

THE
THE CARTELS AND
LENIENCY REVIEW

SEVENTH EDITION

Editors

John Buretta and John Terzaken

THE LAWREVIEWS

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LENIENCY REVIEW

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PREFACE

Cartels are a surprisingly persistent feature of economic life. The temptation to rig the game in one's favour is constant, particularly when demand conditions are weak and the product in question is an undifferentiated commodity. Corporate compliance programmes are useful but inherently limited, as managers may come to see their personal interests as divergent from those of the corporation. Detection of cartel arrangements can present a substantial challenge for both internal legal departments and law enforcers. Some notable cartels have managed to remain intact for as long as a decade before being uncovered. Some may never see the light of day. However, for those that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from 28 jurisdictions to address an issue of growing importance to large corporations, their managers and their lawyers: the potential liability, both civil and criminal, that may arise from unlawful agreements with competitors as to price, markets or output. The broad message of the book is that this risk is growing steadily. In part because of US leadership, stubborn cultural attitudes regarding cartel activity are gradually shifting. Many jurisdictions have moved to give their competition authorities additional investigative tools, including wiretap authority and broad subpoena powers. There is also a burgeoning movement to criminalise cartel activity in jurisdictions where it has previously been regarded as wholly or principally a civil matter. The growing use of leniency programmes has worked to radically destabilise global cartels, creating powerful incentives to report cartel activity when discovered.

The authors are from some of the most widely respected law firms in their jurisdictions. All have substantial experience with cartel investigations and many have served in senior positions in government. They know both what the law says and how it is actually enforced, and we think you will find their guidance regarding the practices of local competition authorities invaluable. This book seeks to provide both breadth of coverage (with a chapter on each of the 28 jurisdictions) and analytical depth for those practitioners who may find themselves on the front line of a government inquiry or an internal investigation into suspect practices.

Our emphasis is necessarily on established law and policy, but discussion of emerging or unsettled issues has been provided where appropriate.

This is the seventh edition of *The Cartels and Leniency Review*. We hope you will find it a useful resource. The views expressed are those of the authors, not of their firms, the editor or the publisher. Every endeavour has been made to make updates until the last possible date before publication to ensure that what you read is the latest intelligence.

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January 2019

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I ENFORCEMENT POLICIES AND GUIDANCE

i Definition

Cartels are regulated by the provisions governing concerted actions under the Taiwan Fair Trade Act (TFTA). The term ‘concerted action’ relates to the conduct of any enterprise, by means of a contract, agreement or any other form of mutual understanding² with a competing enterprise to determine jointly 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 is limited to a horizontal action that is conducted by enterprises competing at the same stage of production or sale, and that may interfere with the market mechanism with regard to the production or supply and demand of goods or services.³

Since the TFTA was amended on 6 February 2015,⁴ the Taiwan Fair Trade Commission (TFTC) is permitted to presume the existence of an agreement on the basis of circumstantial evidence, such as market conditions, characteristics of the products or services involved, and profit and cost considerations. By way of this amendment, the new law substantially shifts the burden of proof regarding the existence of an agreement among competitors from the TFTC to the enterprises that are investigated or penalised.

ii Exemption

A concerted action is prohibited unless it meets one of the requirements stipulated in Article 15 of the TFTA, 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.

1 Stephen Wu is a partner and Rebecca Hsiao and Wei-Han Wu are associate partners at Lee and Li, Attorneys-at-Law.

2 Any other form of mutual understanding means a meeting of minds other than a contract or agreement, regardless of whether it is legally binding, which would in effect lead to joint actions. A resolution of an association’s general meeting of members or a board meeting of directors or supervisors to restrict the activities of its member enterprises will also be deemed a horizontal concerted action.

3 Article 14 of the Taiwan Fair Trade Act (TFTA).

4 For the case precedents cited in this chapter, all provisions referred to are based on the original article numbers under the version of the TFTA that was in place at the time of the decision or ruling by the Taiwan Fair Trade Commission (TFTC).

