

Introduction on the Newly Enacted Leniency Program under Free Trade Act Of the Republic of China (Taiwan)

Introduction

Four internationally renowned optical disc drive companies were imposed a 54-million-New-Taiwan-Dollar (about US\$ 1.85 million) fine by the Taiwan Fair Trade Commission in September 2012, for participating in a series of conspiracies (involving some cross-board transactions) to rig bids (& price fixing) for the sales of optical disc drives to Dell and Hewlett-Packard (the “Price Fixing” matters). Their participation in such a series of conspiracies was considered as a “**concerted action**” and thus deemed violating, inter alia, the Fair Trade Act of the Republic of China (Taiwan). The Price Fixing matters have been investigated by many countries, including the U.S., European Union, and Korea. Taiwan government in its press release stated it was the first country to conclude the Price Fixing matters and to fine the violators, thanks to its newly enacted “Leniency Program”, that was introduced into the Fair Trade Act in November, 2011.

Definition of “Concerted Action”

According to the Article 7 of the Fair Trade Act, the term “**concerted action**” means the conduct of any enterprise, by means of contract, agreement or any other form of mutual understanding, with any other competing enterprise, to jointly determine the price of goods or services, or to limit the terms of quantity, technology, products, facilities, trading counterparts, or trading territory with respect to such goods and services, etc., and thereby to restrict each other's business activities. Additionally, the term is limited to horizontal concerted action at the same production and/or marketing stage which would affect the market function of production, trade in goods, or supply and demand of services. “**Concerted action**” used in the Fair Trade Law includes bid-rigging or price-fixing, which activity is often seen in news reports, and is called “**Cartel**” in some of other countries. A concerted action restrains other competitors from taking competitive actions in the free market and therefore deprives the

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consumers of their rights to enjoy the benefits arising and resulting from free competition. Therefore it is prohibited by the Taiwan Fair Trade Act and Anti-trust Laws in some of other countries.

Article 14 of the Fair Trade Act of the Republic of China has explicitly regulated that a “**concerted action**” is strictly prohibited under the law; and to introduce “**Leniency Program**” into the law, a new Article 35.1 was promulgated and Article 41.1 was amended accordingly in November, 2011, authorizing the Fair Trade Commission much more power to assess upon violating enterprises an administrative fine from 50 thousand to 25 million New Taiwan Dollars, and if such an enterprise fails to rectify the conduct within the time frame prescribed by the authority, the Fair Trade Commission may continue to order such enterprise to rectify the conduct within the time prescribed in the order, and may successively impose administrative fines each time until it rectifies its conduct. Additionally, the violator may be subject to imprisonment for not more than three years or detention, or by a criminal fine of not more than 100 million New Taiwan Dollars, or by both. More importantly, the Article 41.2 of the Fair Trade Act, which was newly promulgated in November, 2011, regulates that for an act that falls within the scope affirmed by the central competent authority to be a serious violation, it shall be subject to an administrative fine up to 10% of such enterprise’s total aggregate sales amount of its last fiscal year, and it is not prejudice to the fine stipulated in Article 41.1 of the Free Trade Act.

The Promulgation of the “Leniency Program”

Given the Fair Trade Act was in force since 1991, in light of the difficulty to gather evidence to prove a **concerted action**, the Fair Trade Commission introduced the “**Leniency Program**” into the law, and implemented it into newly enacted Article 35-1 on 23, November, 2011, which is read as follows:

“The central competent authority may grant waiver or reduction of fines imposed by Article 41 on enterprises that violate Article 14 but meet one of the following conditions:

1. The enterprise files a complaint or informs the central competent authority in writing about the concrete illegal conduct of the concerted action in which it has partaken and also submits the evidence and assists the investigation before the

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central competent authority is aware of the said illegal conduct or initiated an investigation in accordance with the law.

2. The enterprise reveals the concert illegal conduct as well as submits the evidence and assists the investigation during the period in which the central competent authority investigates the said illegal conduct in accordance with the law.

