The Public Competition Enforcement Review

Sixth Edition

Editor
Aidan Synnott

Law Business Research

The Public Competition Enforcement Review

This article was first published in
The Public Competition Enforcement Review 6th edition
(published in April 2014 – editor Aidan Synnott).

For further information please email
nick.barette@lbresearch.com

The Public Competition Enforcement Review

Sixth Edition

Editor
Aidan Synnott

Law Business Research Ltd

THE LAW REVIEWS

THE MERGERS AND ACQUISITIONS REVIEW

THE RESTRUCTURING REVIEW

THE PRIVATE COMPETITION ENFORCEMENT REVIEW

THE DISPUTE RESOLUTION REVIEW

THE EMPLOYMENT LAW REVIEW

THE PUBLIC COMPETITION ENFORCEMENT REVIEW

THE BANKING REGULATION REVIEW

THE INTERNATIONAL ARBITRATION REVIEW

THE MERGER CONTROL REVIEW

THE TECHNOLOGY, MEDIA AND
TELECOMMUNICATIONS REVIEW

THE INWARD INVESTMENT AND
INTERNATIONAL TAXATION REVIEW

THE CORPORATE GOVERNANCE REVIEW

THE CORPORATE IMMIGRATION REVIEW

THE INTERNATIONAL INVESTIGATIONS REVIEW

THE PROJECTS AND CONSTRUCTION REVIEW

THE INTERNATIONAL CAPITAL MARKETS REVIEW

THE REAL ESTATE LAW REVIEW

THE PRIVATE EQUITY REVIEW

THE ENERGY REGULATION AND MARKETS REVIEW

THE INTELLECTUAL PROPERTY REVIEW

THE ASSET MANAGEMENT REVIEW

THE PRIVATE WEALTH AND PRIVATE CLIENT REVIEW

THE MINING LAW REVIEW

THE EXECUTIVE REMUNERATION REVIEW

THE ANTI-BRIBERY AND ANTI-CORRUPTION REVIEW

THE CARTELS AND LENIENCY REVIEW

THE TAX DISPUTES AND LITIGATION REVIEW

THE LIFE SCIENCES LAW REVIEW

THE INSURANCE AND REINSURANCE LAW REVIEW

THE GOVERNMENT PROCUREMENT REVIEW

THE DOMINANCE AND MONOPOLIES REVIEW

THE AVIATION LAW REVIEW

THE FOREIGN INVESTMENT REGULATION REVIEW

THE ASSET TRACING AND RECOVERY REVIEW

THE INTERNATIONAL INSOLVENCY REVIEW

THE OIL AND GAS LAW REVIEW

THE FRANCHISE LAW REVIEW

THE PRODUCT REGULATION AND LIABILITY REVIEW

www.TheLawReviews.co.uk

PUBLISHER
Gideon Roberton

BUSINESS DEVELOPMENT MANAGERS
Adam Sargent, Nick Barette

ACCOUNT MANAGERS
Katherine Jablonowska, Thomas Lee, James Spearing, Felicity Bown

PUBLISHING ASSISTANT
Lucy Brewer

MARKETING ASSISTANT
Chloe Mclauchlan

EDITORIAL ASSISTANT
Shani Bans

HEAD OF PRODUCTION
Adam Myers

PRODUCTION EDITOR
Anne Borthwick

SUBEDITOR
Janina Godowska

MANAGING DIRECTOR
Richard Davey

Published in the United Kingdom
by Law Business Research Ltd, London
87 Lancaster Road, London, W11 1QQ, UK

www.TheLawReviews.co.uk

ISBN 978-1-909830-01-1

Printed in Great Britain by
Encompass Print Solutions, Derbyshire
Tel: 0844 2480 112

ACKNOWLEDGEMENTS

The publisher acknowledges and thanks the following law firms for their learned assistance throughout the preparation of this book:

ANJIE LAW FIRM

BAYKANIDEA LAW OFFICES

BULBOACA & ASOCIATII SCA

BUSTAMANTE & BUSTAMANTE LAW FIRM

CLEARY GOTTLIEB STEEN & HAMILTON LLP

DLA PIPER

DRYLLERAKIS & ASSOCIATES

FRORIEP

HANNES SNELLMAN ATTORNEYS LTD

KHAITAN & CO

KING & WOOD MALLESONS

L PAPAPHILIPPOU & CO LLC

LEE AND LI, ATTORNEYS-AT-LAW

LLOREDA CAMACHO & CO

MARVAL, O'FARRELL & MAIRAL

NAGASHIMA OHNO & TSUNEMATSU

NORTON ROSE FULBRIGHT LLP

OSBORNE CLARKE

PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP

SIDLEY AUSTIN LLP

SQUIRE SANDERS

STIBBE

URÍA MENÉNDEZ – PROENÇA DE CARVALHO

VEIRANO ADVOGADOS

VON WOBESER Y SIERRA, SC

WEBB HENDERSON

WILHELM & ASSOCIÉS

CONTENTS

EDITOR'S PREFACE

The reports from around the globe collected in this volume will be of keen interest to practitioners of competition law everywhere. Increasingly we see that effects of public competition enforcement in individual jurisdictions are felt well beyond those jurisdictions as firms become globalised and cross-border trade increases. To be sure, many jurisdictions retain important local particularities in competition law and enforcement priorities. However, as we can see from the reports collected in this volume, increasing international cooperation among competition enforcers, the widespread reach of firms' conduct and the economic circumstances of certain industries have led to a notable convergence in the cases attracting the attention of enforcers.

With respect to cartel enforcement, the reports from the European Union, Switzerland and the United States all describe efforts in those jurisdictions concerning alleged fixing of the London Inter-Bank Offered Rate (LIBOR). Last year, in a related case, the European Commission levied its largest-ever aggregate fine. The past year also saw continued efforts by regulators to police *auto parts* price-fixing cartels. For example, the United States, the European Commission and Japan each have levied significant fines on auto parts companies around the globe, and Australia continued its proceedings against several firms in this industry. The alleged *liquid crystal display* cartel continues to attract attention from (and fines imposed by) authorities around the world.

Various alleged bid-rigging schemes have attracted the attention of authorities in many jurisdictions, including Brazil, Colombia, Germany, India, Romania, Switzerland and the United States. These investigations range from the provision of subway trains to railway tracks to rubber soles for boots to firearms to road construction. Competition authorities in the United States have continued their focus on bid rigging in municipal bond and real estate foreclosure auctions. The Italian authorities investigated a joint venture between Italian and French firms formed to bid on the provision of services to art museums and archeological sites, but found no infringement.

We also see a convergence in enforcement priorities in other areas. As detailed in the chapters that follow, several jurisdictions have acted against pay-for-delay agreements in the pharmaceutical industry. Last year, the United States Federal Trade Commission

won an important Supreme Court challenge to these agreements, and the European Commission and France levied several fines on parties to such agreements. Italy has also commenced an investigation into one such agreement. The reports from Australia, India and the United Kingdom describe further enforcement efforts in the pharmaceutical industry. Argentina and Italy, like the United States and Spain, continue to investigate various professional associations for possible anti-competitive agreements.