Article 15 of the TFTA provides the following eight requirements for a concerted action to be approved by the TFTC:

- a* unification: it unifies the specifications or models of goods for the purpose of reducing costs, improving quality or increasing efficiency;
- b* joint research and development: it entails joint research and development for the purpose of enhancing technology, reducing costs, improving quality or increasing efficiency;
- c* specialisation: it develops a separate and specialised area for the purpose of rationalising operations;
- d* export: its purpose is for entering into agreements solely concerning competition in foreign markets, to secure or promote exports;
- e* import: its purpose is for importing foreign goods to strengthen trade;
- f* economic downturn: its purpose is to limit the quantity of production and sales, equipment or prices to meet the demand expected during an economic downturn, meaning that the enterprises in a particular industry have difficulties in maintaining their business or face overproduction;
- g* small to medium-sized enterprises: its purpose is for improving operational efficiency or strengthening the competitiveness of small to medium-sized enterprises; and
- h* catch-all provision: any other joint acts for the purpose 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 of the TFTA for prior approval. The TFTC is required to make a decision within three months of receipt of an application, but may extend that three-month period once. The three months start from the time when all the required documents have been 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 attach conditions to the approval. At least three months prior to expiry of the approval the enterprises may, with justification, file a written application with the TFTC for an extension of the approval period for no more than another five years.

Moreover, in March 2016, the TFTC published a ruling explaining that if the combined market shares of all participants in a cartel do not reach 10 per cent in the relevant market, it can be presumed that the cartel scheme will not generate any restrictive effect on the market. However, the ruling also indicates that if the subject cartel aims to restrict the price, quantity, trading counterparty or trading area of the relevant product or service, the aforesaid rule cannot be applied.

iii Enforcement rules

The TFTC has enacted several guidelines and regulations detailing the concrete steps that the TFTC should take in reviewing a cartel case.

The following are guidelines relating to an application for concerted action approval:

- a* TFTC Guidelines on Handling Filing for Approvals of Concerted Actions by Enterprises;
- b* TFTC Guidelines for Concerted Petroleum Purchasing by Individual Petrol Stations;

- c* TFTC Guidelines on Approval of Concerted Pricing Among Small or Medium-sized Enterprises; and
- d* TFTC Guidelines for Handling Cases of Local Airlines' Combination and Concerted Action.

The following regulations are relevant to the Leniency Programme in Taiwan and were introduced into the TFTA at the end of 2011:

- a* Regulations on Immunity and Reduction of Fines in Illegal Concerted Action (the Leniency Programme; see Section IV); and
- b* Regulations for Calculation of Administrative Fines for Serious Violations of Articles 9 (i.e., monopoly) and 15 (i.e., cartel) of the TFTA (the Fine Formula; see Section V).

iv Key policies

The TFTC is in charge of enforcement of the TFTA and policymaking. The TFTC's priority objectives regarding cartel enforcement for 2017 to 2020⁵ are:

- a* to continue the aggressive enforcement of cartel regulations and to improve the effectiveness of the operation of antitrust funds; and
- b* to participate more actively in the international community of competition law, expanding international and cross-strait cooperation, and building a foundation for mutual assistance on global cartel cases.

v Controversies

Exemption requirements

The newly amended TFTA adds a catch-all provision in the hope of covering all types of pro-competition cooperation as broadly as possible. So far, there has been no actual case regarding how the catch-all provision could apply. It is unknown whether the new law can indeed ease the difficulty that enterprises have in finding a legal ground to justify their cooperation.

Leniency Programme

The Leniency Programme helped the TFTC disband a cartel of optical disk drive (ODD) manufacturers in September 2012 (see Section VIII). A 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; thus far, no conclusive answer has been reached.

II COOPERATION WITH OTHER JURISDICTIONS

See Section VIII.

⁵ <https://www.ftc.gov.tw/upload/1070907-1.pdf>.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

Determining the extent of the TFTC's jurisdiction is based on the effect of the conduct in question. Coordination between or among foreign enterprises conducted either in Taiwan or other jurisdictions is subject to the TFTA if the conduct is likely to affect the Taiwanese market. The TFTC has conducted investigations into the conduct of foreign enterprises and has issued directives confirming that their conduct may violate the TFTA if it affects the Taiwanese market. A noteworthy example is the *ODD* case (see Section VIII.i).

