

Explanatory Material Relevant to the Revised Articles of the Fair Trade Act

Having acquired two years of experiences in the enforcement of the Fair Trade Act (the "Law") since its taking into effect on February 1992, the Fair Trade Commission (hereinafter the "Commission") found that it was necessary to revise some of the provisions so as to make the Law more practical and more effective in its application. The "Draft Amendments to the Fair Trade Act" were thus prepared by the Commission and submitted to the Legislative Yuan on April 28, 1994 through the Executive Yuan. The draft amendments were jointly reviewed by the Judiciary Affairs Committee and the Economic Affairs Committee of the Legislative Yuan since June 7, 1996. The review was completed on December 11, 1996 following five review meetings. Consultations between the ruling and opposition parties were held to ensure the acceptance of the amendments by the members of the Legislative Yuan with different perspectives. On January 15, 1999, the Legislative Yuan completed the second and third readings. The amendments were put into effect on February 5, 1999 through a Presidential decree.

The amendments added or revised twenty articles: Articles 10, 11, 16, 18, 19, 20, 21, 23, 35, 36, 37, 40, 41, 42, 46 and 49 were revised, and Articles 23-1, 23-2, 23-3, and 23-4 were added.

The salient points of the amendments are as follows:

1. Deletion of the provisions concerning the announcement of monopolistic enterprises (Article 10(2) and Article 11(2))

The pre-amendment version of Article 10(2) stated: "At fixed times the central competent authority shall announce (the names of) monopolistic enterprises." In order to carry out the mandate of this provision the Commission expended substantial administrative resources. However, where an instance of abuse of a monopoly position arose at a time other than the time of the announcement, the data and conclusions related to the initial determination could not be directly applied, and a de novo investigation into the relevant market and practices of the enterprise was still required.

Under the amended version of the Law, the Commission can directly dispose of illegal monopolistic acts based on market data collected through investigations. Accordingly, the amendments removed the requirement of announcing enterprises that hold twenty percent market share (Article 11(2)).

2. Article 18 prohibitions on resale price restrictions: exemption for "consumer goods for daily use" removed (proviso in Article 18(1) and the provision of Article 18(2) of the old Law)

Article 18 of the Law prohibits restrictions on resale prices. Prior to amendment, the proviso in Article 18(1) and the provision of Article 18(2) contemplated allowance of such resale price restrictions on some consumer goods for daily use where (1) similar goods were available in the market under competitive conditions, and (2)

where the Commission had announced such goods as being an exception to the restriction on resale price restrictions. However, as a practical matter, the market for such goods would never be fully competitive and thus the exemption was removed from the Law.

3. For violations of the Law: "first apply administrative sanctions, then criminal punishment"; significant increases in the amount of maximum fines (Articles 35, 36 and 37)

1. Criminal punishment for illegal activity is the most severe punishment and should be a measure of last resort. Where administrative sanctions are sufficient to meet regulatory objectives, such administrative sanctions should be used before applying criminal punishment based on the principle of proportionality. Article 35 of the old Law (i.e., prior to amendment) directly subjected abuses of monopolistic power, concerted actions, and passing-offs to criminal sanctions. Since its implementation, this approach has drawn heavy criticism from industry as being too harsh. Scholars and experts had on several occasions suggested that administrative measures should be taken as a priority for the regulation of economic activity. Furthermore, the Law has indefinite terms such as "other acts that are abusive of market position" and "well known to the relevant public," for which interpretation and intercession through notice and warning by the administrative branch is necessary. For these reasons, and by reference to comparative legal studies, the system has been changed from one where criminal sanctions applied directly to conducts prohibited under Article 10, Article 14, and Article 20, to a new system that applies administrative sanctions before judicial (e.g., criminal incarceration) punishment. Violations of these provisions of the Law, in a manner similar to Article 32 of the Business Registration Law, will now first be subject to administrative disposition by the Commission, and only if the respondent fails to take corrective measures will the matter be referred to the judicial or prosecution authorities and be subject to potential criminal punishment. It should be noted that this principle has not been adopted across the board. For example, in regard to Article 23 which regulates multi-level sales, due to the relative clarity on the requirements of the crime and the potential for serious adverse consequences, the amendments to the Law have retained the approach whereby procedures for criminal punishment may be initiated in parallel with those for administrative sanctions.
2. The Fair Trade Act is an economic law, and, as such, reasonable economic tools should be used when dealing with barriers to free competition in the market and unfair competition. Taiwan's economy has grown significantly during the past years and with this growth the incomes of Taiwan's enterprises have also grown. It is thus appropriate that the maximum amounts of the monetary fines under the Law should be increased in order to constitute a meaningful deterrent to illegal activity. In looking at countries such as Germany and France, the trend in legislation has been to "deter illegal acts through the threat of impoverishing the violators." The maximum criminal fines under the amendments have been increased to NT\$100 million, which is one hundred times more than the maximum fine under the old Law.

3. Based on the experience of the Commission, cases vary significantly in terms of the gravity of the violation, the size of the firms, and the impact on the market. In order to maintain flexibility in dealing with cases and to be able to meet the infinite variety of situations that are sure to arise in the future, the minimum amount of fines for violations of the Law was not adjusted upward in the amendments. This is also in line with the Criminal Code and other laws that do not specify a minimum amount for fines.
4. Article 36 of the Law also increases the maximum penalty for violations of Article 19 by one hundred times. The maximum criminal fine under this article is now NT\$50 million.
5. Likewise, the maximum criminal fine under Article 37 has been increased to NT\$50 million, which is one hundred times more than the maximum fine under the old Law. Furthermore, to correspond with the Criminal Code for crimes of libel and slander, the maximum term of incarceration has been increased from one year to two years. The amendments have made this crime punishable only upon complaint.

