

Cartels

Enforcement, Appeals & Damages Actions

Fourth Edition

CONTENTS

Preface	Nigel Parr & Euan Burrows, <i>Ashurst LLP</i>	
Australia	Sharon Henrick, Wayne Leach & Peta Stevenson, <i>King & Wood Mallesons</i>	1
Austria	Dr Florian Neumayr, Dr Heinrich Kühnert & Gerhard Fussenegger, <i>bpv Hügel Rechtsanwälte</i>	16
Brazil	Ricardo Inglez de Souza, <i>Inglez, Werneck, Ramos, Cury & Françolin Advogados</i>	27
Canada	Randall J. Hofley, Mark Morrison & Dustin B. Kenall, <i>Blake, Cassels & Graydon LLP</i>	38
China	Zhan Hao, <i>AnJie Law Firm</i>	54
Croatia	Tarja Krehić, <i>Law Office Krehic</i>	67
Cyprus	Maria Ch. Kyriacou, <i>Christodoulos G. Vassiliades & Co. LLC</i>	79
Denmark	Olaf Koktvedgaard, <i>Bruun & Hjejle</i>	90
European Union	Euan Burrows, Irene Antypas and Ruth Allen, <i>Ashurst LLP</i>	98
Finland	Ilkka Aalto-Setälä & Eeva-Riitta Siivonen, <i>Borenius Attorneys Ltd</i>	124
France	Bastien Thomas, <i>Racine</i>	133
Germany	Dr Ulrich Schnelle & Dr Volker Soyecz, <i>Haver & Mailänder</i>	144
Indonesia	Anang Triyono, Rinjani Indah Lestari & Ben Clanchy, <i>Makarim & Taira S.</i>	157
Japan	Catherine E. Palmer, Daiske Yoshida & Hiroki Kobayashi, <i>Latham & Watkins</i>	168
Malta	Ron Galea Cavallazzi & Lisa Abela, <i>Camilleri Preziosi</i>	179
Norway	Kristin Hjelmås Valla & Henrik Svane, <i>Kvale Advokatfirma DA</i>	187
Poland	Iwona Terlecka, Bartosz Targański & Patrycja Szot, <i>CLIFFORD CHANCE Warsaw</i>	201
Portugal	Nuno Ruiz & Ricardo Filipe Costa, <i>Vieira de Almeida & Associados</i>	211
Romania	Silviu Stoica & Mihaela Ion, <i>Popovici Nițu Stoica & Asociații</i>	220
Russia	Anastasia Astashkevich, <i>Bureau of Attorneys Astashkevich and partners</i>	233
Serbia	Raško Radovanović, <i>Petrikic & Partneri AOD</i> <i>in cooperation with CMS Reich-Rohrwig Hainz</i>	242
Singapore	Mark Tan & Nicole Teo, <i>Rodyk & Davidson LLP</i>	252
Spain	Antonio Guerra Fernández & Patricia Vidal Martínez, <i>Uria Menéndez</i>	265
Sweden	Peter Forsberg & Xandra Carlsson, <i>Hannes Snellman Attorneys Ltd</i>	276
Switzerland	Martin Ammann, Christophe Rapin & Renato Bucher, <i>Meyerlustenberger Lachenal</i>	286
Taiwan	Stephen Wu, Rebecca Hsiao & Wei-Han Wu, <i>Lee and Li, Attorneys-at-Law</i>	307
Turkey	Gönenç Gürkaynak & Ayşe Güner, <i>ELIG, Attorneys-at-Law</i>	318
Ukraine	Sergiy Oberkovych, <i>GOLAW Law Firm</i>	330
United Kingdom	Giles Warrington & Tim Riisager, <i>Pinsent Masons LLP</i>	341
USA	Colin Kass & Scott M. Abeles, <i>Proskauer</i>	352