IV LENIENCY PROGRAMMES

i Overview

On 23 November 2011, the president announced the amended TFTA, introducing a Leniency Programme for enterprises participating in a cartel (Article 35) and imposing a higher fine for violation of cartel provisions (Article 40). The Leniency Programme, which came into effect on 6 January 2012, specifies, *inter alia*, the requirements for leniency, the maximum number of cartel participants eligible for leniency, the fine reduction percentage, the required evidence and the confidentiality treatment. Adoption of the Leniency Programme has significantly affected the enforcement of cartel regulations in Taiwan.⁶

ii Elements of leniency immunity

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

- a* before the TFTC knows about the unlawful cartel activities or commences an investigation on its own initiative, the enterprise voluntarily reports in writing to the TFTC the details of its unlawful cartel activities, provides key evidence and assists the TFTC in its subsequent investigation; or
- b* during the TFTC's investigation, the enterprise provides specific evidence that helps prove unlawful cartel activities and assists the TFTC in its subsequent investigation.

iii Markers

An enterprise that intends to apply for immunity from a fine, but that does not have all the information and evidence required by the Leniency Programme and is therefore not qualified to file the application to the TFTC, either in writing or orally, requesting preservation of the priority status for fine immunity (i.e., to obtain a marker), must submit the following information:

- a* the enterprise's name, paid-in capital, annual revenue, the name of its representative, and the address and date of company registration;
- b* the product or service involved, the form of the concerted action, the geographical areas affected and the duration of the action; and
- c* the names, company addresses and representatives of other cartel members.

⁶ Stephen Wu, Yvonne Hsieh and Wei-Han Wu, 'Leniency programme in Taiwan: The impact of a "whistle-blower" system in Eastern culture', *Competition & Antitrust Review* (2013).

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, or it will lose the marker. An application for a marker should be made in writing and follow the format designated by the TFTC.

iv Applicant's obligations to cooperate

From the time an application is filed until the case is concluded, the enterprise that files the application (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:

- a* The applicant should provide the TFTC as early as possible with all the information and evidence regarding the cartel that it currently possesses or may 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.
- b* The applicant should follow the instructions of the TFTC and provide prompt descriptions or cooperation to help the investigation regarding related facts that are capable of proving the existence of the cartel.
- c* If necessary, the applicant must allow those of its staff members or representatives who participated in cartel-related activities to be questioned by the TFTC.
- d* The content of the statements, information or evidence provided may not contain any untruths; and no destruction, forgery, alteration or concealment of any information or evidence related to the cartel will be tolerated.
- e* 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.

v Immunity or reduction of fines

No more than five applicants can be eligible for immunity from a fine or a fine reduction in any one 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 per cent, 20 to 30 per cent, 10 to 20 per cent, and 10 per cent 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 fine reduction.

The board of directors, representatives or managers of an involved enterprise, or others with the authority to represent the enterprise who should be jointly penalised based on the Republic of China (ROC) Administrative Penalty Act, may be granted immunity or a fine reduction if the following requirements are met: (1) the enterprise is an applicant that is eligible for immunity or a fine reduction; (2) the aforementioned persons have provided honest and full statements with regard to the unlawful act; and (3) those persons have followed the instructions of the TFTC, and have provided honest, full and continued assistance to the TFTC during its investigation and until the case is concluded.

vi Non-disclosure versus discovery of materials

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

- a* It should not indicate the name of the applicant, the fine imposed, the amount of the fine reduction or the reasons, without the consent of the applicant. If consent is not given, the TFTC should use aliases and other confidential means to indicate the identity of the applicant and avoid giving any information that may reveal the identity of the applicant.
- b* It should 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 containing information about the identity of the applicant should be kept in a file and stored appropriately. The same measures should be taken for other documents that may reveal 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 investigatory 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 is likely to be identifiable during the court procedure.⁷

V PENALTIES

i Basic concept: administrative fine first, criminal liability later

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 it to discontinue the illegal conduct, or set a time limit for it to rectify the conduct or take necessary corrective measures, and impose an administrative fine of between NT\$100,000 and NT\$50 million. If the violating party fails to act as ordered, the TFTC may continue to order the violating party to cease the violation, or set another time limit for the violating party to comply, and may impose successive administrative fines of between NT\$200,000 and NT\$100 million until the violating party complies.

