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### Procedure Transparency in the Taiwan Fair Trade Commission

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### I. INTRODUCTION

In the Taiwan Fair Trade Commission (“TFTC”), we trust that greater transparency will contribute to accomplishing our mission to maintain trading order and ensure free and fair competition. The implementation of procedure transparency helps companies comply with the competition laws and, as a result, effectively reduces the risk of law violations. The TFTC continues making efforts to raise competition awareness. On the basis of the TFTC survey, over 90 percent of participants who attended competition advocacy seminars, conferences, and related events in 2013 and 2014 have a better understanding of the Fair Trade Act.

A stronger procedure structure also provides parties under investigation opportunities to be heard and present evidence and arguments before being punished by governmental authority. To a greater extent, TFTC will be granted benefits from the fact that TFTC’s decisions would be challenged less often by the courts.

This article investigates procedure transparency at the Taiwan Fair Trade Commission and explores the recent amendments in the Fair Trade Act in the area of procedure transparency.

### II. THE RECENT AMENDMENTS TO PROMOTE TRANSPARENCY

The latest amendments to the Fair Trade Act were promulgated on February 4, 2015. The amendments cover a wide range of provisions under the FTA in line with rapid economic changes and these changes can better protect consumers from the harm caused by anticompetitive and unfair competitive practices.

The amendments were considered to be the most extensive reform since the implementation of the FTA in 1992. A number of significant changes that promote transparency are described as follows:

#### *A. Transparency in Court Procedure*

Based on the new Law, appeals to TFTC’s decisions would be taken directly to the Administrative Court, rather than an appeals committee responsible to the Executive Yuan. All TFTC’s decisions are to be scrutinized by an administrative review that focuses on not only whether decisions made by government agencies are lawful but also considers whether the decision is reasonable and appropriate for administrative purposes. To some extent the revision pushed the TFTC one step forward to a quasi-judiciary agency.

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### ***B. Enforcement Transparency in Cartel Detection***

Recognition of circumstantial evidences for concerted actions (cartels) in response to more sophisticated and clandestine concerted actions is now possible. The new Law employs circumstantial evidences for concerted actions (cartels) and a general clause of cartel exemption is listed explicitly.

### ***C. Enforcement Transparency in Merger Review***

When deciding whether (i) a transaction constitutes a merger under the Fair Trade Act and (b) whether the turnover threshold is met, the revised regulation prescribes that—in addition to considering shareholding and turnover of the merger parties' parent companies and subsidiaries—each affiliated company, where both it and the merger parties are controlled by the same company, should also be taken into consideration. In this regard, the new law can better capture transactions that may affect domestic markets.

### ***D. Enforcement Transparency in Defining RPM (Resale Price Maintenance)***

RPM is generally prohibited. The new law listed out four economically reasonable principles that business entities can apply to see if RPM is not a concern. The five reasonable principles listed in the Enforcement Rules of Fair Trade Act, Article 25, are: 1) promoting downstream efficiency and quality; 2) preventing free riding; 3) promoting new entry enterprises or new brands, 4) promoting inter-brand competition; and 5) considering other economic reasonable principles for competition.

### ***E. Procedure Transparency in Merger Review***

In a review, a broader coverage for the calculation of the turnover threshold and the notifying parties is identified and a longer review period for further merger review, from 30 days to 60 days, if necessary, is stipulated.

### ***F. Procedure Transparency in Administrative Penalties***

For restrictive competition cases, the expiration length of power to impose administrative penalties is extended from 3 years to 5 years.

## **III. THE PROCEDURE TRANSPARENCY IN THE ASIAN REGION**

According to the GCR report, total fines imposed by Asian competition authorities exceed U.S. \$1.7 billion in 2014, which may illustrate a wave of active competition enforcement actions in the Asian region. More and more significant cases have drawn the attention of the business sector, general public, and competition authorities in the rest of the world. Procedural fairness and transparency in Asian antitrust enforcement have been a hot issue over the past years, although these issues have not been limited to Asian jurisdictions. They should be a universal topic around the world and need to be widely discussed among the competition community to find out the best practice.

In my view, the best practices provided by the *ICN Guidance Document on Investigative Process*, OECD reports, and ICN guidelines are still applicable to the Asian region.

#### IV. FROM THE STANDPOINT OF BUSINESS PLANNING

From the standpoint of business planning, two dimensions of procedure transparency are worth noting in the TFTC— in clearing legal criteria and during the decision-making process.

To make businesses more aware of what constitute antitrust violations in Taiwan, the TFTC has developed various kinds of regulations, guidelines, and explanatory notes, and made its decisions public on its website. The related regulations guidelines and explanatory notes will interpret more details regarding legal standards used for enforcement. Besides, the disclosure of the TFTC's decisions may prevent market players from conducting any similar violations (chilling effect).

As for transparency in the investigation process, as early as we can, the TFTC will inform the parties of its investigation and competition concerns before conducting interviews or making compulsory requests for submission of relevant documents. It can ensure that the parties will defend themselves in a timely and appropriate way. For some complicated cases, the parties may apply for hearing proceedings.

The following two procedure stages are also important to reflect agency transparency in the TFTC.

A business has the opportunity to be heard by the agency based on the following laws:

1. Administrative procedure act, which was promulgated in 1999 and most recently amended in 2013.
2. FTC Guidelines on Oral Arguments in Cases, which was promulgated in 1996 and recently amended in 2012.
3. FTC Guidelines on the Procedure of Public Hearing, which was promulgated in 2000 and recently amended in 2014.

The access to and disclosure of public information based on the following laws:

1. The Disclosure of the Regulations, Guidelines, and Decisions; and
2. The Freedom to Reach Government Information Act, if not violating the Personal Information Act. Meeting Records of the agency shall be available to the public

Furthermore, in accordance with the Administrative Procedure Act (Article 46), any party or stakeholder may apply to our Commission during an investigation procedure to examine, transcribe, copy, or take photographs of non-confidential parts of relevant materials or records when these materials or records are necessary for claiming or protecting the requesting party's legal interests.

If the parties are still dissatisfied with the TFTC's decisions, they still have the last resort to execute their statutory right to appeal directly to the Administrative Court based on the sixth amendments came into force February 2015.