Taiwan

Stephen Wu, Rebecca Hsiao & Wei-Han Wu
Lee and Li, Attorneys-at-Law

Overview of the law and enforcement regime relating to cartels

Definition

In Taiwan, cartels are regulated as concerted actions under the Taiwan Fair Trade Act (“TFTA”). Taiwan Fair Trade Commission (“TFTC”), as an independent administrative authority enforcing the TFTA, is authorised by the TFTA to conduct investigations and impose administrative fines and punishments on cartels that do not receive the TFTC’s approval. According to the TFTA, a concerted action is a conduct of any enterprise, by means of contract, agreement or any other form of mutual understanding, with a 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, thereby restricting each other’s business activities. A concerted action regulated by the TFTA is limited to a horizontal action that is conducted by enterprises competing at the same production or sale stage, and that may interfere with the market mechanism with regard to production or supply and demand of goods or services.

Exemption/Prior approval

Under the TFTA, a concerted action is prohibited unless it meets one of the exemptions stipulated in Article 15 of the TFTA and is beneficial to the economy as a whole and in the public interest, and the application filed with the TFTC for the concerted action has been approved. The eight types of exemptions under the TFTA are:

- *unification* – it unifies the specifications or models of goods for the purpose of reducing costs, improving quality or increasing efficiency;
- *joint research and development* – it entails joint research and development for the purpose of enhancing technology, reducing costs, improving quality or increasing efficiency;
- *specialisation* – it develops a separate and specialised area for the purpose of rationalising operations;
- *exportation* – it is to enter into agreements concerning solely competition in foreign markets for the purpose of securing or promoting exportation;
- *importation* – it is for the importation of foreign goods for the purpose of strengthening trade;
- *economic downturn* – it is to limit the quantity of production and sales, equipment or prices for the purpose of meeting the planned demand for the enterprises in a particular industry which encounter difficulties in maintaining their business or face overproduction during an economic downturn;
- *small to medium-sized enterprises* – it is for the purpose of improving operational efficiency or strengthening the competitiveness of small to medium-sized enterprises; and

- *catch-all provision* – any other joint acts for the purposes of improving industrial development, technological innovation, or operational efficiency.

Since a prior approval system is adopted for a concerted action, enterprises participating in a concerted action must submit the documents specified in Article 13 of the Enforcement Rules to the TFTA for a prior approval. The TFTC is required to make a decision within three months of receipt of an application, and may extend the three-month period once. The three-month period starts to run from the time when all the required documents are submitted to the TFTC. The approval granted by the TFTC shall specify a time limit not exceeding five years for the implementation of a concerted action, and may subject the approval to certain conditions. At least three months prior to the expiration of the approval, the enterprises which have justification to continue the concerted action may file a written application with the TFTC for extension of approval for a period of no more than another five years.

The liabilities for violation of the cartel regulations under the TFTA are detailed in the “Administrative penalties” section below.

Overview of investigative powers in Taiwan

Investigatory tools

The TFTC has the following types of investigatory tools:

- (i) order the target enterprises and any related third parties to appear before the TFTC to make statements;
- (ii) order the target enterprises and any related third parties to submit books and records, documents and any other necessary materials and evidence;
- (iii) dispatch personnel to conduct any necessary on-site inspection of the office, place of business or other locations of the target enterprises and any related third parties; and
- (iv) seize articles discovered during any of the above-mentioned investigations which may serve as evidence. The articles and period of the seizure should be limited to those necessary for the investigation, inspection, verification, or any other purpose of preserving evidence.

Lack of dawn-raid power

Under the current legal framework, the TFTC is not entitled to apply for a search warrant with the court because it is not granted judicial power. Therefore, its investigatory power granted by the TFTA and other administrative regulations is somehow limited, when compared with that of competition authorities in other jurisdictions.

Given the lack of power to conduct “dawn-raid”, when the TFTC carries out unscheduled visits to target enterprises, it may request that the enterprises provide necessary documents and information; however, it cannot force those enterprises to submit such documents and information to it or search the enterprises’ premises to obtain the requested documents and information.