In addition to the aforementioned administrative punishments, a violation of cartel regulations may also carry criminal liability. That is, if any enterprise is ordered by the TFTC, pursuant to Article 40 of the TFTA, to cease, rectify or carry out necessary measures to correct its violation of the cartel regulations under the TFTA, but fails to follow such an order or repeats the violation, its responsible person and any employees involved may face a prison term of up to three years, while the enterprise may receive a criminal fine of up to NT\$100 million in accordance with Article 34 of the TFTA.

⁷ Stephen Wu, 'Crackdown on Cartel as Global Trend', *Chinese National Federation of Industries Magazine*, No. 512 (2012).

ii Higher administrative fine for serious violation

According to the Fine Formula (see Section VIII.ii), if the TFTC considers a concerted action to be serious, it may impose a fine of up to 10 per cent of the violating enterprise's revenue in the previous fiscal year. The fine is not capped by the amounts mentioned in Section V.i.

In the calculations, revenues from an enterprise's domestic and foreign branches should be included, but those from its subsidiaries (if any) are excluded. The reason for this is that the TFTC considers a subsidiary as a separate entity that operates independently. Given the above, the TFTC will not consider the consolidated revenues of a conglomerate, but only the revenues of the enterprise that violates the TFTA. Since some enterprises (such as holding companies) do not have actual operational activities, the fine calculated without including the consolidated revenues may be much lower than the TFTC's expectation.

A serious concerted action is one that materially affects competition in the relevant market by taking the following factors into account:

- a* the scope and extent of the market competition and order affected;
- b* the duration of the damage to market competition and order;
- c* the market status of the violating enterprise and the structure of the corresponding market;
- d* the total sales and profits obtained from the unlawful conduct during the violation period; and
- e* 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 either of the following circumstances, the violation should be deemed serious: (1) the total amount of turnover of the relevant products or services during the period the cartel is active exceeds NT\$100 million; or (2) the total amount of gains derived from the cartel exceeds the maximum fine under the TFTA (i.e., NT\$50 million).

iii Calculating fines for serious cartels

According to the Fine Formula, the amount of the fine imposed on a serious cartel should be based on the basic amount and adjusting factors. The 'basic amount' equates to 30 per cent of the total amount of turnover of the relevant products or services during the cartel period. The adjusting factors include aggravating factors and mitigating factors.

The aggravating factors are that the violating enterprise:

- a* has organised or encouraged the unlawful conduct;
- b* has implemented supervision or sanctioning measures to ensure that the concerted action is upheld or executed; and
- c* has been sanctioned for violation of monopoly or cartel regulations within the past five years.

The mitigating factors are that:

- a* the violating enterprise immediately ceased the unlawful act when the TFTC began the investigation;
- b* the violating enterprise has shown real remorse and cooperated in the investigation;
- c* the violating enterprise has established compensation agreements with the victims or has initiated remedial measures;

- d* the violating enterprise has participated in the concerted action under coercion; and
- e* other government agencies approve or encourage a reduction of the fine imposed, or the fine reduction can be granted in accordance with other laws.

iv Administrative settlement

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 a party if it does not have enough evidence to secure a sanction. This is a contractual arrangement between the TFTC and the party. 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.⁸

How this settlement mechanism should work after the Leniency Programme comes into effect or how it should be calibrated to complement the Leniency Programme remain open issues.

VI 'DAY ONE' RESPONSE

i Limit of the TFTC's power

Under the current legal framework, the TFTC is not entitled to apply to the courts for a search warrant because it has not been granted judicial power. Therefore, the investigatory power granted by the TFTA and other administrative regulations is somewhat limited compared with that of other foreign competition authorities or the prosecutors' office. Accordingly, in Taiwan, while a dawn raid may be initiated by a prosecutor based on a search warrant, the TFTC cannot take such action.

