Explanatory Notes to the Amendment to the Fair Trade Act

The Fair Trade Act (hereinafter "this Law") was promulgated on 4 February 1991, became effective on 4 February 1992, and was previously amended twice respectively on 3 February 1999 and 26 April 2000. The key points of the February 1999 amendment included the switch to the principle that "administrative action shall precede judicial adjudication" and the strengthening of law enforcement by increasing the amount of fines. The April 2000 amendment was in response to the passage of both the Provisional Statute Governing Adjustment of the Functions, Work, and Organization of the Taiwan Provincial Government and the Law on Local Government Systems by deleting Article 9 of this Law, which had previously provided for the competent authorities at the provincial level.

There are two focuses of the current amendment. The first is to accommodate the implementation of the Administrative Procedure Act by bringing the Commission's administrative practices in line with the principles of openness, fairness, and transparency. In 2000, the provisions relevant to the Commission's existing administrative procedures were thoroughly reviewed and amendment was accordingly prepared with the aim of safeguarding the people's rights and interests, increasing administrative efficiency, and enhancing the accountability of government administration. The second focus of the current amendment relates to the situation where local enterprises have been encountered enormous competitive pressure from economic globalization in the 21st Century, and the competitive advantages of large multinational enterprises as well as the current structure of the economy have made acquisitions and mergers an important trend to competition. To accommodate the aforementioned industrial restructure and the needs of current economic environment, secure market competition mechanisms, and meet the request made by consensus of the industrial sub-group of the Economic Development Advisory Conference (hereinafter the "EDAC") that the government should streamline procedures, remove barriers, and offer suitable incentives for mergers and acquisitions, the Commission, taking into account foreign legislation relating to merger regulation, drafted the current amendment in 2001, which was aimed to be in line with the international regulatory development and to establish a fair and reasonable competition mechanism.

Given that the two aforementioned focuses of the current amendment differ in nature, the following explanation notes are divided into two sections corresponding respectively to the part amended for the Administrative Procedure Act and the part amended to accommodate the EDAC's consensus on relaxing regulation for mergers and acquisitions.

1. Amendment for the implementation of the Administrative Procedure Act

In the amendment, existing provisions of relevant subsidiary regulations that affect the people's rights or interests and go beyond the provisions of this Law are moved up to this Law. In addition, to meet the requirements of the Administrative Procedure Act, there are new provisions added to provide explicitly that the Commission may attach provisos to its decisions on merger applications, and also provisions added to provide for the legal effects for violation of such provisos, as well as provisions provided for the length of the processing

period, types of provisos, and the nullification of the approvals granted exceptionally to concerted action. Moreover, the amendment clearly specifies the scope of authorization in this Law for the Supervisory Regulations Governing Multi-Level Sales, and sets out the principles for concerned parties to have access to materials and files as well as the basis for authorization of relevant procedures thereof. Specifically speaking, there are three articles newly added, ten amended, and in total thirteen contained in the part of amendment made for the implementation of the Administrative Procedure Act. The major content and the reasons for the amendment of this part are explained below:

1.1 Moving certain relevant provisions of this Law's current Implementing Rules and the current Supervisory Regulations Governing Multi-Level Sales up to this Law itself

1.1.1 Articles 3 and 5 of this Law's current Implementing Rules are provisions respectively supplementing Article 5 of this Law, which provides for the scope of a monopolistic enterprise, and Article 7 of this Law, which provides for the definition of a concerted action. However, the current provisions of Articles 3 and 5 seem to narrow this Law's current identification of and application to monopolistic enterprises and concerted actions. In addition, this Law currently does not provide for any legal basis for the limitation set out by current Article 34 of the Implementing Rules on the period during which the business of an enterprise is suspended by order despite that it affects the rights and interests of the violating enterprises substantially and should be provided for in this Law itself. Therefore, these provisions are moved up to this Law in compliance with the requirement of Article 150 of the Administrative Procedure Act. (Amendment of Article 5-1, Article 7, and Article 42-1)