Overview of cartel enforcement activity during the last 12 months

According to the TFTC’s 2014 Annual Report, the TFTC ruled six cartel infringement cases in 2014, two of which were launched on its initiative and the remaining four were prompted by third parties’ complaints. The total fines imposed by the TFTC on the violating parties amount to around NT\$ 6.068bn, most of which comes from the TFTC’s third-time decision in the IPPs Case (defined below). In a nutshell, the IPPs Case was first ruled by the TFTC in 2013, where the TFTC penalised nine independent power producers (IPPs) for their joint

refusal to amend the existing power purchase agreements with the Taiwan Power Company (“IPPs Case”). The total fine of the TFTC’s original decision on the IPPs Case was NT\$ 6.32bn, which is the highest in the TFTC’s enforcement history so far. After several rounds of appeals, the TFTC’s original decision was found to be flawed and hence the TFTC was required to make a new decision. In the new decision ruled in 2014, the total fine is adjusted to NT\$ 6.007bn.

Although the number of cartel cases concluded in 2014 may not be significant, it is anticipated that the TFTC will follow the international trend to take more aggressive actions to curb the growth of domestic as well as international cartels.

Key issues in relation to enforcement policy

In the newly amended TFTA which took effect in early 2015, two amendments related to cartel enforcement are noteworthy. First, the new TFTA permits the TFTC to presume the existence of a cartel agreement on the basis of circumstantial evidence, such as market conditions, characteristics of the products or services involved, and profit and cost considerations, etc. By way of this amendment, the TFTA substantially shifts the burden of proof regarding the existence of a cartel agreement among competitors from the TFTC to the enterprises that are investigated or penalised.

Secondly, the newly amended TFTA adds a catch-all provision for exemption of concerted actions in the hope of covering all types of pro-competition cooperation as broadly as possible. So far there is no actual case regarding how the catch-all provision could apply. It is unknown whether this new provision may help enterprises find a legal ground to justify their cooperation.

Moreover, in mid-2015, a whistle-blower reward scheme, described as “antitrust fund” is added into the TFTA. As said in the TFTC’s press release, this reward scheme aims to encourage individuals to report illegal activities carried out by their employers. By obtaining such internal information from whistle-blowers, the TFTC’s chances of detecting and proving a cartel can be effectively escalated.

All the amendments above are expected to strengthen the TFTC’s power of enforcing the cartel regulations and to overhaul the legal landscape in Taiwan.

Leniency/amnesty regime

Elements for the leniency programme

An enterprise violating the cartel prohibitions under the TFTA is immune from fines or entitled to a fine reduction if it meets one of the following requirements and the TFTC agrees in advance that the enterprise qualifies for the immunity or reduction:

- (i) before the TFTC knows about the unlawful cartel activities or commences investigation on its own initiative, the enterprise voluntarily reports in writing or orally to the TFTC the details of its unlawful cartel activities, provides key evidence and assists the TFTC in its subsequent investigation; or
- (ii) during the TFTC’s investigation, the enterprise provides in writing or orally specific evidence that helps prove unlawful cartel activities and assists the TFTC in its subsequent investigation.

Markers

An enterprise that intends to apply for fine immunity, but that does not have information and evidence required by the leniency programme and is therefore unqualified to file the

application, may submit a written statement to the TFTC or pay a visit to the TFTC to give oral statements requesting preservation of the priority status for fine immunity (i.e., to obtain a marker), which must contain the following information:

- (i) the enterprise's name, paid-in capital, annual revenue, name of its representative, and address and date of company registration;
- (ii) the product or service involved, the form of the concerted action, the geographic areas affected and the duration of the action; and
- (iii) the names, company addresses and representatives of other cartel participants.

An enterprise that has been granted a marker should provide the information and evidence required by the leniency programme within the period specified by the TFTC; otherwise it will become disqualified as a marker. The application for a marker should follow the format designated by the TFTC if it is made in writing. If the application is made orally, the applicant should dispatch someone to visit the TFTC to give oral statements and sign the meeting minutes to confirm the statements.