High technology industries – and in particular concerns surrounding the behaviour of firms holding standard-essential patents – continue to get significant attention from enforcers around the world. Chinese authorities have launched an investigation into a wireless research and development company over complaints that it has charged excessive fees for the licensing of certain of its patents for technology standards for mobile phones; the European Commission is undertaking an investigation of major industry players in connection with their ownership of standard-essential patents; and United States authorities continue to actively discuss policy in this area.

Additionally, both the United States and the European Commission have had success in their actions against e-Book publishers. Several jurisdictions – including Brazil, Germany, Switzerland and Finland – have brought actions concerning resale price maintenance schemes for various products. We also note that Brazil, Japan and Spain have moved against copyright management organisations for their actions with respect to royalties. Several of the chapters that follow note the efforts of various regulators concerning interchange fees associated with credit card transactions.

Enforcement activity related to mergers remains robust, and issues surrounding consolidation in the airline industry have occupied regulators across the globe. Both the European Commission and the United States Department of Justice confronted proposed airline mergers last year, leading to different results: the European Commission continued to oppose the proposed merger of Irish airlines Aer Lingus and Ryanair, while the merger of American Airlines and US Airways was ultimately cleared by the United States authorities. Brazilian authorities approved the merger of Azul and Trip Linhas Aéreas subject to conditions. Meanwhile, as detailed in the report from India, after an analysis that will be of interest to practitioners in and observers of airline competition issues, the Indian authorities approved various agreements between Etihad Airways and Jet Airways.

Competition law continues to evolve across the globe. Indeed, the report from the United Kingdom will be of particular interest. It describes the significant changes in the competition enforcement regime there, as authority for enforcement shifts from two separate authorities, the Office of Fair Trading and the Competition Commission, to a single Competition and Markets Authority. Mexico has a proposed new Antitrust Act, which is under discussion in the Mexican Congress. In China, Mofcom has published draft Provisions on Imposing Restrictive Conditions on Concentration of Undertakings which, we read, are expected to be adopted this year. We also note that in the coming year Australia will undertake a significant review of its competition laws. The report from Brazil details the first full year of that jurisdiction's new competition regime. The report from Germany describes important amendments to the German Act Against Restraints to Competition, particularly regarding the law's application to merger review; and the report from France details new guidelines there for merger control. Numerous

jurisdictions continue to implement and refine leniency programmes designed to encourage the reporting of cartel activity.

The reports that follow detail the efforts of public competition enforcers around the globe. Also of keen interest is the keynote piece challenging the European Commission's philosophy of encouraging private enforcement of competition laws. That chapter will surely provoke much thought on the efficacy and desirability of such enforcement.

Aidan Synnott
Partner
Paul, Weiss, Rifkind, Wharton & Garrison LLP
April 2014

Chapter 24

TAIWAN

Stephen Wu, Rebecca Hsiao and Wei-Han Wu[1]

I OVERVIEW

i Prioritisation and resource allocation of enforcement authorities

The Taiwan Fair Trade Commission (TFTC) is in charge of the enforcement of the Fair Trade Act of Taiwan, Republic of China (TFTA). The TFTA is the major competition legislation in Taiwan. It was promulgated on 4 February 1991, became effective on 4 February 1992, and was amended in 1999, 2000, 2002, 2010 and 2011. The TFTA can be divided into two parts:

a restrictive business practices, which cover monopolies and the abuse of dominance, combination (merger control), concerted actions (cartel), fixing of resale prices and other restrictive business practices (such as boycotts, discriminatory treatment, solicitation of trading counterparts by improper means, tying and other restrictions imposed on trading counterparts' business activities without due cause); and

b unfair trade practices, which cover counterfeiting, false advertisements, damage to business reputation, illegal multi-level sales, and other deceptive or obviously unfair conduct capable of affecting trading.

The TFTC has various functions, from policymaking and market surveys to law enforcement. The TFTA empowers the TFTC to:

a draft and formulate fair trade policies and regulations;

b review fair trade matters;

c conduct studies on particular markets or business activities and economic conditions;

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

d investigate and determine whether an enterprise[2] has violated the TFTA; and
e handle any other matters related to fair trade practices.

The TFTC may, on its own initiative or upon complaint, investigate cases that involve unfair competition. In the investigation, the TFTC may:
a ask the parties and any third party to give a statement;
b ask relevant agencies, organisations, enterprises or individuals to submit books and records, documents, and any other necessary materials or exhibits; and
c search or inspect the office, place of business, or other locations of the relevant organisations or enterprises.

Any person who, without reasonable grounds, refuses an investigation or withholds evidence, may face an administrative fine of NT$20,000 to NT$250,000. If the person remains uncooperative despite receiving another notice, the TFTC may continue to issue notices of investigation, and may impose additional fines of NT$50,000 to NT$500,000 until such person cooperates with the TFTC.

As of 6 February 2012, the TFTC is no longer under the supervision of the Executive Yuan[3] and is now an independent government body. The TFTC may, if it is satisfied that one or more enterprises have violated the TFTA, impose administrative sanctions against the enterprises. Enterprises punished by the TFTC may appeal to the Executive Yuan,[4] then the High Administrative Court and finally the Supreme Administrative Court. Civil and criminal liabilities under the TFTA should be determined by the courts. Enterprises will face criminal liabilities only if they fail to comply with the TFTC's administrative sanctions.

ii Enforcement agenda

The TFTC's goals are to promote free and fair competition and strong economic growth. It sets its priority objectives every four years. The TFTC's priority objectives for the period from 2013 to 2016 are as follows:
a investigate anti-competition activities and correct unfair trade practices;
b formulate or amend the regulations of the TFTA;
c help enterprises create fair trade practices;
d cooperate with foreign counterparts to stay abreast of the latest international developments in competition law; and
e build an industry-wide database to facilitate the TFTC's economic analysis and market survey exercises.

2 The term 'enterprise' means any company, sole proprietor, partnership, trade association, or any individual or association that sells products or services. All enterprises are subject to the TFTA.

3 The government is mainly divided into five branches: the Legislative Yuan (the parliament), the Executive Yuan (the cabinet), the Judicial Yuan, the Examination Yuan and the Control Yuan.

4 In future, the TFTC's decision will not be subject to the Executive Yuan's review due to the organisational reconfiguration of the Executive Yuan.

II CARTELS

i Definition

Cartels are regulated by the provisions governing concerted actions under the TFTA. A concerted action is the conduct of any enterprise, by means of contract, agreement or any other form of mutual understanding,[5] with any other 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, etc., and thereby to restrict each other's business activities. A concerted action is limited to a horizontal concerted action at the same production or marketing stage, or both, which would affect the market function of production, trade in goods, or supply and demand of services.[6]

ii Significant cases

Record-breaking fine on power producers (2013)[7]

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

5 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 board meeting of directors or supervisors to restrict the activities of its member enterprises will also be deemed a horizontal concerted action.