If the TFTC has carried out unscheduled visits to target enterprises, it may request that the enterprises provide necessary documents and information; however, it cannot compel those enterprises to submit documents and information to the TFTC, or search the enterprises' premises to obtain the requested documents and information.⁹

ii The TFTC's investigatory tools

According to the TFTA, the TFTC has investigatory tools that allow it to:

- a* order the parties and any related third parties to appear before the TFTC to make statements;
- b* order relevant agencies, organisations, enterprises or individuals to submit books and records, documents and any other necessary materials or exhibits;
- c* dispatch personnel to conduct any necessary on-site inspection of the office, place of business or other locations of the relevant organisations or enterprises; and

8 Parties that have entered into a settlement agreement with the TFTC include Matra Transport International (1998), RCA Thomson Licensing Corporation (1998) and Microsoft Taiwan Corporation (2003). However, none of these settlements is related to cartel prohibition.

9 See footnote 6.

d seize articles discovered during any of the above-mentioned investigations that 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.¹⁰

In addition, when conducting an investigation, the TFTC must observe the principles in the Administrative Procedure Act (the Act) in the same way as all other administrative government agencies. In particular, the principle of proportionality under the Act requires that (1) the method adopted by a government agency should help achieve the intended objective, (2) where there are several methods that could lead to the same result, the method that causes the least harm to the people concerned should be adopted, and (3) the harm caused by an action should not be disproportionately greater than the benefits from the action.

iii Punishment for non-cooperation

If any person refuses an investigation without justifiable reasons, or refuses to appear when called to answer queries before the TFTC, or to submit books and records, documents or exhibits upon request with the set time limit, an administrative penalty of between NT\$50,000 and NT\$500,000 may be imposed upon that person. If that person continues to withhold cooperation without justification upon another notice, the TFTC may continue to issue notices of investigations, and may successively impose an administrative penalty of between NT\$100,000 and NT\$1 million each time until the person cooperates with the investigation, appears when called to answer queries, or submits books and records, documents or exhibits upon request.

VII PRIVATE ENFORCEMENT

According to the TFTA, if any enterprise violates the TFTA and thereby infringes the rights and interests of another entity, the injured party may demand the removal of the infringement; if there is a likelihood of infringement, prevention may also be claimed. Additionally, the injured party may claim damages from the violating enterprise.¹¹

As to the calculation of damages, if the violating enterprise makes any gains from its act of infringement, the injured party may demand 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 injury actually suffered and the interests that have been lost. 'Interests that have been lost' refers to those that were expected in the ordinary course of matters, from decided projects or equipment, or in other special circumstances.¹²

Moreover, the TFTA allows claims for punitive damages. That is, if the violation is intentional, the injured party is entitled to request that the court awards damages exceeding actual damage, provided that no award exceeds three times the amount of the proven damage.¹³

10 Article 27 of the TFTA.

11 Articles 29 and 30 of the TFTA.

12 Article 216 of the Civil Code.

13 Article 31 of the TFTA.

Although the TFTA provides legal grounds for civil action, so far there is no TFTC case precedent in which an injured party has successfully obtained compensation from an enterprise violating the cartel regulations.

The Leniency Programme offers confidentiality protection to the applicant, forbidding the TFTC from disclosing the identity of the applicant and relevant documents while issuing the decision letter. However, as mentioned in Section IV.vi, the applicant is likely to be identifiable during the court procedure if any injured party files a civil action against the enterprises involved in the violation.

VIII CURRENT DEVELOPMENTS

i The first application of the Leniency Programme: the ODD case¹⁴

Background

In September 2012, the TFTC ruled that four manufacturers of optical disk drives – 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 a bidding process held by Hewlett-Packard Company (HP) and Dell Inc (Dell), and hence had violated the cartel provisions under the TFTA.