Applicant's obligations to cooperate

From the time the application is filed until the case is concluded, the enterprise that files the application for leniency (the "applicant") should withdraw from the cartel immediately or at the time specified by the TFTC, follow the instructions of the TFTC, and provide honest, full and continued assistance to the TFTC during its investigation. The assistance should include the following:

- (i) the applicant should provide the TFTC as early as possible with all the information and evidence regarding the cartel that it currently possesses or will obtain in the future. For those applying for a fine reduction, the information and evidence provided must be of significant help in the TFTC's investigation into the cartel or enhance the probative value of the evidence the TFTC has already obtained;
- (ii) the applicant should follow the instructions of the TFTC and provide prompt descriptions or cooperation to help the investigation regarding related facts capable of proving the existence of the cartel;
- (iii) if necessary, the applicant must allow its staff or representatives that participated in cartel-related activities to be questioned by the TFTC;
- (iv) the content of the statements, information or evidence provided must not contain any untruths, and no destruction, forgery, alteration or concealment of any information or evidence related to the cartel will be tolerated; and
- (v) without the consent of the TFTC, the applicant may not disclose to any other parties the filing of the application or any content of the application before the case is concluded.

Immunity or reduction of fines

Only up to five applicants can be eligible for fine immunity or reduction in a case. The first applicant to file the application can qualify for full immunity from a fine. The fines for the second to fifth applicants can be reduced by 30 to 50%, 20 to 30%, 10 to 20%, and 10% or less, respectively. An applicant that has coerced any other enterprises to join or not to exit the cartel cannot be eligible for immunity or a reduction of the fine.

The board directors, representatives or managers of an involved enterprise, or others with the authority to represent the enterprise, may also be imposed with the same fine under the Administrative Penalty Act if they had acted with intention or in gross negligence, resulting in the enterprise's breach of law. They may be granted the same fine immunity or reduction as the enterprise if the following requirements are met:

- (i) the enterprise is an applicant that can be granted the fine immunity or reduction;
- (ii) these persons have provided honest and full statements with regard to the unlawful act; and
- (iii) these persons have followed the instructions of the TFTC and provided honest, full and continued assistance to the TFTC during its investigation before the case is concluded.

Non-disclosure *versus* discovery of materials

According to the leniency programme, when the TFTC grants an applicant the fine immunity or reduction, it must take the following steps to protect the confidentiality of the applicant's identity:

- (i) after obtaining the consent of the applicant, send its decision letter stating the name of the applicant, the fine imposed, and the amount of fine reduced and the reasons. Where consent is not granted, the TFTC should use aliases and other confidential means to indicate the identity of the applicant and avoid giving any information that may indicate the identity of the applicant; and
- (ii) send its decision letter to each violating enterprise, with the main text regarding the fine referring only to the enterprise that receives the decision letter. 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 about the identity of the applicant should be kept in a file and stored appropriately. The same measure should be taken for other documents that may give away the identity of the applicant. Unless otherwise stipulated by law, the conversation records and documents stated above may not be provided to any agencies, groups or entities other than public prosecution and judicial agencies. Despite the foregoing, if any injured party files a civil lawsuit for damages against the violating enterprises, the injured party may request that the court ask the TFTC to provide relevant documents according to the ROC Code of Civil Procedure. The applicant will likely be identifiable during the court procedure.

The first application of the leniency programme: the ODD Case

Background

In September 2012, the TFTC ruled that four optical disk drive (ODD) manufacturers, namely Toshiba Samsung Storage Technology Korea Corporation (TSST-K), 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 provisions under the TFTA.

According to the TFTC, from September 2006 to September 2009, the 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. Additionally, 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 and desktops made up around 10% of the relevant Taiwanese market. As 90% or more of the disk drives used in HP's and Dell's notebooks and desktops were purchased through bidding processes, the four ODD manufacturers' bid rigging had certainly affected supply and demand in the domestic ODD market. Thus, the TFTC fined TSST-K, 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 pleaded 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 in accordance with the leniency programme under the TFTA. Having fully cooperated with the TFTC, the leniency applicant was awarded full immunity from the fine. The identity of the applicant is being kept confidential by the TFTC at the applicant's request.