1.1.2 Articles 3, 4, and 24 of the current Supervisory Regulations Governing Multi-Level Sales are provisions respectively for "definition of multi-level sales enterprises," "definition of participants," and "supervision of foreign multi-level sales enterprises," and seem to exceed the scope of authorization of this Law. To avoid any possible controversy, these provisions are therefore also moved up to the Law itself. (Amendment of Article 8)

1.2 Adding provisions explicitly authorizing the Commission to attach provisos to its decisions on merger applications and providing for the legal effects for violation of such provisos (Amendment of Articles 12, 13, and 40)

Article 10, Paragraph 1 of this Law's current Implementing Rules provides that the central competent authority may impose conditions or burdens of a reasonable duration as provisos to its decision on merger applications in order to ensure that the benefits to the overall economy outweigh the disadvantages from restraints on competition. In parallel to the way in which current Article 15 of this Law provides for provisos to the approvals for concerted action, and in accordance with Article 93 of the Administrative Procedure Act, Article 10, Paragraph 1 of the Law's current Implementing Rules is moved up to this Law. Besides, to strengthen the supervision of merged enterprises, new provisions are also added to provide for the legal effect to the cases where an enterprise fails to comply with the provisos attached by the Commission.

1.3 Adding new provisions to provide for the length of the processing period, types of provisos, and nullification of the approvals granted exceptionally to concerted action

1.3.1 Provisions are added to prescribe the length of period for processing applications for exceptional approval upon concerted action in accordance with the requirement of Article 51 of the Administrative Procedure Act for the processing period for people's applications and in parallel to the way in which this Law provides for the processing period for merger applications. (Amendment of Article 14)

1.3.2 The types of provisos provided for by Article 93 of the Administrative Procedure Act do not include any type of "restrictions," and therefore, the proviso of "restrictions" currently allowed by Article 15, Paragraph 1 to be attached to the exceptional approval granted to concerted action is deleted. (Amendment of Articles 15 and 17)

1.3.3 To withdraw the effect of an unlawful administrative disposition is by "revocation", and to cease the effect of a lawful administrative disposition is by "nullification." This can be referred to the provisions of Articles 117, 122, and 123 of the Administrative Procedure Act. Article 16 of this Law currently allows the exceptional approval granted to a concerted action to be "revoked" in case of any subsequent changes in circumstances. The word "revoke" should be amended to the word "nullify" for consistency. (Amendment of Article 16)

1.4 Adding the provision for the scope of authorization for the Supervisory Regulations Governing Multi-Level Sales. (Amendment of Article 23-4)

The obligation of multi-level sales enterprises to "have their financial statements certified by certified public accountants and disclosed externally," the "activities prohibited" for their serious impact on participants' rights and interests, and the supervisory obligations to participants, as provided for currently in the Supervisory Regulations Governing Multi-Level Sales, all are important provisions that either restrict the rights of multi-level sales enterprises or impose obligations thereupon, or protect participants' rights and interests, and should have a clear legal basis in the law itself to authorize them. Therefore, a provision of authorization is added, and part of the wording is amended .

1.5 Adding the principles dealing with applications of concerned parties for their access to materials or files and the basis for authorization (Amendment of Article 27-1)

The investigation result and disposition of a case concerning this Law seriously affect the rights and interests of the parties to the case or other interested parties. In accordance with the provision of Article 46 of the Administrative Procedure Act, new provisions are added to set out the principles for the handling of applications of concerned parties or other interested parties for their access to materials or files and to authorize the central competent authority to separately prescribe the relevant procedures and restrictions by statutory orders.

2. Amendment of merger regulation to accommodate the EDAC's consensus

For the consensus of the industrial sub-group of the EDAC's on the relaxing of merger regulation and with reference to foreign legislation related to merger regulation, the amendment replaces the current "prior approval system" with a "pre-merger notification system" to streamline the review process for mergers. In addition, a new provision is also added to authorize the Commission to distinguish between financial institutions and non-financial institution enterprises in prescribing and publishing the sales volume thresholds that trigger the premerger filing requirements. Exemption is also added for mergers reducing no competition in the market in order to make the regulation of this Law more reasonable. Apart from the provision that allows the Commission to attach provisos to its decisions on merger applications as explained above, this part of amendment introduces one new article, amends one existing article, and in total contains two articles. Key points are as follows.