According to the TFTC, between September 2006 and 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 between themselves other sensitive information, such as capacity and amount of production. A market survey indicated that the four ODD manufacturers jointly occupied at least 75 per cent of the ODD market, and HP's and Dell's notebooks and desktops made up around 10 per cent of the relevant Taiwanese market. As 90 per cent or more of the disk drives used in HP's and Dell's notebooks and desktop computers were purchased through bidding processes, the bid rigging by the four ODD manufacturers had certainly affected supply and demand in the domestic ODD market. Therefore, the TFTC fined TSST-K, HLDSK, PLDS and SOI, respectively, NT\$25 million, NT\$16 million, NT\$8 million and NT\$5 million.

The TFTC indicated that it began investigating the case because some of the parties involved in the cartel had 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 has been kept confidential by the TFTC at the applicant's request.

Implications

The *ODD* case is the first that the TFTC has concluded successfully with the help of an applicant since the Leniency Programme came into effect in 2011. Before the Leniency

¹⁴ TFTA decision announced on 24 September 2012. The full content of the decision letter was not published because of protection of the leniency applicant.

Programme was incorporated into the TFTA, local practitioners doubted that the 'whistle-blower mechanism' would work in Taiwan as it does in other countries. Enterprises within the same industry in Taiwan have close interaction, and employees of these enterprises socialise with each other regularly. In addition, the requirement by the Leniency Programme for an enterprise to betray its business partners in return for immunity from or reduction of fines contradicts business practice. Nevertheless, the Leniency Programme, within one year of coming into effect, assisted the TFTC in bringing the cartel members in the *ODD* case to justice.¹⁵

This case is also the first instance of the TFTC seeking assistance from competition authorities in other jurisdictions (such as the United States and the European Union) because the cartel involved foreign markets and entities. A TFTC news 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.¹⁶

ii Record-breaking fine imposed on power producers¹⁷

Background

The TFTC rendered a decision on 13 March 2013, penalising nine independent power producers (IPPs) that are members of the Association of IPPs. During Association meetings between August 2008 and October 2012, these IPPs had agreed *en bloc* to refuse to amend the existing power purchase agreements with the Taiwan Power Company, and not to adjust the sale price of electricity even when there was a reduction in electricity production costs.

The TFTC found that the IPPs' joint refusal could disrupt the functioning of the market, since each participating IPP could boost its profits by maintaining the existing sale price even when its electricity production costs decreased. Eventually, this refusal to adjust the price would lead to a price rise for the consumer. The TFTC therefore found the joint refusal to be a material violation of the concerted action regulations. To penalise the nine IPPs for their concerted action, the TFTC invoked the newly amended punishment provision under the TFTA (i.e., the Fine Formula), in which the maximum fine imposed on each violating enterprise can be up to 10 per cent of its turnover in the previous fiscal year. By applying the formula, the total fine in the subject case was NT\$6.32 billion, which is the highest amount imposed in a single cartel case in the TFTC's enforcement history.

The IPPs filed an administrative appeal with the Executive Yuan against the TFTC's decision. In September 2013, the Executive Yuan ruled that the TFTC had calculated the fine recklessly. In particular, the Fine Formula had come into effect in April 2012 and the alleged concerted action straddled the new and old laws. Consequently, the Executive Yuan asked the TFTC to re-evaluate whether the old punishment provision, which capped the fine for a first offence at NT\$25 million, should be considered when imposing fines on each IPP. Even though the TFTC reached a second decision in November 2013, whereby the fine imposed on each IPP was reduced by NT\$30 million, that decision was also revoked by the Executive Yuan, in May 2014. According to the Executive Yuan, the TFTC failed to consider that each IPP's culpability may vary, and thus reducing the fines uniformly would not comply with the legal requirements. Therefore, the TFTC made a third decision, in July 2014, whereby

15 See footnote 6.

16 Stephen Wu and Yvonne Hsieh, 'Taiwan: ODD manufacturers fined for global bid-rigging conspiracy', *Global Competition Review Daily Headlines* (2 October 2012).