Implications

This case is the first time the TFTC has concluded successfully with the help of an applicant since the leniency programme came into effect in 2011. Before the leniency programme was introduced under the TFTA in 2011, whether the "whistle-blower" mechanism would work in Taiwan as it does in other countries was doubted by local practitioners. In Taiwan, enterprises in the same industries have close interaction, and employees of these enterprises socialise with each other regularly. In addition, the leniency programme requiring an enterprise to betray its business partners in return for an immunity or reduction of fines contradicts business practice in Taiwan. Nevertheless, the leniency programme, within one year of it coming into effect, assisted the TFTC in bringing the cartel members in the ODD case to justice.

The case is also the first time the TFTC sought assistance from competition authorities in other jurisdictions (such as the United States and European Union) because the cartel involved foreign markets and entities. The TFTC press release also indicates that the TFTC's documents were served upon foreign entities in other countries with help from the Ministry of Foreign Affairs and its overseas offices.

Another remarkable aspect of the case is that the TFTC did not disclose the identity of the enterprise that applied for leniency at the enterprise's request. While this non-disclosure option is unheard of in some jurisdictions, whether such an option is appropriate has sparked intense debate.

The highest fine imposed on foreign enterprises: the Capacitor Case

Background

On December 9, 2015, the TFTC ruled that seven aluminium capacitor companies, namely, Nippon Chemi-Con Corporation (NCC), Hongkong Chemi-Con Limited (NCC HK), Taiwan Chemi-Con Corporation (NCC TW), Rubycon Corporation (RUBYCON), ELNA Co., Ltd. (ELNA), SANYO Electric (Hong Kong) Ltd. (SANYO HK), and Nichicon (Hong Kong) Ltd. (NICHICON HK), and three tantalum capacitor companies, NEC TOKIN Corporation (NEC TOKIN), Vishay Polytech Co., Ltd. (VISHAY POLYTEC), and Matsuo Electric Co., Ltd. (MATSUO) participated in meetings or bilateral communications to exchange sensitive business information such as prices, quantity, capacity, and terms of trade to reach agreements, and the conducts were sufficient to affect the market function of capacitors in Taiwan. The practices violated the cartel regulations under the TFTA. The TFTC therefore imposed administrative fines of NT\$ 1.8683bn on NCC, NT\$ 82.9m on NCC HK, NT\$ 293.8m on NCC TW, NT\$ 1.248bn on RUBYCON, NT\$ 76.6m on ELNA, NT\$ 842m on SANYO HK, NT\$ 111.3m on NICHICON HK, NT\$ 1.2182bn on NEC TOKIN, NT\$ 31.2m on VISHAY POLYTEC, and NT\$ 24.3m on MATSUO. The total amounts of the fines are NT\$ 5,796,600,000 (5.8bn).

The TFTC indicated that the Japanese capacitor companies had convened several multilateral meetings and engaged in bilateral communications since the 1980s, and had exchanged sensitive business information to reach agreements. Products involved in this

case included aluminum capacitors and tantalum capacitors. There are seven aluminum capacitor companies, including NCC, NCC HK, NCC TW, RUBYCON, ELNA, SANYO HK, and NICHICON HK, that have been involved in this case, each to a different extent and duration of attending meetings. Starting from at least 2005 to January 2014 at the latest, the companies convened the MK Meeting (Market Study Meeting), CUP Meeting (Cost Up Meeting), and SM Meeting (Hongkong Sales Manager Meeting) in Japan and other countries, or conspired bilaterally via emails, telephones or gatherings to exchange sensitive business information for reaching agreements. The three tantalum capacitor companies including NEC TOKIN, VISHAY POLYTEC, and MATSUO also exchanged sensitive business information in the above-mentioned MK Meeting and conspired bilaterally via emails, telephones or gatherings to reach agreements.

