

Leniency programme in Taiwan: The impact of a “whistle-blower” system in Eastern culture

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In this article we will firstly explain the basic elements of the leniency programme under the Taiwan Fair Trade Act (TFTA), which came into effect in early 2012. Further, we introduce the pioneer case, in which for the first time the Taiwan Fair Trade Commission (TFTC) closed the cartel investigation with the assistance from the leniency applicant. Lastly, we will examine the impact which may arise from this whistle-blower system, alongside the other proposed amendments on the regulatory and enforcement landscape of the competition law in Taiwan.

In January 2012, the leniency programme was formally introduced into Article 35-1 of the TFTA, which specifies, among others, the requirements for leniency, the maximum number of cartel participants eligible for leniency, the fine reduction percentage, the required evidence and confidentiality treatment.

In conjunction with the leniency programme, a higher fine for the violation of cartel provisions is also stipulated in Article 41. The adoption of the leniency programme is expected to significantly affect the enforcement of cartel regulations in Taiwan.

Qualifications for immunity: “First-in-the-door” requirement

According to the leniency programme, an enterprise violating the cartel prohibitions under the TFTA can be exempted from fine if it meets one of the following requirements and the TFTC agrees in advance that the enterprise qualifies for the immunity:

- *before* the TFTC knows about the unlawful cartel activities or commences its *ex officio* investigation, the enterprise voluntarily reports to the TFTC the details of its unlawful cartel activities, provides key evidence, and assists with the TFTC’s subsequent investigation; or
- *during* the TFTC’s investigation, the enterprise provides specific evidence that helps prove unlawful cartel activities and assists with the TFTC’s subsequent investigation.

Please note only the “first” applicant that meets any of above requirements can qualify for a full immunity of fine. Nonetheless, those belated applicants can still have the chance of enjoying fine reduction (see Section IV below) if they meet other requirements under the leniency programme.

Markers system

Enterprises intending to apply for fine immunity, but have no information and evidence required by the leniency programme and are therefore unqualified to file the application, may provide the TFTC with the following information to request for preservation of the priority status for fine immunity, i.e., to obtain a “marker”:

- The corporate information of the applying enterprise, including name, paid-in capital, annual revenue, name of the representative, address, and date of company registration.
- The product or service involved, the form of the concerted action, the geographic areas affected, and the duration of the action.
- The names, company addresses, representatives of other cartel members.

An applicant granted with the marker should provide other information and evidence required under the leniency programme within the period specified by the TFTC on a case-by-case basis, or they will lose the marker.

Applicant’s obligations to cooperate

From the time the application is filed until the case is concluded, the applicant should withdraw from the cartel immediately (or within the time specified by the TFTC) and follow the TFTC’s instructions to provide honest, full and continuous assistance during the investigation. The assistance should include the following:

- The enterprise should provide the TFTC at the earliest time with all the information and evidence regarding the cartel that it currently possesses or may obtain in the future. For those applying for fine reduction, the information and evidence provided must be of significant help in the TFTC’s investigation on the cartel or able to enhance the probative value of the evidence the

- TFTC has already obtained.
- The enterprise should follow the instructions of the TFTC and provide prompt description or cooperation to help the investigation on related facts capable of proving the existence of the cartel.
 - If necessary, the enterprise must allow its staff members or representatives having participated in the cartel related activities to be questioned by the TFTC.
 - The content of the statement, information or evidence provided may not contain any untruthfulness, and no destruction, forgery, alteration or concealment of any information or evidence related to the cartel will be tolerated.
 - Without the TFTC's consent, the applicant may not disclose to any other parties about filing the application or any content of the application before the case is concluded.

Fine immunity or reduction

Only up to five enterprises can be eligible for fine immunity/reduction in a single case. That is, the first applicant can qualify for full immunity of fine. The fine for the second to the fifth applicant can be reduced by 30%-50%, 20%-30%, 10%-20%, and 10% or less respectively. Nevertheless, for the sake of fairness, an enterprise which has ever coerced other enterprises to join or not to exit the subject cartel cannot be eligible for the fine immunity/reduction.

The board directors, representatives, managers of an involved enterprise, or others with the authority to represent the enterprise who should be jointly penalised based on the ROC Administrative Penalty Act may be granted immunity or reduction of fines if the following requirements are met:

- the involved enterprise can be granted immunity or reduction of fines;
- the said parties provide honest and full statements with regard to the unlawful act; and
- the said parties follow the instruction of the TFTC and provide honest, full and continuous assistance during the investigation before the case is concluded.

Non-disclosure of materials

According to the leniency programme, when the TFTC reaches the final decision of granting an enterprise immunity or reduction of fines, it must take the following measures to protect the confidentiality of the applicant's entity:

- Not to indicate the name of the enterprise, the fine imposed, and the amount of fine reduced and the reasons unless with the applicant's consent. While the consent is not granted, the TFTC

should use codes and other confidential means to indicate the enterprise and avoid giving any information that may indicate the identity of the enterprise.