17 TFTC decision letter dated 15 March 2013, Ref. No. 102035.

the fines on various levels were reduced according to each IPP's business operation and involvement in the case. Although the fines are still being disputed in the administrative appeal procedure, the substance of the case (i.e., whether concerted action exists among the IPPs) has been moved to the administrative litigation process. On 29 October 2014, the Taipei High Administrative Court revoked the TFTC's decision on the grounds that, *inter alia*, no 'provision of electricity' market exists in the subject case where IPPs can conspire to impair competition. Instead, it is a contract dispute between the IPPs and Taiwan Power Company. The TFTC appealed to the Supreme Administrative Court (the Supreme Court). In July 2015, the Supreme Court revoked the Taipei High Administrative Court and remanded the case to the Taipei High Administrative Court on the basis that several issues – such as whether a relevant market exists, whether the IPPs reached a meeting of minds and whether the IPPs' conduct affected the market function – require further clarification. The TFTC filed an appeal against the judgment of the Taipei High Administrative Court. Then, in September 2018, the Supreme Court revoked and remanded the case again to the Taipei High Administrative Court. There is no final decision on this case as yet.

Implications

As this is the first case that has adopted the Fine Formula, the general public is anticipating that the interpretation of when a case should be considered as a material violation and how the 10 per cent turnover Fine Formula should be calculated will be clarified by the subsequent appeal decision and lawsuit (if any). Furthermore, the TFTC has shown how heavy-handed it can be when the interests of the public are at stake. Enterprises that receive a high degree of public attention should be cautious when interacting with their competitors.

iii The highest fine ever imposed on foreign enterprises in a cartel case

The Capacitor case

Background

On 9 December 2015, the TFTC handed down a NT\$5.8 billion fine on 10 international capacitor suppliers for price-fixing.¹⁸ Seven aluminium capacitor companies – Nippon Chemi-Con Corporation, Hongkong Chemi-Con Limited, Taiwan Chemi-Con Corporation, Rubycon Corporation, ELNA Co Ltd, Sanyo Electric (Hong Kong) Ltd and Nichicon (Hong Kong) Ltd – and three tantalum capacitor companies – NEC Tokin Corporation, Vishay Polytech Co Ltd and Matsuo Electric Co Ltd – were found to have violated the cartel regulations under the TFTA. According to the TFTC, all these enterprises were involved in exchanging sensitive information pertaining to clients, pricing, and production capacity and volume through meetings or bilateral communications starting in 2005. As Taiwan's electronics manufacturing sector heavily relied on the importing of capacitors, with domestic supply accounting for minimal market share, the subject price-fixing scheme had detrimentally undermined competition in the Taiwanese market. Some of the capacitor suppliers have appealed to the Taipei Administrative Court against the TFTC's decision; these cases are being reviewed by the Court.

18 The TFTC published a press release on its decision on 9 December 2015. It did not disclose the full text of the decision because of protection of the leniency applicants.

Implications

The heavy fine in the *Capacitor* case demonstrates that the TFTC will use the enterprise's 'global' revenues to determine the cap of the fine for a serious violation. Also, by imposing the highest fine on foreign enterprises in its enforcement history, the TFTC said it would like to set an example for upholding fair business practices. Separately, the TFTC also pointed out that its decision was reached following a joint investigation launched last year with the European Union, Singapore and the United States. Among those agencies investigating the subject cartel, the TFTC is the first to conclude the case and reach a decision. This shows that the TFTC has gradually gained its exposure in the international antitrust community and has ample capability for handling cross-border cartels involving foreign enterprises.

iv Compliance programme

Guidance from the TFTC

To assist Taiwanese enterprises in establishing internal compliance rules to curb their risk of violating antitrust laws of other countries, in December 2011 the TFTC published the Guidelines on Setting up Internal Antitrust Compliance Programmes (the Guidelines) and the Antitrust Compliance Dos and Don'ts (the Principles of Conduct).

According to the Guidelines, an enterprise should stipulate an antitrust compliance programme that is appropriate for its business strategies and corporate culture. The programme should cover at least the following measures to ensure compliance:

- a* developing a corporate culture where legal compliance is essential;
- b* stipulating policies and procedures that everyone should observe;
- c* providing education or training programmes;
- d* establishing audit, review and report mechanisms;
- e* creating proper rewards and punishments; and
- f* designating a means for contact or consulting.