Further, the TFTC pointed out that aluminium capacitors are mainly used in larger electronic products, e.g., PCs, household appliances, home video game consoles, and power supplies. Tantalum capacitors are mainly used in thin and small electronic products, e.g., notebooks, mobile phones, and handheld game consoles. Domestic electronics companies largely rely on the companies involved in this case for the supply of capacitors. Even though there are a few aluminum capacitor companies in Taiwan, their scale is far smaller than that of the Japanese capacitor companies. On the other hand, there are no domestic tantalum capacitor companies; all tantalum capacitors are fully imported. The total sales revenue of the aluminum capacitors and tantalum capacitors of the companies involved in this case is estimated at NT\$ 50bn and NT\$ 16bn, respectively, during the term of their concerted action. The aluminium capacitor companies NCC, RUBYCON and NICHICON are the top three aluminium capacitor companies in the world. The tantalum capacitor companies involved in this case also have considerable global market shares. Hence, the companies involved in this case have had a direct, substantial impact on the domestic markets with reasonably foreseeable effects.

Implication

The TFTC sees the capacitor case as a successful outcome of its efforts in international enforcement cooperation with other competition authorities through years. The TFTC had worked with competition authorities of the US, EU and Singapore in investigation of the subject case from the beginning. In addition to coordinating a synchronised investigation action on March 28, 2014, the TFTC also exchanged enforcement experiences with those agencies through telephone conferences or emails. The TFTC's decision is the first among competition agencies and will be highly concerning internationally as it is still under investigation, at least in countries such as the EU, US, Japan, Korea, Singapore and China, etc. Meanwhile, the TFTC invoked the "10% rule" (i.e., for a serious concerted action, the fine can be up to 10% of the violating enterprise's revenue in the last fiscal year; see below for details) when determining a fine on an enterprise, bringing the case to be the first in which the TFTC applied this fine formula to foreign enterprises, and also the one with the highest fines imposed on foreign enterprises in the TFTC's enforcement history. It is noteworthy that the fines imposed by the TFTC can be up to 10% of an enterprise's "global revenues", instead of 10% of the revenues generated in Taiwan only.

Administrative settlement of cases

In addition to the leniency programme, the administrative settlement provides another channel for seeking plea-bargaining. According to the TFTC Guidelines for Handling Administrative Settlement Cases, the TFTC may settle a case with an enterprise if the TFTC

does not have enough evidence to secure a sanction. This is a contractual arrangement between the TFTC and the enterprise. In assessing whether to settle a case, the TFTC will have to consider the legality and appropriateness of the settlement, the possible impact on the public interest, and the possible detriment to the interested parties.

How this settlement mechanism should work after the leniency programme comes into effect, or how it should be calibrated to complement the leniency programme, remains an open issue.

Third party complaints

In general, any person who becomes aware of a possible violation of the TFTA can report the incident to the TFTC. Upon the receipt of the complaint, the TFTC is required to conduct a preliminary review to determine whether the TFTC should open a formal investigation or just reject the complaint for the case is without merit. The aforementioned procedure is also applicable to a third party's complaint regarding cartel infringement. Nonetheless, it is unclear in Taiwan as to whether the complaining party can appeal against the TFTC's rejection of the complaint or closing of the case without a punishment decision.

Administrative penalties

Basic concept

The basic concept of penalties for violation of the cartel regulations is administrative fine first, criminal liability later. To be specific, if any enterprise is found to have conducted a concerted action without the TFTC's approval, the TFTC may, pursuant to Article 40 of the TFTA, order the enterprise to discontinue the illegal conduct, or set a time limit for the enterprise to rectify the conduct or take necessary corrective measures, and impose an administrative fine of between NT\$ 100,000 and NT\$ 50m on the enterprise. If the violating enterprise fails to act as ordered, the TFTC may continue to order the enterprise to cease the violation, or set another time limit for it to comply with the order, and may impose successive administrative fines of NT\$ 200,000 to NT\$ 100m until the violating enterprises complies with the order.

Higher administrative fine for serious violation: 10% of last fiscal year's revenues

If the TFTC considers a concerted action to be serious, it may impose a fine of up to 10% of a violating enterprise's revenue for the last fiscal year, without subjecting the limitation of the range of fines described above.