6 If any enterprise is found to have violated the cartel regulations under the TFTA, the TFTC may order it to discontinue the illegal conduct, or set a time limit for it to rectify the conduct or take any necessary corrective measure. The TFTC may further impose an administrative fine of between NT$50,000 and NT$25 million. If the perpetrating enterprise fails to discontinue or rectify its conduct or take any necessary measure as ordered, the TFTC may re-issue its order and set another time limit, and may impose another administrative fine of between NT$100,000 and NT$50 million, until the enterprise has discontinued or rectified its illegal conduct or has taken such necessary corrective measure. Moreover, the latest amended TFTA provides that, in the case that the violation is deemed serious, the TFTC has the discretion to impose a fine of up to 10 per cent of the relevant enterprise's turnover in the previous fiscal year. If the perpetrating enterprise disobeys the TFTC's order and fails to cease or rectify such conduct, take necessary corrective action within the given period, or engages in the same or similar violation after the TFTC order, the enterprise will face a criminal fine of up to NT$100 million, and the persons in charge will face a prison term of up to three years, a criminal fine of up to NT$100 million, or both.

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

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 current sale price when its electricity production costs decreased. Eventually, 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 regulation. To penalise the nine IPPs for the concerted action, the TFTC invoked the newly amended punishment provision under the TFTA – the Fine Formula – in which the maximum fine imposed on a violating enterprise can be up to 10 per cent of its turnover during the previous fiscal year. By applying the Fine Formula, the total fine imposed in this case was 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 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 requested that the TFTC reevaluate 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.

This is the first case in which the Fine Formula has been adopted by the TFTC. As such, it is anticipated that the interpretation of whether a case should be considered as a material violation and how the 10 per cent turnover fine calculation formula should be calculated will be clarified in the subsequent administrative decision and court judgments. Furthermore, the TFTC has shown how heavy-handed it can be when the public's interests are at stake; as such, enterprises that receive a high degree of public attention should exercise caution when interacting with their competitors.

Sanction on dairy products suppliers[8] and convenience stores[9] for price fixing (2011)

On 19 October 2011, the TFTC found that Wei-chuan, Uni-President and Kuang-chuan, three leading dairy product suppliers, had violated the prohibition against concerned action under the TFTA by increasing the prices of milk products at the same time and by the same amount, which affected competition in the domestic milk product market. Consequently, the TFTC imposed a fine of NT$12 million on Wei-chuan, NT$10 million on Uni-President and NT$8 million on Kuang-chuan.

According to the TFTC's investigation, because of the increased cost of raw milk, milk product suppliers felt pressure to raise milk product prices. Nonetheless, the price hikes imposed by Wei-chuan, Uni-President and Kuang-chuan did not reflect their respective costs of purchasing raw milk. For example, the prices of all Wei-chuan's, Uni-President's and Kuang-chuan's one-litre and two-litre milk products were raised by NT$6, regardless of their original prices. This situation ran counter to commercial practice, because Wei-chuan, Uni-President and Kuang-chuan should have had different pricing structures. Consequently, the TFTC concluded that this price adjustment by Wei-chuan,

8 TFTC decision letter dated 25 October 2011, Ref. No. 100204.

9 TFTC decision letter dated 9 November 2011, Ref. No. 100220.

Uni-President and Kuang-chuan was reached through a conspiracy among them. Since Wei-chuan, Uni-President and Kuang-chuan jointly hold a more than 80 per cent share in the Taiwanese milk market, this conspiracy jeopardised consumers' interests.

The raw milk cost escalation led to another parallel-pricing case. Immediately after the milk decision, the TFTC concluded in a decision dated 2 November that four leading convenience stores, 7-Eleven, Family Mart, Hi-Life and OK, raised the prices of their freshly brewed coffee (with milk added) in the same week by the same increment. Without any justification for the simultaneous price adjustment, such conduct constitutes illegal concerted action, which is prohibited by Article 14 of the TFTA; thus, the TFTC imposed a fine of NT$16 million on 7-Eleven, NT$2.5 million on Family Mart, NT$1 million on Hi-Life and NT$0.5 million on OK.

The TFTC indicated in the decision that the convenience store coffee market is highly concentrated where the combined market share of the four convenience stores exceeds 80 per cent. Therefore, any collusion among them would prejudice consumer interest and market competition. According to the TFTC's investigation, these four stores offer 48 products that are variations of brewed coffee with added milk. Nevertheless, the prices for all these products were simultaneously raised by NT$5, regardless of being different in size, flavour and ingredient. Meanwhile, although these four convenience stores claimed that the price increase reflected the rise in raw milk cost, the TFTC viewed their price adjustment differently. Applying the same logic that it did in the milk decision, the TFTC explained that, since each convenience store has its own operational costs and management policy, increasing price by the same amount, at the same time and for the same product, was impossible unless the convenience stores have colluded.

In both decisions, the TFTC pointed out that a concerted action can be proved not only by direct evidence such as a contract or agreement, but also by circumstantial evidence or empirical rules. In these cases, the three suppliers and four convenience stores' uniform price increases without reasonable calculations as a justification could be considered as circumstantial evidence of their conspiracies.

After losing their appeal before the Executive Yuan, the dairy suppliers subsequently brought a lawsuit to contest the TFTC's decision. The Taipei High Administrative Court sided with the TFTC. According to the Court judgment, since the determining factors of a price are myriad and should vary among suppliers, it is inconceivable that the price increase by the dairy suppliers would eventually be uniform, unless evidence suggests otherwise. The dairy suppliers lost their case because they failed to provide convincing evidence. They may appeal to the Supreme Administrative Court.

In addition, the four convenience stores in the coffee case filed a lawsuit against the TFTC's decision after its unsuccessful appeal with the Executive Yuan. On 19 December 2012, the Taipei High Administrative Court ruled that the increase in the coffee price by each convenience store was merely to reflect the cost increase. Since it is common market practice to raise the coffee price by NT$5 each time, there was no evidence to support the TFTC's allegation that the convenience stores coordinated with each other to determine the price increase. Instead, the price increase by NT$5 may have been merely a price leader or price follower or parallel pricing conduct, which is not illegal from an academic perspective. It was also doubtful whether the relevant market should be narrowly defined as a 'convenience store coffee market', which is an oligopolistic market. Without a clear market definition, the TFTC was unable to confirm whether the alleged price increase, if

due to an illegal conspiracy, could have any effect on the relevant market. Based on these reasons, the TFTC's decision was revoked.

The TFTC appealed against the Taipei High Administrative Court's judgment. The Supreme Administrative Court found that certain legal issues needed be further clarified, and remanded the case to the Taipei High Administrative Court on 14 May 2013. On 5 December 2013, the Taipei High Administrative Court issued a remanded judgment that was in favour of the convenience stores and revoked the TFTC decision regarding the alleged illegal concerted action. This is not a final judgment, because the TFTC may still file an appeal.

iii Trends, developments and strategies

Leniency programme

On 23 November 2011, the President announced the amended TFTA, introducing a leniency programme for cartel participants (Article 35-1) and imposing a higher fine for cartel violations (Article 41). On 6 January 2012, the regulations for the leniency programme (Regulations) came into effect. The Regulations specify, *inter alia*, requirements for leniency, maximum number of cartel participants eligible for leniency, fine reduction percentage, required evidence and confidentiality treatment. The adoption of the leniency programme is expected to affect the enforcement of cartel regulations in Taiwan significantly.[10]