4. Increase of administrative fines for violations of the provisions in the Fair Trade Act concerning illegal mergers; introduction of minimum fines for continued violations of the Law

1. Under the old Law, the first clause of Article 41 provided that the Commission could fine an enterprise for a violation of this Law, but only after the Commission had warned the enterprise. Many enterprises adopted the attitude that they could freely violate the provisions of the Fair Trade Act once. The amendments retain the provisions on warnings, however, the Commission now has the authority to impose an administrative fine for first time violations.
2. In accordance with the aforementioned principle of using administrative sanctions before judicial punishment, as well as from the standpoint of economic analysis, the amendments adopt the approach of eliminating any "motivation" of an enterprise to violate the Law through the imposition of very high fines. This approach follows legislative and enforcement trends in other countries. One of the more noticeable examples of this trend is from Germany where the German government agency in charge of oversight of cartel activity imposed fines of up to DM 260 million on ten German wire and cable manufacturers that cornered the market and jointly manipulated prices. In reviewing the current other laws in place in Taiwan, the highest fine is NT\$50 million, and this is the amount chosen as the maximum administrative fine under this provision of the Law. For the first time violations, the Commission can impose a fine up to NT\$25 million. This is fifty times more than the amount under the old Law.
3. Current laws that provide for fines normally set the minimum amounts, and those that do not set the minimum amounts are mostly because their maximum amounts are relatively small. As has been noted, the maximum fines have been increased significantly in the amendments and the principle of

"administrative sanctions first, criminal punishment later" has been adopted. For these reasons, the amendments introduce a minimum amount for fines at the amount of NT\$50,000, or when the fine is imposed consecutively, a minimum of NT\$100,000.

4. Based on the experience of the Commission, cases vary significantly in terms of the gravity of the violation, the size of the firms, and the impact on the market. Therefore, the Commission has in separate context formulated criteria for determining the amount of fines, which criteria are based on the principle of proportionality and take into consideration the above-mentioned factors and the motive, the purpose and the gains involved in the illegal acts.

5. Strengthening the provisions in the Law on the regulation of multi-level sales (Articles 23, 23-1, 23-2, 23-3, 23-4 and 42)

1. The rights of participants in multi-level sales organizations regarding rescission and termination of agreements and return of goods have been moved from Article 5 of the Supervisory Regulation of Multi-level Sales to Articles 23-1, 23-2, 23-3 of the Law, thus enhancing the legal protection of those participants. In addition, in accordance with the directive from the Council of Grand Justices as per Interpretation No. 313, the matters that the competent authority is authorized to regulate through administrative regulations are now more clearly specified in Article 23-4. The second paragraph of Article 23 under the old Law has been deleted to correspond with this change.
2. Prior to the amendments, the Law provided for dissolution, suspension or termination of the operations of enterprises only in cases involving serious violations of the Supervisory Regulation of Multi-level Sales. However, for relatively more serious illegal activities relating to multi-level sales engaging in activities prohibited under Article 23, there were no provisions in the Law upon which the Commission could issue an order to the enterprise in question to dissolve, or to suspend or terminate its operations. This shortcoming has been addressed with the amendments, under which serious violations of the Law's provisions on multi-level sales can be punished by fines under Article 41, and depending on the gravity of the circumstances, the amended law also permits the Commission to order the enterprise in question to dissolve, or to suspend or terminate its operations.
3. As noted above, some of the limitations on multi-level marketing businesses have now been incorporated into the Law rather than leaving such provisions in administrative regulations. These include the provisions concerning the rescission and termination of agreements, and the return of goods by participants in multi-level marketing organizations. Violations of the provisions on these matters are now subject to the same sanctions as set forth in the provisions of Article 41 of the amended Law, and where the circumstances are serious, for example, if the multi-level marketing organization refuses the return of goods, the Commission may also order the enterprise to dissolve or may suspend or terminate its operations.

4. With regards to violations of the Supervisory Regulation of Multi-level Sales, Article 41 of the old Law only provided for fines after an enterprise had been warned and continued the violation. As noted above, the amendments address and amend this shortcoming.
5. For violations of the Supervisory Regulations, the punishment is less severe and does not include orders to dissolve, suspend or terminate the operations, as the offense may be relatively less serious than the offenses discussed in the preceding two paragraphs.

6. Affirm the status of the Fair Trade Act as the fundamental economic law that serves as the basis for harmonizing competition and industrial policies (Article 46)

1. Under the old Law, the first paragraph of Article 46 set out the principle that if other laws applied to certain activities within the scope of the Law, such activities would be exempt from application of the Law. That is to say, even where an enterprise engaged in activity prohibited under the Law, as long as other laws specified that the activities could be conducted under the supervision of the government agency in charge of that enterprise the Law would not apply. Under the amendment to Article 46, before the activity can be exempt from the Fair Trade Act, it must be confirmed that the other applicable law does "...not conflict with the legislative purposes of this Law..." The legislators' intent in these amendments was to affirm the status of the Law as R.O.C.'s basic economic law.
2. In determining whether or not there is a "conflict" between another law and the "legislative purposes" of the Law, one should refer to the principles that apply in situations involving a law of general application and a special law and to the time, purpose, and circumstances surrounding the enactment of the other law, however, that law should conform with competition and industrial policy and be conducive to the promotion of economic well being.
3. There was the second paragraph of Article 46 which exempted state owned enterprises, public utilities, and transportation enterprises from the application of the Law where those entities obtained exemption authorization from the Executive Yuan. The article however provided for a five year "sunset period." The five year period had expired, and the paragraph was accordingly deleted.

7. Other amendments

Finally, the amendments to the language of Articles 16, 19, 20 and 21 are to clarify the provisions of these articles. Article 49(2) states that the amendments will be effective upon promulgation.