
THE CARTELS AND LENIENCY REVIEW

FIFTH EDITION

EDITORS

CHRISTINE A VARNEY AND JOHN TERZAKEN

LAW BUSINESS RESEARCH

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CHRISTINE A VARNEY AND JOHN TERZAKEN

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EDITORS' 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 enforcement. Some notable cartels managed to remain intact for as long as a decade before they were uncovered. Some may never see the light of day. However, for those cartels that are detected, this compendium offers a resource for practitioners around the world.

This book brings together leading competition law experts from more than two dozen 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 of these chapters 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 chapters on 30 jurisdictions) and analytical depth to those practitioners who may find themselves on the front lines 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 fifth edition of *The Cartels and Leniency Review*. We hope that you will find it a useful resource. The views expressed in this book are those of the authors and not those 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.

Christine A Varney

Cravath, Swaine & Moore LLP
New York

John Terzaken

Allen & Overy LLP
Washington, DC

January 2017

Chapter 28

TAIWAN

*Stephen Wu, Rebecca Hsiao and Wei-Han Wu*¹

I ENFORCEMENT POLICIES AND GUIDANCE

i Definition

Cartels are regulated by the provisions governing concerted actions under the Taiwan Fair Trade Act (TFTA). A concerted action is a conduct of any enterprise, by means of contract, agreement or any other form of mutual understanding,² 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 others' business activities. A concerted action 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.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

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 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 TFTC's decision or ruling.

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

Under the TFTA, a concerted action is prohibited unless it meets one of the requirements 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.

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* exportation: it is to enter into agreements concerning solely competition in foreign markets for the purpose of securing or promoting exportation;
- e* importation: it is for the importation of foreign goods for the purpose of strengthening trade;
- f* economic downturn: it is to limit the quantity of production and sales, equipment or prices for the purpose of meeting 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: it is for the purpose of improving operational efficiency or strengthening the competitiveness of small to medium-sized enterprises; and
- h* 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 of 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 attach conditions to the approval. At least three months prior to the expiration of the approval the enterprises may, with justification, file a written application with the TFTC for extension of approval for a period of no more than another five years.

Moreover, in March 2016, the TFTC published a ruling explaining that if the combined market shares of all the cartel participants do not reach 10 per cent in the relevant market, it can be presumed that such cartel scheme will not generate any restrictive effect on

the market. However, the ruling also indicates that if the subject cartel aims to restrict 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 related to the application for concerted action approval:

- a* the TFTC's Guidelines on Handling Filing for Approvals of Concerted Actions by Enterprises;
- b* the TFTC's Guidelines for Concerted Petroleum Purchasing by Individual Petrol Stations;
- c* the TFTC's Guidelines on Approval of Concerted Pricing among Small or Medium-sized Enterprises; and
- d* the TFTC's Guidelines for Handling Cases of Local Airlines' Combination and Concerted Action.

The following are regulations that are relevant to the Leniency Programme in Taiwan, which were introduced into the TFTA at the end of 2011: the Regulations on Immunity and Reduction of Fines in Illegal Concerted Action (the Leniency Programme; see Section IV, *infra*); and the 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, *infra*).

iv Key policies

The TFTC is in charge of the enforcement of the TFTA and policymaking. For cartel enforcement, the TFTC's priority objectives 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 more actively participate 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 enterprises' difficulty in find 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, *infra*). A remarkable aspect of the case

5 <https://www.ftc.gov.tw/upload/36959cd9-49ea-45c1-a648-90f84c4f1fd3.pdf>.

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 and, thus far, no conclusive answer has been reached.

II COOPERATION WITH OTHER JURISDICTIONS

See Section VIII, *infra*, for details.

III JURISDICTIONAL LIMITATIONS, AFFIRMATIVE DEFENCES AND EXEMPTIONS

The TFTC's jurisdiction is determined 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 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. A noteworthy example is the *ODD* case (see Section VIII.i, *infra*).

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). On 6 January 2012, the Leniency Programme came into effect. The Leniency Programme 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 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:

- 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.

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).

iii 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 requesting preservation of the priority status for fine immunity (i.e., to obtain a marker), which must contain the following information: the enterprise's name, paid-in capital, annual revenue, name of its representative, and 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; and the names, company addresses and representatives of other cartel members.

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. The 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 the 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 capable of proving the existence of the cartel;
- c* if necessary, the applicant must allow its staff members or representatives that 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; and
- 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

Only up to five applicants can be eligible for fine immunity or a fine 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 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 reduction of the fine.

The board 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: the enterprise is an applicant that can be granted immunity or a fine reduction; these persons have provided honest and full statements with regard to the unlawful act; and these persons have followed the instructions of the TFTC, and have provided honest, full and continued assistance to the TFTC during its investigation before 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 reduction of the fine, it must take the following steps to protect the confidentiality of the applicant's identity:

- a* not indicate the name of the applicant, the fine imposed, and the amount of fine reduced and the reasons, unless with the consent of the applicant. 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
- b* 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 investigation 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.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 NT\$200,000 to NT\$100 million until the violating party complies.

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

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 take necessary measures to correct its violation of the cartel regulations under the TFTA, but fails to follow such 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.

ii Higher administrative fine for serious violation

According to the Fine Formula (see Section VIII.ii, *infra*), 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 last fiscal year. Such fine is not capped by the amounts mentioned in subsection i, *supra*.