Pursuant to the amended TFTA, the consequences of violating the cartel prohibitions under the leniency programme are as follows:

a For any violation of the prohibitions against concerted action, the TFTC may order the violating entity to cease and rectify its conduct or take necessary corrective action within the time prescribed in the order. In addition, it may impose upon such violating entity an administrative penalty of between NT$50,000 and NT$25 million, which can be doubled if the violating entity fails to cease and rectify the conduct or take any necessary corrective action after the lapse of the prescribed period.

b If the violation is deemed serious, the TFTC has the discretion to impose a fine of up to 10 per cent of the violating enterprise's revenue of the previous fiscal year.

c An enterprise violating the cartel prohibitions under the TFTA can be exempted from or be entitled to a reduction of the above fine if it meets one of the following requirements and the TFTC agrees in advance that the enterprise qualifies for the exemption or reduction:

- prior to the TFTC knowing about the unlawful cartel activities or commencing its *ex officio* investigation, the enterprise voluntarily reports in writing or orally to the TFTC the details of its unlawful cartel activities, provides key evidence and assists with the TFTC's subsequent investigation;
- during the TFTC's investigation, the enterprise provides specific evidence that helps prove unlawful cartel activities and assists with the TFTC's subsequent investigation; or

10 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).

- only a maximum of five companies can be eligible for a fine exemption or reduction in a single case: that is, the first applicant can qualify for a fine exemption, while the fine for the second to the fifth applicants can be reduced by 30 per cent to 50 per cent, 20 per cent to 30 per cent, 10 per cent to 20 per cent, and 10 per cent or less respectively.

An enterprise that has coerced other enterprises to join or not to exit the cartel cannot be eligible for a fine exemption or reduction.

The first application of the leniency programme: ODD*[11] *(2012)

In September 2012, the TFTC found that four optical disk drive (ODD) manufacturers (i.e., Toshiba-Samsung Storage Technology Korea Corporation (TSSTK), Hitachi-LG Data Storage Korea Inc (HLDSK), Philips & Lite-On Digital Solutions Corporation (PLDS) and Sony Optiarc Inc (SOI)) had conspired during the bidding process held by Hewlett-Packard Company (HP) and Dell Inc (Dell), and hence violated the cartel regulations under the TFTA. This case marks the first time that the TFTC dealt with a cartel through the leniency programme introduced into the TFTA at the end of 2011.

According to the TFTC, from September 2006 to September 2009, these 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. In addition, 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 Taiwanese relevant 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 the supply and demand in the domestic ODD market. Therefore, the TFTC fined TSSTK, HLDSK, PLDS and SOI NT$25 million, NT$16 million, NT$8 million and NT$5 million, respectively.

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

This case is notable because it represents the first time the TFTC concluded a case successfully with the help of a leniency applicant after the leniency programme came into effect. The case is also significant because it involved a global cartel, and the public record

11 TFTC decision announced on 24 September 2012. The full content of the decision letter has not been published due to the protection of the leniency applicant.

suggests that the TFTC sought assistance from competition authorities in the United States and the EU to conduct the investigation.

Alliances between or among airlines

On 30 July 1998, the TFTC replied to China Airlines that the execution of a free endorsement agreement by or among local airlines is subject to TFTC approval, because it constitutes a concerted action that would interfere with the market mechanism with regard to production or supply and demand of goods or services. Over recent years, the TFTC has granted several free endorsement (involving special prorate arrangement) applications filed by local airlines on the condition, *inter alia*, that the individual airlines should decide their prices and other transaction terms separately, or that the reduction in the capacity of the individual airlines should not exceed a certain percentage. The TFTC has also punished several local airlines for jointly agreeing on a reduction in capacity or implementing an alliance and revenue pool agreement without the TFTC's approval.

In its 29 November 2001 resolution, the TFTC confirmed that the execution by two local airlines of a free endorsement agreement for the Taipei–Taichung route was not subject to its approval, because such an agreement would not interfere with the market mechanism in view of the interchangeability of air transport with land transport (i.e., from the inter-modal competition analysis) for the Taipei–Taichung route.

Regulations on joint venture

The term 'joint venture' is not defined under the TFTA. A joint venture is an entity established between two or more enterprises in order to integrate their resources to undertake economic activities together. Depending on the level of integration of resources between the participating enterprises, the establishment of a joint venture will likely be governed by:

a the merger control law, which regulates the high-level integration of resources between enterprises; or

b the cartel law, which regulates the coordination of the economic activities of competitors without fully integrating their resources.[12]

On 23 June 1999, the TFTC concluded at its commissioners' meeting that if a joint venture performs on a lasting basis all the functions of an autonomous economic entity, the establishment of such a joint venture should be subject to merger control. In contrast, if a joint venture simply aims to coordinate competitive conduct of competitors, its establishment falls outside the merger control rules, but may be analysed under the provisions on the cartel prohibition. In other words, if a joint venture does not fulfil the functions of an autonomous economic entity on a lasting basis but is created to coordinate the competitive conduct of the horizontal competitors under a project, the establishment of the joint venture may be deemed a concerted action, which falls under the cartel provisions.

12 Lawrence S Liu and Stephen Wu, 'Reconsideration of Antitrust Regulations on Concerted Actions', *The Taiwan Law Review,* No. 98 (2003).

It is easier for the enterprises to obtain merger control clearance than approval of a concerted action since the prior notification system for the merger filing has been well developed and the criteria for the review on combination cases seem more straightforward. If it is difficult to determine whether the establishment of a joint venture is a merger or a concerted action, the enterprises involved in the joint venture are recommended to file a combination notification with the TFTC to avoid any possible regulatory challenges. According to the TFTC, if any enterprises file a combination notification with the TFTC for the establishment of a joint venture and then obtain a clearance, the chances of the TFTC challenging the operations of the joint venture in violation of the cartel prohibition would be slim.[13]

Facilitating practices theory

The TFTC's 2004 sanction on CPC and FPC, the two oligopolists in the petrol industry, for fixing gasoline prices is the first time that the TFTC decided a concerted action case involving facilitating practices, and is highly indicative of the TFTC's future approach to such cases.[14] Since then, enterprises may not use advance announcements to test their competitors' attitude before making joint price rises. The decision sets a new precedent for the treatment of concerted actions, and may protect consumers' interests by discouraging the widespread commercial practice of coordinated price rises. In its 2009 judgment, the Supreme Administrative Court upheld the TFTC's finding that the price adjustments via prior information exchanges amounted to an unlawful coordinated action via a 'form of mutual understanding' prohibited under Articles 7 and 14 of the TFTA.

iv Outlook

Compliance programme

To assist Taiwanese enterprises establish internal compliance rules to curb their risk of violating antitrust laws of other countries, in December 2011 the TFTC published its Guidelines on Setting up Internal Antitrust Compliance Programme (Guidelines) and 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 a consultant.

13 Stephen Wu and Rebecca Hsiao, 'Joint Ventures under Taiwan Antitrust Law', *Competition Law International* (2010), pp. 58–63.

14 TFTC decision letter dated 21 October 2004, Ref. No. 093102.

To allow each enterprise to grasp what is and is 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 dos and don'ts for concerted action (cartel), restrictions on resale price, monopoly and abuse of market power.