A serious concerted action is one that materially affects competition in the relevant market, after the TFTC takes the following factors into account:

- (i) the scope and extent of the market competition and order affected;
- (ii) the duration of the damage to market competition and order;
- (iii) the market status of the violating enterprise and the structure of the corresponding market;
- (iv) the total sales and profits obtained from the unlawful conduct during the violation period; and
- (v) the type of concerted cartel – joint price decision on product or service, or restriction on quantity, trading counterpart or trading area.

In the event of any of the following circumstances, the violation should be deemed as serious:

- (i) the total amount of turnover of the relevant products or services during the period the cartel is active exceeds NT\$ 100m; or

- (ii) the total amount of gains derived from the cartel exceeds the maximum fine under the TFTA (i.e., NT\$ 50m).

Calculating fines for serious cartels

The amount of the fine imposed on a serious cartel should be based on a “basic amount” and adjusting factors. The basic amount refers to 30% of the total amount of an enterprise’s turnover of relevant products or services sold or provided during the cartel period. The adjusting factors include aggravating factors and mitigating factors.

The aggravating factors are as follows:

- (i) the violating enterprise has organised or encouraged the unlawful conduct;
- (ii) the violating enterprise has implemented supervision or sanctioning measures to ensure that the concerted action is upheld or executed; and
- (iii) the violating enterprise has been sanctioned for violation of monopoly or cartel regulations within the past five years.

The mitigating factors are as follows:

- (i) the violating enterprise immediately ceased the unlawful act when the TFTC began the investigation;
- (ii) the violating enterprise has shown real remorse and cooperated in the investigation;
- (iii) the violating enterprise has established compensation agreements with the victims or has taken remedial measures;
- (iv) the violating enterprise has participated in the concerted action under coercion; and
- (v) other governmental agencies approve or encourage the fine imposed to be reduced, or the fine reduction can be granted in accordance with other laws.

See “Criminal sanctions” section below for the details of criminal liability.

Right of appeal at administrative court

In the past, an enterprise punished by the TFTC appealed against the TFTC’s decision in the Executive Yuan first. If the decision of the Appeal Committee of the Executive Yuan is unsatisfactory, the enterprise may then file a lawsuit with the High Administrative Court. However, after the new TFTA came into effect in early 2015, an enterprise that is dissatisfied with the the TFTC’s decision must file a lawsuit with the High Administrative Court directly, without the appeal procedure at the Executive Yuan.

The appeal procedure at the level of the High Administrative Court is a “full merit” appeal, in which both finding of facts and laws are examined. However, after the case is moved on to the level of the Supreme Administrative Court, the review is a purely trial of law. According to the TFTC’s 2014 Annual Report, none of the TFTC’s decisions in cartel cases was overturned by the Administrative Courts in 2014.

Criminal sanctions

In addition to the administrative punishments mentioned above, a violation of cartel regulations may carry criminal liability. That is, if any enterprise is ordered by the TFTC, pursuant to Article 40 of the TFTA, to cease, rectify or take necessary measures to correct its violation of the cartel regulations under the TFTA and fails to follow such order or repeats the violation, its responsible person and employees involved may face an imprisonment sentence of up to three years, while the enterprise may receive a criminal fine of up to NT\$ 100m in accordance with Article 34 of the TFTA. As of now, no public information suggests that any criminal sanction has ever been imposed on enterprises violating the cartel regulations under the TFTA.

Cross-border issues

The TFTC's jurisdiction is determined based on the effect of the conduct in question. Thus, coordination between or among foreign enterprises conducted either in Taiwan or other jurisdictions is subject to the jurisdiction of the TFTA if this conduct may affect the Taiwanese market.

The TFTC has conducted investigations into foreign enterprises' conduct, and has issued directives confirming that their conduct may violate the TFTA if it affects the Taiwanese market. For instance, in the ODD case mentioned above, the TFTC sought assistance from competition authorities in other jurisdictions (such as the United States and European Union) because the cartel involved foreign markets and entities. The TFTC's press release also indicates that the TFTC's documents were served upon foreign entities in other countries with help from the Ministry of Foreign Affairs and its overseas offices.