In the revenue 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 operation 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 as serious: the total amount of turnover of the relevant products or services during the period the cartel is active exceeds NT\$100 million; or 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 refers 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 as follows:

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

The mitigating factors are as follows:

- 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 taken remedial measures;
- d* the violating enterprise has participated in the concerted action under coercion; and
- e* other governmental agencies approve or encourage the fine imposed to be reduced, 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 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 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 it, or search the enterprises' premises to obtain the requested documents and information.⁹

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 note 6, *supra*.

ii TFTC's investigatory tools

According to the TFTA, the TFTC has the following three types of investigatory tools.¹⁰ It can:

- 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 organisation or enterprises; and
- 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.

In addition, the TFTC has to observe the principles in the Administrative Procedure Act (the Act) just like all other administrative government agencies when conducting an investigation. In particular, the principle of proportionality under the Act requires that the method adopted by a governmental agency should help achieve the intended objective; 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 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 the 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 by the set time limit, an administrative penalty of between NT\$50,000 and NT\$500,000 may be imposed upon that person. If such 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, the injured party may demand the removal of such 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 calculation of damages, if the violating enterprise reaps 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

10 Article 27 of the TFTA.

11 Articles 29 and 30 of the TFTA.

to the damages calculation. 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 the court to award damages exceeding actual damage, provided that no award exceeds three times the amount of the proven damage.¹³

Although the TFTA provides legal grounds for civil action, so far there is no TFTC case precedent in which an injured party 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 other relevant documents while issuing the decision letter. However, as mentioned in Section IV.vi, *supra*, 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.

VIII CURRENT DEVELOPMENTS

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

Background

In September 2012, the TFTC ruled that four ODD manufacturers – 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 had 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 e-mails, 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 per cent of the ODD market. Meanwhile, 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 desktops were purchased through bidding processes, the four ODD manufacturers' bid rigging had certainly affected supply and demand in the domestic ODD market. Therefore, the TFTC fined TSST-K, HLDSK, PLDS and SOI NT\$25 million, NT\$16 million, NT\$8 million and NT\$5 million, 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

12 Article 216 of the Civil Code.

13 Article 31 of the TFTA.

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

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 incorporated into 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 coming into effect, assisted the TFTC in bringing the cartel members in the *ODD* case to justice.¹⁵

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. 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. From August 2008 to October 2012, during Association meetings, 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 hike for the public. 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 (the Fine Formula), in which the maximum fine imposed on each violating enterprise can be up to 10 per cent of its turnover of the previous fiscal year. By applying the Fine Formula, the total fine of the subject case is NT\$6.32 billion, which is the highest amount imposed in a single case in the TFTC's enforcement history.

The IPPs filed an administrative appeal against the TFTC's decision with the Executive Yuan. In September 2013, the Executive Yuan ruled that the TFTC had calculated the fine

15 See note 6, *supra*.

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.

recklessly. In particular, the Fine Formula came into effect in April 2012, and chronologically 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 at NT\$25 million for a first-time offence, should be considered when imposing fines on each IPP. Even though the TFTC reached a second decision in November 2013 whereby the fines imposed on each IPP were universally reduced by NT\$30 million, the decision was then revoked by the Executive Yuan again 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 be in conformity with the legal requirements. Therefore, the TFTC made a third decision in July 2014 whereby the fines on various levels were reduced depending on 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 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 mind and whether the IPPs' conducts affected the market function, require further clarification. The case is now being tried at the Taipei High Administrative Court.

Implications

As this is the first case that has adopted the Fine Formula, the public anticipates 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 public's interests 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: the Capacitor case¹⁸

Background

On 9 December 2015, the TFTC handed down a NT\$5.8 billion fine on 10 international capacitor suppliers for price-fixing. Seven aluminium capacitor companies, namely, 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, the enterprises above 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

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.

electronics manufacturing sector heavily relied on importation of capacitors, with domestic supply accounting for minimal market share, the subject price-fixing scheme has detrimentally undermined the competition in the Taiwanese market.

Implication

The heavy fine in the subject case demonstrates that the TFTC will use the enterprise's 'global' sales 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 EU, Singapore and the US. 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 of handling cross-broader 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 (Principles of Conduct).

According to the Guidelines, an enterprise should stipulate an antitrust compliance programme 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 what actions are and are not permissible, the TFTC published the Principles of Conduct, including types of violation under the TFTA and antitrust laws of other jurisdictions. The Principles of Conduct lists the 'dos and don'ts' relating to cartels, restrictions on resale price, 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 take its corporate culture and industry characteristics into consideration while drafting such programme.¹⁹

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

Reaction from the enterprises

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

v 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. A more mature enforcement strategy can be expected to be developed by the TFTC in the near future.²¹

In the 2015 February 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 such dawn-raid power may be unconstitutional. As dawn raids can be an effective tool in cartel investigations, the TFTC has indicated that it will keep advocating legislators to grant it with the right to seize and search with the aim of strengthening its enforcement power.

The TFTA was further amended in June 2015 to introduce a whistle-blower reward scheme. According to Article 47-1 of the newly amended TFTA, among other sources, 30 per cent of the funds for this reward, described as an 'antitrust fund' under the TFTA, will come from the amount of 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 note 7, *supra*.

21 See note 6, *supra*.

22 The 'Regulations on Payment of Rewards for Reporting of Illegal Concerted Actions' and the '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>.

Appendix 1

ABOUT THE AUTHORS

STEPHEN WU

Lee and Li, Attorneys-at-Law

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

Lee and Li, Attorneys-at-Law

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

Lee and Li, Attorneys-at-Law

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 matter. 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, No. 201 Tun-Hua North Road

Taipei 10508

Taiwan

Tel: +886 2 2715 3300

Fax: +886 2 2713 3966

stephenwu@leeandli.com

rebeccaHSiao@leeandli.com

weiHanwu@leeandli.com

www.leeandli.com