The Guidelines and Principles of Conduct are administrative directives with no binding legal effect; however, the TFTC encourages Taiwanese enterprises to take their own initiative and draft their own compliance programmes so as to lower their risk of violating the relevant laws. In addition, besides referring to the Guidelines and Principles of Conduct, each enterprise, while drafting such programmes, should take into consideration its corporate culture and industry characteristics.[15]

Fine calculation formula

According to the amended TFTA, 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 of the previous fiscal year. The TFTC has published rules on the calculation of fines (Fine Formula). Pursuant to the Fine Formula, a 'serious' concerted action is one that materially affects the competition status of the relevant market, where:

a the total amount of turnovers of the relevant products or services during the period the cartel is active exceeds NT$100 million; or

b the total amount of gains derived from the cartel exceeds the maximum fine under the TFTA (i.e., NT$50 million).

In addition, the fine imposed on a serious cartel should be reached based on the 'basic amount' and 'adjusting factors', according to the Fine Formula. The basic amount refers to 30 per cent of the total amount of turnovers of the relevant products or services during the period the cartel is active. Adjusting factors include aggravating factors such as being punished for violating cartel or monopoly regulations within the previous five years, and mitigating factors such as full cooperation during the TFTC's investigation. Antitrust observers are expecting more lucid guidance on how to appropriately interpret the Fine Formula once the court renders its opinion in the *IPPs* case (see Section II.ii, *supra*).

III ANTITRUST: RESTRICTIVE AGREEMENTS AND DOMINANCE

i Definition

The TFTA defines a monopoly as a situation in which an enterprise faces no competition or has such a superior market power that it is able to exclude competition in a relevant market.[16] Two or more enterprises as a whole will be deemed to have the status as a monopolistic enterprise if they do not in fact engage in price competition.

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

16 In defining the relevant market, both the relevant products or services and the geographical markets will be taken into consideration.

An enterprise meeting one of the following requirements may be deemed as a monopolistic enterprise; provided, however, that an enterprise will not be deemed a monopolistic enterprise if its market share does not reach 10 per cent or its total sales in the preceding fiscal year are less than NT$1 billion:

a the market share of the enterprise in a relevant market reaches 50 per cent;
b the combined market share of two enterprises in a relevant market reaches two-thirds; and
c the combined market share of three enterprises in a relevant market reaches 75 per cent.

An enterprise not qualified under the above criteria or falling under the exception may still be deemed a monopolistic enterprise if the establishment of such enterprise or any of the goods or services supplied by such enterprise to a relevant market are subject to legal or technological restraints, or there exists any other circumstance under which the supply and demand of the market are affected and the ability of others to compete is impeded (Article 5 of the TFTA).

While the possession of monopoly power is not illegal *per se*, a monopolist is prohibited from abusing its dominant position in any of the following methods:

a using unfair means to exclude, directly or indirectly, other enterprises from entering the market or otherwise participating in competition;
b improperly determining, maintaining or changing the prices of goods or services;
c requiring a counterpart to the transaction to provide preferential treatment without proper cause; and
d engaging in any other abusing acts of its dominant market position (Article 10 of the TFTA).

ii Significant cases

Sanction for abuse of dominance in CD-R Patent Pool[17] ***(2001–2011)***

Local CD-R manufacturers filed complaints with the TFTC in June 1999 against Koninklijke Philips Electronics NV (Philips), Sony Corporation (Sony) and Taiyo Yuden Co, Ltd (Taiyo Yuden) for an unlawful concerted action, abuse of their dominant power and tying of their technologies in joint licensing the CD-R manufacturing technologies. In its decision dated 20 January 2001, the TFTC found that Philips, Sony and Taiyo Yuden had committed an unlawful concerted action and abuse of monopoly power, and fined them NT$8 million, NT$4 million and NT$2 million respectively. The three companies appealed to the Executive Yuan. In November 2001, the Executive Yuan overturned the TFTC's decision and remanded the case to the TFTC. The TFTC made another decision dated 25 April 2002, fining the three companies NT$8 million, NT$4 million and NT$2 million respectively for an unlawful concerted action and abuse of monopoly power. The Executive Yuan upheld the TFTC's 2002 decision. The tree companies appealed to the Taipei High Administrative Court. In 2003, the Taipei High Administrative Court overturned the TFTC's decision and ordered the TFTC to make

17 TFTC decision letter dated 20 January 2011, Ref. No. 100012.

a proper disposition upon further investigation. The TFTC appealed to the Supreme Administrative Court, but the appeal was dismissed by the Supreme Administrative Court in 2007. The TFTC applied for a retrial, but the application was dismissed by the Supreme Administrative Court in 2009.

The Taipei High Administrative Court overturned the TFTC's 2002 decision and the Supreme Administrative Court dismissed the TFTC's appeal because the courts found that:

a the three companies were not competitors, as their technologies were not substitutable in making CD-Rs, and hence their joint licensing did not constitute a concerted action; and

b the three companies are monopolistic enterprises in the CD-R technology market and they abused monopoly power, but the fines imposed by the TFTC were improper because the three companies should not be penalised for abuse of the market power before 3 February 1999 as they were not the monopolistic enterprises defined under the TFTA at that time, and the amounts of the fines did not reflect the interest (i.e., the ratio of the royalties) received by the three companies.

In its decision dated 28 October 2009, the TFTC ruled that the three companies are monopolistic enterprises in the CD-R technology market, and that they abused monopoly power by improperly maintaining the formula to calculate the licence fees even when the market had drastically changed, refusing to provide important trade information on the licensed patent technologies and prohibiting their trading counterparts from contesting the validity of the patent – all of which are abuses of market power. Considering the Taipei High Administrative Court's accusation of its previous improper assessment of the fines, the TFTC reduced the fines imposed on Philips, Sony, and Taiyo Yuden to NT$3.5 million, NT$1 million and NT$500,000 respectively. It stated that, while the Taipei High Administrative Court overturned the TFTC's 2002 decision, the Taipei High Administrative Court and the Supreme Administrative Court upheld the TFTC's findings that the three companies as a whole had the same status as a monopolistic enterprise by virtue of their joint licensing and that they abused monopoly power. It further pointed out that from 1999 to 2001, when the CD-R market grew significantly and there was a substantial shift in the market demand and supply, the three companies refused the licensees' request to change the formula for calculation of royalties. When the three companies negotiated the licence agreements with the licensees, they did not make full disclosure regarding the content, scope and term of validity of the subject patent, and they also prohibited other enterprises from raising objections on the patent's validity. The above-mentioned conducts violated the prohibitions on abuse of market power provisions under the TFTA.[18]

18 In 2011, the TFTC reissued its decision, as per the order of the Supreme Administrative Court, but still ruled that the parties had abused their market power. Despite the subsequent appeal and administrative lawsuits, the TFTC's 2011 decision was eventually upheld and confirmed by the Supreme Administrative Court in July 2013.

iii Trends, developments and strategies

On 5 February 1999, the requirement that monopolistic enterprises be announced by the TFTC was taken out of the TFTA. Since then, an enterprise will be deemed a monopolistic enterprise if it falls within the definition of monopolistic enterprises under Article 5 of the TFTA. Given the rapid pace of change in market and business models, competition law has been characterised by a high level of uncertainty, making the collection of evidence of violation a challenging task.