Developments in private enforcement of antitrust laws

According to the TFTA, if any enterprise violates the TFTA and thereby injures the rights and interests of another, the injured party may demand the removal of such injury; if there is a likelihood of any injury, prevention of such injury may also be claimed. Additionally, an injured party may claim damages from the violating enterprise.

As to the calculation of damages, if a violating enterprise reaps gains from its act of violation of the TFTA, the injured party may claim damages based solely on the monetary gain of the violating enterprise. Otherwise, the general principle under the civil lawsuit will apply to the calculation of damages. That is, the compensation will be limited to the actual loss or damage and loss-in-profits. Loss-in-profits refers to those that could have been expected in the ordinary course of matters, from decided projects or equipment, or in other special circumstances.

Moreover, the TFTA stipulates punitive damages. That is, if a violation is intentional, the injured party is entitled to request the court to award damages in the amount of up to three times the actual loss or damage.

Although the TFTA provides legal grounds for civil actions, so far no public record shows that an injured party has obtained compensation from an enterprise violating the cartel regulations.

On a related note, the leniency programme under the TFTA offers confidentiality protection to the applicant, forbidding the TFTC from disclosing the identity of the applicant and other relevant documents while issuing the decision letter. However, the applicant will likely be identifiable during the court procedure if any injured party files a civil action against the enterprises involved in the violation.

Reform proposals

Though the TFTC's original proposal of empowering it to search and seize (i.e., the dawn-raid) did not pass the Legislative Yuan's third read, the TFTC indicated that it will keep advocating legislators to grant it with the right to seize and search, aiming to strengthen its enforcement power.

**Stephen Wu****Tel: +886 2 2715 3300 ext: 2388 / Email: stephenwu@leeandli.com**

Stephen Wu is the partner leading the competition law practice group of Lee and Li, and is also the founding chair and an active member of the Competition Law Committee of the Taipei Bar Association. He has successfully represented domestic and international clients in handling numerous antitrust filing, cartel investigation and unfair competition cases. He has been recognised as being among the world's leading competition lawyers by *Who's Who Legal* in 2012 and 2013. He keeps abreast of the latest developments in global antitrust and competition law, and regularly contributes briefings and articles to the *Global Competition Review*, *AntitrustAsia.com* and many competition law publications.

**Rebecca Hsiao****Tel: +886 2 2715 3300 ext: 2257 / Email: rebeccaHSiao@leeandli.com**

Rebecca Hsiao is an associate partner at Lee and Li. She began her practice when she joined Lee and Li in 2001, and has practised in the areas of antitrust and competition law, mergers and acquisitions, securities, and corporate and investment law.

**Wei-Han Wu****Tel: +886 2 2715 3300 ext: 2395 / Email: weihanwu@leeandli.com**

Wei-Han Wu is an associate partner at Lee and Li. She joined the firm in 2008 and is a core member of the competition law practice group of Lee and Li. Ms. Wu advises clients on the full range of competition law, focusing on merger control, cartel work, restrictive practice and unfair trade matters. She has extensive experience in representing international corporations in major deals relating to her practice areas before the Taiwan Fair Trade Commission. Ms. Wu is also frequently involved in various cases at the intersection of antitrust and IP laws.

Lee and Li, Attorneys-at-Law

7F, 201 Tun Hua N. Road, Taipei, Taiwan 10508, R.O.C.

Tel: +886 2 2715 3300 / Fax: +886 2 2713 3966 / URL: <http://www.leeandli.com.tw/EN/>

Other titles in the *Global Legal Insights* series include:

- Banking Regulation
- Bribery & Corruption
- Commercial Real Estate
- Corporate Tax
- Employment & Labour Law
- Energy
- International Arbitration
- Litigation & Dispute Resolution
- Merger Control
- Mergers & Acquisitions

Strategic partners:



www.globallegalinsights.com