The central competent authority shall enact the regulations with regard to the eligibility of the subjects to whom the preceding paragraph applies, the criteria of the said waiver and reduction of the fine, the number of enterprises to be eligible for the said waiver or reduction of the fine, the procedures for the submission of evidence, the management of the non-disclosure of the identity of the subjects, and other matters in relation to the enforcement of the said regulations.”

To clarify the implementation issues of the “**Leniency Program**”, pursuant to Article 2 of Fair Trade Act, the Fair Trade Commission has so enacted the “**Regulations on waiver and Reduction of Fines in Illegal Concerted Action Cases**” as to give legal basis to grant a waiver or reduction of fines to such enterprises which take the initiative in revealing the **concerted action** as well as submitting the evidence and assisting the investigation.

Requirements for the “Regulations on waiver and Reduction of Fines in Illegal Concerted Action Cases”

The requirements for “Regulations on waiver and Reduction of Fines in Illegal Concerted Action Cases” are as follows:

1. Qualifications and eligibility for applying waiver and reduction of fines:

To be eligible and qualified to apply for a waiver or reduction of fines, the applicant shall not destroy, forge, alter or conceal evidence related to the **concerted action** in which they are involved, nor shall they directly or indirectly disclose to other parties their intention to apply for a waiver or reduction of fines or any content of the information they intend to provide to the central competent authority to apply for a waiver or reduction of fines.

2. Types of application and its requirements

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(1) Applying for a waiver of fines

- A. For those applications filed **before** the central competent authority is aware of the illegal conduct or initiates an investigation in accordance with the law, the application shall contain the concrete content of the violation and evidence submitted should provide a statement of concrete details of the **concerted action** concerned, along with evidence that the applicant has already possessed and is capable of proving the violation of the said **concerted action** and able to assist the central competent authority to initiate an investigation. As for what specific point in time is deemed to be the beginning of the investigation (i.e. the deemed timing when the authority becomes aware of a possible violation), **it shall be the date when the central competent authority begun to send out notifications or dispatch personnel to investigate.**
- B. For those applications filed **during the period** of the central competent authority's investigation, the concrete content of the violation and evidence submitted must be able to assist the central competent authority to establish the evidence proving the enterprises involved have violated the said regulation. Additionally, the evidence should be strong enough to be able to prove the accused's illegal activities. As for what period of time is deemed to be the central competent authority's investigation, it shall start at the date when the central competent authority initiated the investigation until the date when the central competent authority concluded its final decision to grant waiver or reduction of fines.

(2) Applying for reduction of fines

For those applications during the period of the central competent authority's investigation, the concrete content of the violation and evidence submitted must be able to assist the central competent authority to establish the evidence proving the involved enterprises have violated the said regulation of concerted action.

3. Approval with conditions precedent by the central competent authority

- (1) The central competent authority may grant a waiver or reduction of the fines on condition that the enterprise eligible for the application not only filed the

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application but also has met all the requirements for the conditions precedent.

- (2) The conditions precedent include that the applicant shall cease the concerted action immediately upon filing the application or at the time specified by the central competent authority, and from the time the application is filed until the case is concluded, the applicant shall follow the instructions of the central competent authority and provide honest, full and continuous assistance during the investigation. The assistance should include providing prompt description or cooperation to help the investigation to collect relevant evidence to prove the existence of the concerted action, allowing its staff members or representatives having participated in the concerted action to be interviewed by the competent authority, if necessary. The statement, information or evidence provided shall not be misrepresented, forged, altered or concealed. And without the consent of the central competent authority, the applicant may not disclose to any other parties any information related to the filing or content of the application before the case is concluded. Furthermore, the applicant should also follow the instructions specified by the central competent authority.

4. Requirements for waiver of fines

Under one of the following circumstances, a full waiver of the fines shall be granted:

- ① The enterprise is the first to apply for a waiver of fines **before** the central competent authority initiated an investigation in accordance with the law, and the central competent authority has thus granted the waiver on conditions that all the requirements under the conditions precedent must be fulfilled.
- ② The enterprise is the first to apply during the central competent authority's investigation, and no any other enterprise is applying for a waiver of fine under the category ① mentioned above; provided that the central competent authority has granted the waiver with conditions precedent, and the enterprise has fulfilled all the requirements as per the conditions precedent.