- Send a decision letter for each violating enterprise and the main text regarding the fine refers only to the receiving enterprise of that decision letter. That is, the decision letter should not contain information about other violating enterprises involved in the same case.

Furthermore, the conversation records or original documents carrying information on the identity of the applicant should be kept in a file and saved properly. The same measure should be taken for other documents that may give away the identity of the applicant. Unless otherwise stipulated, the conversation records and documents stated above may not be provided to any agencies, groups, or entities other than investigation and judicial agencies. Despite the foregoing, please note if any injured party files a civil lawsuit for damages against the violating enterprises, the injured party may request the court to ask the TFTC to provide relevant documents according to the ROC Code of Civil Procedure. Hence, the leniency applicant will likely be identifiable during the court procedure.

The first application of the leniency programme: ODD Case

Background

In September 2012, the TFTC ruled that four optical disk drive ("ODD") manufacturers, i.e., Toshiba-Samsung Storage Technology Korea Corporation ("TSSTK"), Hitachi-LG Data Storage Korea Inc. ("HLDSK"), Philips & Lite-On Digital Solutions Corporation ("PLDS"), and Sony Optiarc Inc. ("SOI"), had conspired during the bidding process held by Hewlett-Packard Company ("HP") and Dell Inc. ("Dell") and hence violated the cartel regulations under the TFTA.

According to the TFTC, from September 2006 to September 2009, those four ODD manufacturers, during or before the bidding procedure held by HP and Dell, exchanged their bidding prices and expected bid ranking through emails, telephone calls, and meetings. Also, in several bidding cases, they agreed on the final price and ranking in advance while exchanging other sensitive information such as capacity and amount of production among themselves.

A market survey indicated that the four ODD manufacturers jointly occupied at least 75% of the ODD market. Meanwhile, HP's and Dell's notebooks/desktops made up around 10% of the Taiwanese relevant market. As 90% or more of the

disk drives used in HP's and Dell's notebooks/desktops were purchased through bidding processes, the four ODD manufacturers' bid rigging had certainly affected the supply and demand in the domestic ODD market. Therefore, the TFTC fined TSSTK, HLDSK, PLDS and SOI NT\$25m, NT\$16m, NT\$8m and NT\$5m respectively.

The TFTC indicated that it began investigating the case because some parties involved in the cartel pled guilty and settled the case with the US Department of Justice in November 2011. After the commencement of the TFTC's investigation, one manufacturer applied to the TFTC for leniency and provided all relevant evidence to the TFTC in accordance with the leniency programme under the TFTA. Having fully cooperated with the TFTC, the leniency applicant was awarded with full exemption from the fine. The identity of the applicant is being kept confidential by the TFTC at the applicant's request.

Implications

This ODD case represents the first time the TFTC concluded a case successfully with the help of a leniency applicant after the leniency programme came into effect in 2012. In fact, before the leniency programme was officially incorporated into the TFTA, whether such a "whistle-blower" mechanism will work in Taiwan as it does in Western countries was doubted by local practitioners.

In Taiwan, there is close association among enterprises in the same industries, and employees of these companies socialise with each other regularly. Additionally, with Taiwan being a Confucian society, most Taiwanese frown upon backstabbing which is deemed immoral. In view of the cultural difference, the leniency programme, which requires that enterprises "betray" business partners, seems on the surface to contradict the business practice in Taiwan. Nevertheless, the efficacy of the leniency programme was proven less than one year after it came into effect, as it assisted the TFTC to make a decision against the cartel members in the ODD case. However, does this mean from now the TFTC can heavily rely on this programme and wait for more cartel cases to come to light? This issue definitely deserves continuing observation.

Meanwhile, public records reveal that in order to investigate the ODD case, the TFTC sought substantial assistance from foreign competition authorities because the cartel involved foreign markets/entities. This is the first time the TFTC formally indicated that it works with other foreign authorities on a real case, rather than just academic

exchanges. Also, according to the TFTC's news release, the TFTC's documents were served legally on foreign entities with help from the Ministry of Foreign Affairs and Taiwan's overseas representative offices. Nevertheless, other than the foregoing, the TFTC did not explain how the coordination with other foreign authorities was carried out and thus the extent of assistance the TFTC received from other competition authorities is unknown to the public.

Outlook

With the leniency programme, the TFTC is joining the competition agencies around the world in actively cracking down on cartel activities. But owing to the differences in Eastern and Western cultures, whether the whistle-blower mechanism will work in Taiwan remains to be seen. Meanwhile, in order to establish a complete mechanism to curb illegal conspiracy, the TFTC plans to further amend the TFTA to complement the current legislation.

According to the draft amendment, which is now pending for the Legislative Yuan's review, the TFTC is demanding quasi-judicial power, i.e., being able to apply for search warrants from courts in conducting investigation. With the power to search and seize, the TFTC will have the authority to carry out dawn raids on enterprises suspected of violating cartel regulations. Moreover, the statute of limitations for penalising a cartel under the draft amendment is extended from three years to five. Once the amendment comes into effect, it is expected to reinvigorate cartel enforcement in Taiwan.

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