To allow each enterprise to grasp which actions are and are not permissible, the TFTC published the Principles of Conduct, including the types of violations under the TFTA and antitrust laws of other jurisdictions. The Principles of Conduct list the 'dos and don'ts' relating to cartels, restrictions on resale prices, monopolies and abuse of market power.

The Guidelines and the Principles of Conduct are administrative directives with no binding legal effect. However, the TFTC encourages Taiwanese enterprises to take the initiative in drafting their own compliance programmes so as to lower their risk of violating the relevant laws. In addition, besides referring to the Guidelines and the Principles of Conduct, the TFTC recommends that each enterprise takes its corporate culture and industry characteristics into consideration while drafting a compliance programme.¹⁹

Reaction from the enterprises

Several Taiwanese enterprises have been penalised by foreign competition authorities during the past decade for their involvement in international cartels. The most recent and notorious case ended with AU Optronics Corporation (AUO), its US subsidiary and two senior executives being convicted by a jury in March 2012 of violating US antitrust laws by colluding

¹⁹ Stephen Wu, Yvonne Hsieh and Wei-Han Wu, 'Today and Tomorrow', *The 2012 Guide to Competition and Antitrust* (2012).

to fix prices of LCDs between 2001 and 2006. In September 2012, the court fined AUO US\$500 million and imposed on each of the executives a prison sentence of three years and a fine of US\$200,000. The severe penalties imposed on AUO and its high-ranking officers stunned the industry and alerted Taiwanese enterprises to the importance of compliance with antitrust law. In the wake of this case, Taiwanese enterprises may be more eager to establish internal compliance programmes to monitor the risk of cartel violation in various jurisdictions, as advised by the TFTC.²⁰

IX OUTLOOK

In the past, the TFTC devoted most of its administrative resources to unfair competition matters, such as false advertisements or multi-level sales, while antitrust issues such as cartels received scant attention. Nonetheless, the amendment to the concerted action provisions, in particular the introduction of the Leniency Programme, may considerably transform how the TFTC enforces cartel regulations. As foreign competition authorities have vowed to take aggressive action to curb the growth of international cartels, the TFTC may follow the trend. The TFTC can be expected to develop a more mature enforcement strategy in the near future.²¹

In the February 2015 amendments to the TFTA, the TFTC's original proposal of empowering the TFTA to search and seize (i.e., conduct dawn raids) did not pass the Legislative Yuan's final review because of concerns that the power to conduct dawn raids may be unconstitutional. In the past few years, the TFTC has advocated such a proposal several times. However, as there have already been strong criticisms against such a move on the grounds of the separation of powers between administrative agency and judicial authority, there is no certainty that this dawn-raid power will be adopted and become effective in the near future. In November 2018, the TFTC proposed a draft bill to amend Article 41 of the TFTA regarding the statute of limitations. The amended Article 41 stipulates that the statutory limitation on the TFTC's power to impose sanctions will be interrupted on the day on which the TFTC starts an investigation. This amendment significantly prolongs the amount of time available to the TFTC for conducting investigations and imposing sanctions on anticompetition conduct. The draft bill is subject to the approval of the Executive Yuan and then three readings of the Legislative Yuan. Thus, whether and when it will become effective is still unknown.

The TFTA was amended in June 2015 to introduce a whistle-blower reward scheme. According to Article 47-1 of the amended TFTA, and other sources, 30 per cent of the funds for this reward, described as an 'antitrust fund' under the TFTA, will come from the penalties collected by the TFTC. As outlined in a TFTC news release, this reward scheme aims to encourage employees 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.²²

20 See footnote 7.

21 See footnote 6.

22 'Regulations on Payment of Rewards for Reporting of Illegal Concerted Actions' and 'Regulations Governing Management and Utilization of the Antitrust Fund' can be found at <https://www.ftc.gov.tw/internet/english/doc/docList.aspx?uid=1294>.

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