5. Requirements and criteria for reduction of fines

- ① Only the first four enterprises applying for a fine reduction during the central competent authority's investigation are eligible for the reduction of the fines; provided that the central competent authority has agreed to reduce the

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finer, and the enterprise has fulfilled all the requirements under the conditions precedent.

② The proportions of the fine reduction stated in the preceding paragraph are as follows:

a. The first applying enterprise who meets the requirements shall be granted a 30% to 50% reduction of the statutory imposed fine.

b. The second applying enterprise who meets the requirements shall be granted a 20% to 30% reduction of the statutory imposed fine.

c. The third applying enterprise who meets the requirements shall be granted a 10% to 20% reduction of the statutory imposed fine.

d. The fourth applying enterprise who meets the requirements shall be granted a reduction up to 10% of the statutory imposed fine.

6. The final decision of waiver or reduction of fines

When the investigation is concluded, the central competent authority shall grant a full waiver or reduction of fine to enterprises that it considers meeting the requirements for a full waiver or reduction; provided that there is no non-compliance on the part of the enterprise for the central competent authority to revoke the waiver.

7. Other requirements

① The Procedures

In addition to the filing requirements stated above, enterprises applying for a waiver or reduction of fines should follow the documentation requirements as set forth by the central competent authority to file the written application either by registered mail or by walk-in application. In the event the application is intended to file orally, the applicant should have its representative to visit to the central competent authority's office, have his/her statement recorded by the central competent authority, and have the recorded statement signed by the representative.

② Preservation of the priority status

For those enterprises intending to apply for a fine waiver or reduction but possessing no available information and evidence at the time, they may present a written or oral statement to apply with the central competent authority first to preserve their priority status for the waiver or reduction for the time being; provided that those enterprises given the priority status preservation should provide the information and evidence within the specified period as prescribed by

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the authority.

③ To handle/manage documents containing the identity of the applying enterprise

Unless agreed in writing, the identity or relevant information of the applying enterprise recorded or contained in depositions and/or other documents should be kept in confidence to protect it from disclosure and prevent causing harm to said enterprise.

④ To keep the applying enterprise's identity in confidence

To avoid any third party's giving the applying enterprise its revenge, it is necessary to protect the applying enterprise's identity from disclosing during the course of conducting investigation procedures and the relevant administrative remedies. The identity of the applying enterprise should be kept in confidence by means of taking similar measures as employed by the Witness Protection Act.

⑤ To grant waiver for enterprise & its legal representatives

For those board directors, representatives, managers of an enterprise involved in the concerted activities or those having obtained the authority to represent the enterprise, who by the definition set forth in Paragraphs 1 and 2 of Article 15 or Article 16 of the Administrative Penalty Act are to be jointly subject to the punishments, they may be granted a waiver or reduction of fines at the same time if they met any of the following requirements:

- a. The involved enterprise meets all requirements and may be granted waiver or reduction of fines.
- b. The said parties provide honest and full statements with regard to the unlawful act.
- c. The said parties follow the instructions of the central competent authority and provide honest, full and continuous assistance during the investigation until the case is concluded.

Conclusion

The consumers, as a whole, may be pleased to see that the new law was introduced into the Taiwan Fair Trade Law. But given the different cultures and mentality in different countries, people see the gravity and seriousness of a violation of economic laws differently. For example in the U.S., it may be a felony to violate the Anti-trust Law regulations, and the perpetrators may be sentenced to imprisonment up to 10 or

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more years, which might not be widely acceptable in Taiwan, in terms of the mentality. After all, it may take sometimes for people in Taiwan to accept the notion that an economic criminal offense may be equivalent to a felony in some cases.

As global economy develops, an anti-trust violation may no longer be only a single incident occurred in a single country. After all, an anti-trust violation in one single country may involve multinational business transactions, which in turn would trigger the scrutiny of various Anti-trust Laws/Fair Trade Laws in various countries, and agreements to cooperate in Anti-trust Law enforcement have been signed among different nations. Thus enterprises intending to do business globally should possess sufficient knowledge of the fundamentals of the Anti-trust Laws/Fair Trade Laws to avoid unnecessary legal risks.



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