Administrative settlement

On 2 May 2002, the TFTC established a software market monopoly taskforce to investigate the perceived monopolistic dominance of Microsoft Taiwan Corporation (Microsoft) in the software market, unreasonable software pricing and inappropriate bundling of Microsoft Office software. On 3 October 2002, Microsoft requested an administrative settlement with the TFTC. At its commissioners' meeting on 31 October 2002, the TFTC agreed in principle to Microsoft's request for administrative settlement, and began the negotiation process. On 26 February 2003, Microsoft submitted a settlement offer to the TFTC on behalf of itself and the relevant affiliates. At its commissioners' meeting on 27 February 2003, the TFTC decided that the settlement offer was in the public interest and agreed to sign an administrative settlement agreement with Microsoft.

The signing of this administrative settlement agreement was followed by a fall in software retail prices, improved after-sales service and a general enhancement of consumer welfare. The agreement also created opportunities for companies in the information and communications technology sector to utilise source code made available by Microsoft in new product development, and a licensing environment based on fair competition. It has been proven that the use of administrative settlement helps reduce wastage of administrative resources and avoid time-consuming lawsuits, encourage compliance with the TFTA by enterprises, and implement competition law and competition policy.

Regulation on oligopolists

In the TFTC's 2004 decision to penalise CPC and FPC for price fixing, a commissioner pointed out that as the two companies did not in fact engage in price competition, they as a whole may be deemed to have the status of a monopolistic enterprise and their concurrent increases in prices may constitute an abuse of monopoly power. However, monopoly power is exercised on a lasting or structural basis while a simple coordination of competitive conduct of competitors under a project may be analysed under the provisions on the prohibition of cartels. If the TFTC could not find a 'normal market price' based on economic analysis to prove any improper price change by the oligopolists, it could not prove whether they had abused monopoly power. Given the difficulty in proving an improper price change, the TFTC decided that the fixing of petrol prices by CPC and FPC was a concerted action involving facilitating practices.

Increase of maximum fine

Under the amended TFTA, the maximum fine for monopolistic enterprises' abuse of market power has increased from NT$50 million to 10 per cent of the violating enterprise's revenues in the previous fiscal year. The details on fine calculation are still being reviewed and drafted by the TFTC.

iv Outlook

According to the amendment bill to the TFTA, the chief revisions to the monopoly provisions are as follows:

a Raising the threshold for not being a monopolistic enterprise – if the total sales in the preceding fiscal year of an enterprise are less than NT$2 billion, such enterprise shall not be deemed a monopolistic enterprise. The raised threshold is in keeping with economic growth in recent years.

b Revising the definition where two enterprises may be deemed as the monopolistic enterprise as a whole – two or more enterprises will be deemed one monopolistic enterprise if they do not in fact engage in competition with each other, and thus they as a whole have the same status as a monopolistic enterprise. In addition, since competition activities cover not only competition in price but also in other categories, the amended provision changed the wording from 'price competition' to 'competition'.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

Blu-ray patent pool*[19] *(2011)

On 31 March 2011, the TFTC conditionally permitted a proposed combination for the joint operation of One-Blue by Hitachi, Panasonic, Philips, Samsung, Sony and Cyberlink.[20] One-Blue will act as a licensing agent for the patent pool to license essential blue-ray disk (BD) patents for the manufacturing of backwards-compatible BD products. Upon the consummation of the combination, the participating parties will respectively acquire a one-sixth shareholding and then jointly operate One-Blue.

19 TFTC decision letter dated 31 March 2011, Ref No. 100002.

20 Although combination should be deemed helpful to lower transaction costs for Taiwanese enterprises when applying for licences, in order to prevent the participating parties from stifling competition through the patent pool, the TFTC attaches six necessary conditions to eliminate any disadvantages from possible competition restraints, and to ensure the overall economic benefit, as follows: (1) the participating parties should not engage in any concerted action by entering into any agreement restricting the quantities or prices of BD products or by exchanging important transaction information; (2) the participating parties and One-Blue should not restrict licensees' scope of technology use, trading counterparts and product prices; (3) the participating parties and One-Blue should not forbid licensees from challenging the essentiality and validity of the licensed patents; (4) the participating parties and One-Blue should not forbid licensees from researching and developing, manufacturing, using and selling competing products or adopting competing technologies during the licence term or after expiration of the licence; (5) the participating parties and One-Blue should not refuse to provide licensees with the content, scope and term of the licensed patents; and (6) the participating parties are required to provide executed copies of the pool agreements for the TFTC's review.

The relevant market of One-Blue is defined as 'the domestic product market, technology market, and innovation market which are related to BD'. The basis for such broad definition is that the participating parties not only hold technologies for the manufacture of BD products but are also engaged in the manufacture of BD products.

Regarding the competition analysis, the TFTC held that the proposed combination would not give rise to competition restraints due to the following arrangements in the applicable pool agreements:

a only essential patents will be included in the patent pool and the essentiality of the patents will be determined by independent patent experts, according to the pool agreements;

b the patent pool will be open to all patent holders and thus is not a closed pool, and all licensors of the patent pool are required to conduct individual licensing activities for any licensee requesting individual licences on a reasonable and non-discriminatory basis;

c licensors are prohibited from disclosing their confidential information so as to ensure that the confidential information will not be exchanged between licensors resulting in a conspiracy among pool members;

d licensors cannot have access to licensees' information provided for the application of per-batch licence before each shipment of product;

e the scope for the grant back provision is limited to essential patents, and the royalties paid under the applicable pool agreement will qualify for the royalty rate for the grant back of essential patents; and

f licensors are not prohibited from using competing technologies or developing competition standard or products.

The TFTC further explained that regarding BD technology, Taiwanese enterprises are in a position to adopt technologies that have been developed by others. If this combination were prohibited, Taiwanese BD products manufacturers would have to negotiate for licences with patent holders individually, and the transaction cost of individual negotiations and the accumulated royalties are expected to be higher than those involved in being granted licences through One-Blue. Therefore, licensing the essential BD patents through a patent pool is expected to make it easier for Taiwanese manufacturers to obtain the licences for essential patents, lower the transaction cost and avoid the risk of infringement and litigation, which will promote competition among Taiwanese manufacturers, with consumers being the ultimate beneficiary.

On the other hand, since the participating parties are also engaged in the manufacturing and sales of BD products, the patent pool will increase the opportunity for third parties to use the licensors' essential patents, which may stimulate competition in the downstream market. The licensors will not acquire sensitive information such as cost data, and will refrain from exchanging sensitive information between themselves, and thus upstream and downstream vertical competition will not be negatively affected.

In January 2013, the TFTC cleared another similar case with five conditions in which LG Electronics, Philips, Pioneer Corporation and Sony will jointly operate a DVD

patent pool named One-Red.[21] As the rationale adopted by the TFTC to analyse both One-Blue and One-Red cases is similar, it seems the TFTC may have set up reliable case precedents for patent holders intending to establish patent pools to follow and observe.

Merger of cable system operators[22] (2010)

In its decision dated 29 October 2010, the TFTC conditionally permitted the proposed combination of Dafu Media Co, Ltd (Dafu), Cheng Ting, Kbro and 12 cable system operators (SOs) controlled by Cheng Ting and Kbro. The case is noteworthy because the TFTC has imposed record-breaking 13 conditions for its clearance. Previously, the TFTC granted clearance in December 2009 for the combination between Taiwan Mobile Co Ltd (TWM) and Kbro with 10 conditions, although the transaction was not successfully concluded owing to other regulatory issues.