2.1 The "prior approval system" provided for by current Article 11 of this Law is changed into a "pre-merger notification system," and a new provision is also added to allow the Commission to distinguish between financial institutions and non-financial institution enterprises for the publication of the sales volume thresholds under Subparagraph 3 of Paragraph 1 of the same article (Amendment of Article 11)

Given that the two-month review period required by the current "prior approval system" of this Law hardly meets the enterprises' need in timing for mergers and acquisitions, the amendment with reference to relevant foreign legislation instead adopts a "pre-merger notification system," under which a merger becomes effective by law if the Commission does not raise any objection within a prescribed period after the enterprise files the merger with the Commission.

With respect to the period for objection, its duration is prescribed as 30 days based on the Commission's past administration practice and most foreign legislation, and such period can be shortened or extended at the discretion of the Commission on a case-by-case basis. Accordingly, for any merger obviously unlikely to restrict competition, the Commission may, after processing it with a streamlined procedure and within a shorter time period, notify the enterprises to consummate the merger earlier. For any merger likely to result in restraint on competition, the Commission is required to notify the filing enterprise of the extension within the original 30-day period in order to obtain more time for review and make a final decision. However, in light of the consideration that the extension should not be too lengthy to affect the business opportunities for mergers, and that currently this Law provides for a two-month period, the extension period is prescribed as 30 days to accommodate the needs of substantive oversight.

In addition, based on the sales volume threshold currently published by the Commission (NT$5 billion), almost no merger involving financial institutions can be exempt from review, which has given rise to the contention of over-regulation. The amendment therefore allows the Commission to distinguish between financial institutions and non-financial institution enterprises in prescribing and publishing the sales volume trigger thresholds so that the regulatory thresholds for financial institutions can become more definite and reasonable.

2.2 Adding exemption for mergers which reduce no competition of the market (Amendment Article 11-1)

Although adjustments in shareholdings, assets, or operations among affiliated enterprises fall within the types of mergers currently defined in Article 6 of this Law, they involve only adjustments of the existing internal economic structure of enterprises, and do not necessarily increase the economic scale or reduce the efficiency of the competition in the market. Where an enterprise, pursuant to the proviso in Article 167, Paragraph 1 of the Company Law or the provisions of Article 28-2 of the Securities and Exchange Law, redeems shares from its shareholders so that the percentage of the shareholding of existing shareholders reaches the level prescribed in Article 6, Paragraph 1, Subparagraph 2 of this Law and makes the situation one of the types of mergers, it is simply an act of a company in securing its rights as creditor for its own interest in property and falls outside the purpose of this Law for merger regulation, which is to prevent harms caused by concentration of economic power by requiring premerger filings. The amendment therefore exempts the aforementioned types of mergers for there is no need to subject them to the regulatory purview of this Law.

In sum, the part of current amendment in response to the implementation of the Administrative Procedure Act is to explicitly provide for the procedures relevant to law enforcement and does not significantly change the substantive content of this Law. It will help to enhance the degree of openness, fairness and transparency of the Commission's enforcement of this Law, more fully safeguard the rights and interests of concerned parties, and increase the accountability of the implementation of the Fair Trade Act. Regarding the part of amendment accommodating the EDAC's consensus, which changes this Law's merger regulation by replacing the current "prior approval system" with a "pre-merger notification system" is to respond to current economic situation and the international regulatory trend by expediting the authorities' review of mergers. It not only helps enterprises to cope with global competition, but also ensures a fair and reasonable competition mechanism. Thus, there is significant impact of current amendment on the establishment of the Commission's administrative procedures, safeguarding people's rights and interests, the requirement of current economic environment, and the maintenance of fair competition.