the investigation might have adverse effects on the applicant and will also affect the FTC's investigation and evidence gathering, and that the identity of the applicant cannot be protected in the administrative remedy process after the FTC issues a disposition without a legal basis, the FTC has stipulated in Article 20 of the Leniency Regulations that the identity of the enterprise applying for immunity or a fine reduction shall be kept confidential unless the enterprise agrees otherwise. The FTC is responsible for keeping the identity of the applicant confidential, and conversation records and documents containing the applicant's true identity may not be provided to any agencies, groups or individuals other than investigation and judicial agencies unless otherwise stipulated. Prior consent may be given voluntarily by the enterprise, but is not an obligation of the enterprise applying for immunity or a fine reduction.

11. Paragraph 1 of Article 20 of the Leniency Regulations stipulates that the identity of the enterprise applying for immunity or a fine reduction shall be kept confidential unless the enterprise agrees otherwise. Hence, when an enterprise applies to preserve its priority status for immunity under the marker system, the FTC shall keep the identity of the enterprise confidential unless the enterprise agrees otherwise.

3.2 The leniency program of Chinese Taipei currently does not include stipulations or a policy on "confidentiality waivers"

12. The "confidentiality waiver" was designed for cases that involved the exchange of classified information between countries. Law enforcement experiences of other countries show that confidentiality waivers play a considerable role in investigations into international cartels. In other words, when the enterprise applying for leniency signs a confidentiality waiver, the competent authority may inform other competent authorities of competition law regarding the cartel investigation when the investigation is first launched, and may exchange or share information regarding the case in question. The extent of information exchange is based on the competition law and relevant laws of each country.

13. Although the leniency program of Chinese Taipei does not include provisions on confidentiality waivers, during an investigation on concerted actions, if the FTC needs to exchange or share information about the enterprise applying for leniency with other competent authorities of competition law, the FTC may still gain the enterprise's "prior consent" in accordance with Article 20 of the Leniency Regulations, and it will relieve the FTC of its obligation to keep the enterprise's identity confidential. Furthermore, the Leniency Regulations do not limit the form of the applicant's "prior consent." If the applicant voluntarily agrees to provide its identity to other competent authorities of completion law, in practice the FTC will have the applicant sign a written consent form as evidence of the applicant's prior consent.

14. The use of confidentiality waivers in leniency programs is currently a topic of great concern in international society, because countries all believe information exchange (especially the exchange of classified information) to be important in investigations, especially international cartel investigations. The FTC will continue to follow developments regarding this topic, and will use it as a basis for considering whether or not to add provisions on “confidentiality waivers.”

4. Case Study

15. Toshiba-Samsung Storage Technology Korea Corporation (hereinafter referred to as “TSSTK”), Hitachi-LG Data Storage Korea Inc. (hereinafter referred to as “LDSK”), Philips & Lite-On Digital Solutions Corporation (hereinafter referred to as “PLDS”) and Sony Optiarc Inc. engaged in a concerted action in the optical disc procurements of Dell Inc. and Hewlett-Packard Company between September 2006 and November 2009. Before or during the tender process, the four companies would contact each other via e-mail, telephone, or meetings to exchange information, such as their offer and expected place in the tender, and reached agreements on several occasions on the final price and place in the tender. Furthermore, the companies often exchanged information sensitive to competition, such as production capacity and output. This conduct was sufficient to impact the supply and demand in the domestic optical disc drive market, and violated Article 14 of the Fair Trade Act. The FTC therefore issued disposition on September 19th, 2012. Besides ordering the companies to immediately cease their unlawful act, the FTC imposed administrative fines of NT\$25 million, NT\$16 million, NT\$8 million and NT\$5 million on the companies.

16. One of the enterprises concerned in this case learned that the FTC had adopted the leniency program, and thus voluntarily came forward and applied for immunity in accordance with the Leniency Regulations. The enterprise also submitted a written application to the FTC to preserve its priority status for immunity because it did not have sufficient evidence. The enterprise provided all the facts of its involvement in the cartel, including the product or service involved, the form of concerted action, the enterprises involved, the time and place of the agreement, the duration of the concerted action, and the geographical area influenced by the concerted action, within 30 days after filing the application. It also produced evidence of the facts to gain immunity from an administrative fine. After examining the evidence provided by the enterprise, the FTC granted a “conditional consent,” in which it instructed the enterprise to cease all participation in the concerted action during the FTC’s investigation, and to assist with the investigation. The enterprise was granted immunity from an administrative fine after complying with the conditions in the FTC’s “conditional consent.”

17. This is the first international cartel case decided by the FTC since the leniency program was introduced on November 23rd, 2011. It is also the first case where an enterprise applied for full immunity for an administrative fine and also applied for the “marker” system for the immunity. The case was exceptionally meaningful to the FTC’s law enforcement as both of the applications were approved. Since the enterprise did not sign a confidentiality waiver, the FTC was required to keep the identity of the enterprise confidential in accordance with Article 20 of the Leniency Regulations. After the disposition was issued, TSSTK found the decision to be unacceptable and filed for an administrative remedy on October 18th, 2012; the procedures for administrative remedies are currently ongoing.

5. Conclusion

18. The FTC adopted a leniency program to correspond with the international trend, and put the marker system down in writing. This leniency program, however, has only been in effect for a short amount of time, and there is currently only 1 case where an enterprise applied for a marker under it. Still, the FTC has ongoing consultations and applications.

19. In order to let the public fully understand the relationship between the leniency programs and the marker system, the FTC not only provides relevant laws and information on its website, but also actively provides details of the leniency program and marker system to enterprises. The FTC thus hopes to encourage enterprises to apply for leniency, and also deter enterprises from participating in concerted actions, thereby preventing hard-core cartels from forming, while maintaining trading order throughout the market.