Kbro is a Taiwanese company that Carlyle has invested in, and Kbro itself has invested in 12 SOs. It provides general advertising services. The transaction involves Dafu's acquisition of Kbro and the 12 SOs. While the parties are in different markets and there are no overlapping products or upstream/downstream relations, the major shareholders of Dafu are the chair, vice chair and directors of TWM, and Dafu's affiliates. Since TWM is the second-largest mobile telephone and fixed-line telecoms service provider and has invested in four cable system operators, there will be a horizontal or vertical combination effect if Dafu and TWM jointly manage Dafu's business. After considering the relevant market structure and competition, opinions from relevant industries, trends in technology development and the maintenance of market competition after the combination, the TFTC concluded that the overall economic benefit due to this transaction would outweigh the disadvantages of stifled competition. Consequently, it permitted the subject transaction subject to the following four conditions:

a preventing Dafu and its affiliates (collectively Dafu Group) from further combination with other SOs to abuse Dafu Group's market power;

b preventing Dafu Group from further vertical combination with channel providers to abuse its market power;

c ensuring digitalisation of cable television and developments of digital convergence; and

d demanding information from Dafu Group to check its compliance with the conditions imposed by the TFTC.[23]

21 TFTC decision letter dated 24 January 2013, Ref No. 102002.

22 TFTC's decision letter dated 29 October 2012, Ref. No.099004.

23 The TFTC gave clearance on the combination on the following 13 conditions: (1) Dafu Group cannot directly or indirectly acquire or own any shares in a Taiwan SO or its affiliates (other than those SOs in this proposed transaction); (2) no director, supervisor or manager of Dafu Group can simultaneously serve as a director, supervisor or manager in a Taiwan SO or its affiliates (other than those SOs in this proposed transaction); (3) Dafu Group cannot sell any shares in a company of the group to TWM group companies (including but not limited to TFN Media Co, Ltd and the SOs controlled by it, collectively TWM Group), or directly or indirectly acquire or own any shares in a TWM Group company; (4) no director,

ii Trends, developments and strategies

As society advances rapidly, there is a need to promulgate or amend rules that can serve as guidelines in regulating industries in which business models change often so as to protect the overall economy. To such end, the TFTC from time to time stipulates new guidelines for handling cases related to certain industries.

Guidelines for airlines

After Taiwan High-Speed Rail started to provide domestic transportation services, the TFTC revoked its Guidelines for Handling Civil Air Transportation Enterprises' Merger Filings and Guidelines on Unendorsed Ticket Transfers between Airline Companies, and issued the Guidelines for Handling Merger and Concerted Action Cases of Domestic

supervisor or manager of Dafu Group can simultaneously serve as a director, supervisor or manager in TWM Group, and vice versa; (5) Dafu Group cannot collocate headends, share trademarks or customer service, or jointly conduct any other business operation with other SOs not within Dafu Group; (6) Dafu Group cannot increase the number of analogue channels being produced or distributed by companies in its group; (7) Dafu Group cannot, jointly with other SOs or their affiliates, collectively procure programmes from channel providers, set the purchase price for the procurement, boycott channel providers or conduct any concerted actions as defined under the TFTA through any kind of agreements; (8) Dafu Group cannot jointly with other programme distributors sell programmes produced or distributed by Dafu Group or conduct any concerted actions as defined under the TFTA; (9) Dafu Group cannot, without reasonable grounds, refuse to license, impose different licence fee schedules on, or place conditions other than licence fees on, other SOs, direct-to-home (DTH) operators, multimedia content transmission service operators, or other competing wired or wireless content transmission service providers for broadcast of channels produced or distributed by Dafu Group; nor can Dafu Group discriminate against them; (10) Dafu Group cannot, without reasonable grounds, grant licences at difference prices or on different transaction terms to other SOs, DTH operators, multimedia content transmission service operators, or other competing wired or wireless content transmission service providers for broadcast of channels produced or distributed by Dafu Group; (11) Dafu Group must actively (a) implement digitalisation of cable television and two-way network construction, (b) fulfil the Digital Convergence Plan announced by the Executive Yuan to popularise the digital cable television services, (c) obtain a licence from channel providers to broadcast through internet protocol television (IPTV) and reasonably relicense such rights to IPTV operators to ensure the fair competition among different platforms, and (d) assist with the development of HD contents and channels, as well as the cultural creative industry; (12) Dafu must submit the following information to the TFTC for five years starting from the date of the combination: (a) names of the channels and copies of the distribution and agent agreements for the channels being produced or distributed by Dafu Group, (b) information related to pricing, licensing fees, discounts and licensees of such channels, and (c) a report on how the combination benefits the general public and the overall economic; and (13) Dafu must submit from time to time within the five-year period any change of the chair of the board, directors, supervisors, managers or articles of incorporation of each Dafu Group company to the TFTC for its records.

Civil Air Transportation Enterprises (2008 Guidelines) in 2008. The 2008 Guidelines are intended to enable the TFTC to effectively handle domestic civil air carriers' merger filings and applications for concerted actions in order to maintain the orderly conduct of trade, uphold consumers' interests and assure fair market competition, following the major changes in the competitive environment in Taiwan's domestic air transportation market. The 2008 Guidelines mention the following points:

a Market definition: the definition of markets will in principle be based on the 'city pair' as the smallest market unit. The following factors should also be considered: substitutability of other air routes originating from areas close to the point of departure, substitutability between air, high-speed rail, conventional rail, road and water transportation modes,[24] and other factors relevant to the definition of domestic air transportation markets.

b Market share: besides considering such information as the service volume, sales quantity, service value and sales value of the enterprise compared with the totals for the related markets, the market share of a domestic air carrier may also be calculated on the basis of market demand (the number of passengers carried by, or the turnover of, a specific domestic civil air carrier, expressed as a proportion of the total number of passengers carried by, or the total turnover of, all civil carriers in the relevant market) or market supply (the number of seats made available by a specific domestic civil air carrier, expressed as a proportion of the total number of seats made available by all civil carriers in the relevant market).

Guidelines for 4C enterprises and financial industry

The TFTC has established the following guidelines for handling competition in different market sectors:

a TFTC Disposal Directions on Cable Television and Related Industry;

b TFTC Disposal Directions on Telecommunication Industry;

c TFTC Disposal Directions on the Business Practices Cross-Ownership and Joint Provision among 4C Enterprises (telecommunications, cable TV, computer network, and e-commerce);

d TFTC Disposal Directions on Electronic Marketplace; and

e TFTC Disposal Directions on the Business Practices of Financial Industry.

iii Outlook

According to the TFTC's priority objectives for 2013 to 2016, the industries that affect the overall economic growth and people's daily lives or welfare will be the priority targets for the investigation. These industries include real property, liquefied petroleum gas, TFT-LCD, DRAM, LCD and retail. The TFTC aims to enhance its regulatory power

24 When assessing substitutability between different routes and different modes of transportation, the following factors should be considered: distance travelled and time required for journey; passenger characteristics and time cost of journey; and whether service providers have the ability to collectively or individually make small but significant non-temporary price adjustments without adversely affecting their profitability.

over those industries, starting with conducting research into their market structures. Through an in-depth analysis of the markets, the TFTC expects to learn more about the background as well as the general business models of each market to swiftly detect any unlawful conduct that could stifle competition.

V MERGER REVIEW

i Definition

Under the TFTA, a defined combination meeting certain thresholds as prescribed by the TFTA would require a prior notification to the TFTC. The term 'combination' is broadly defined in the TFTA to include combinations conducted offshore (i.e., an extraterritorial combination or a foreign-to-foreign transaction).

Types of notifiable combination

According to Article 6 of the TFTA, a 'combination' is defined to include:

a a merger;

b a holding or acquisition of at least one-third of the voting shares of or interest in another enterprise;

c a transfer or lease of all or a substantial part of an enterprise's business or assets;

d an arrangement with another enterprise for joint operation on a regular, ongoing basis, or the management of another enterprise's business based on a contract of entrustment; or

e direct or indirect control over the operation or personnel of another enterprise.

Filing thresholds

According to Article 11 of the TFTA, if any or all of the parties to a combination meet any of the following thresholds, a notification must be filed with the TFTC prior to the closing of the proposed transaction:

a as a result of the combination, any of the enterprises will acquire at least one-third of the market share;

b any of the enterprises participating in the combination holds a market share of at least a quarter before the combination; or

c the preceding fiscal year's turnover of an enterprise participating in the combination exceeded the amount set forth by the TFTC (i.e., for a combination between non-financial enterprises, one of the enterprises generated an annual turnover of at least NT$10 billion, while the other enterprise generated an annual turnover of at least NT$1 billion).

Extraterritorial transactions

The TFTC Disposal Directions (Guidelines) on Extraterritorial Mergers is stipulated for the purpose of handing merger filings related to foreign mergers. In spite of the guidelines, the filing requirements (thresholds, time frame, documents, etc.) for foreign mergers are the same as those for domestic transactions, although the TFTC will take the local effect into account when determining whether it will exercise jurisdiction; that is, for an extraterritorial transaction, the TFTC will exercise its jurisdiction only

when such combination has direct, substantial and reasonably foreseeable effect on the Taiwan market. Therefore, theoretically, a filing obligation can be avoided in a foreign-to-foreign combination that meets the filing thresholds based on a lack of local effect argument. However, it is the TFTC, not the participating parties, that has the discretion to determine whether the local effect exists in the proposed transaction.

ii Significant cases

Combination between chip makers*[25] *(2012)

At its 1 August 2012 commissioners' meeting, the TFTC unconditionally cleared the proposed combination between MediaTek Inc (MediaTek) and Mstar Semiconductor Inc (Mstar).

The proposed combination entails the acquisition of at least 40 per cent and up to 48 per cent of the shares in Mstar by MediaTek through a public tender offer. Following the consummation of the tender offer, a post-closing merger will be further pursued in which MediaTek will be the existing company and Mstar will be the dissolved company.

According to the TFTC, MediaTek and Mstar overlap in the mobile chip market and TV/display control chips market, and thus the transaction should be defined as a horizontal combination. However, for the reasons listed below, the TFTC concluded that the proposed combination would not generate any anti-competitive effect on the Taiwanese relevant product markets:

a as most of the participating parties' relevant products are exported for sale globally, the participating parties face intense competition from their worldwide competitors. Therefore, after the combination, even if any attempt is made to raise product prices arbitrarily, it would be constrained by market forces;

b the proposed combination is unlikely to result in any concerted action among the participating parties and their competitors. Furthermore, no material entry barrier to the relevant markets exists; hence, Taiwanese and other multinational enterprises interested in the industry can enter the market anytime, making the market even more competitive; and

c because there are already numerous enterprises in the relevant markets, when choosing business partners, the participating parties' upstream and downstream counterparties have a wide pool to choose from. In fact, the participating parties' transacting counterparties have considerable bargaining power. Consequently, the merged entity would not be able to abuse its market power after the combination.

The TFTC also indicated that the proposed combination did not have the potential of undermining competition and would instead fortify the Taiwanese TV/display control chip makers' ability to compete with global enterprises.

25 TFTC decision announced on 1 August 2012.

Given the above, the TFTC found that the overall economic benefit from this transaction would outweigh the disadvantages of stifled competition. Consequently, it cleared the subject transaction under Paragraph 1, Article 12 of the TFTA.[26]

iii Trends, developments and strategies

Remedies

In September 2012, the TFTC updated the Directions (Guidelines) on Handling Merger Filings (Merger Guidelines) to include its official standards for remedies. According to the Merger Guidelines, the remedies the TFTC can impose as conditions are:

a measures impacting the structural aspect: the TFTC can order the parties to take measures to dispose of the shares or assets in their holding, transfer part of their operations or remove personnel from certain positions; and

b measures impacting the behavioural aspect: the TFTC can order the parties to continue to supply critical facilities or essential elements to businesses outside the merger, order the parties to license such businesses to use their intellectual property rights, and prohibit the parties from engaging in exclusive dealing, discriminatory treatment and tie-in sales.

Despite the foregoing, the TFTC still reserves the right to impose other types of remedy on a case-by-case basis. The Merger Guidelines also outline that the TFTC may seek the parties' opinions on the possible remedy before it makes its final decision.

International cooperation for merger reviews

No official documentation indicates that the TFTC has, to date, ever cooperated with foreign authorities while conducting the review of a combination notification. However, the TFTC has entered into certain cooperation agreements or memorandum with the following countries for the application of competition regulations: Hungary, Canada, Australia, New Zealand, France and Mongolia. Meanwhile, while reviewing a cross-border transaction, it is not uncommon for the TFTC to order the filing parties to report the current status in other jurisdictions where a combination notification has also been made. Given the above, even without formal coordination, the TFTC still more or less consults agencies in other jurisdictions to make its decision on a merger filing.

iv Outlook

According to the amendment bill to the TFTA, the main revisions to the merger control rules are as follows:

a removal of the market share filing threshold, leaving the turnover filing threshold as the only basis to determine the notifiability of a transaction;

26 The proposed combination of MediaTek and Mstar is also subject to the merger review processes of the authorities in several jurisdictions, including China's Ministry of Commerce (Mofcom). The deal was eventually cleared by Mofcom with a substantial remedy package in August 2013, one year after the TFTC's clearance.

b prolongation of the review period by up to 90 calendar days if the TFTC deems this necessary;
c raising of the minimum fine for violating the merger control rules from NT$100,000 to NT$200,000; and
d extension of the time limit for enforcing the merger control rule from three years to five years.

VI CONCLUSIONS

i Pending cases and legislation

Since the TFTC gained a higher level of independence in February 2012, a sweeping amendment to the TFTA has been proposed to address the change. The amendment centres around the following objectives:

a to grant the TFTC the power to search and detain;
b to have the arrangement regarding resale price maintenance assessed by rule of reason instead of being illegal per se;
c to adopt a single threshold for merger filings (i.e., the turnover threshold while deleting the market share threshold);
d to have a more flexible approach to closing an investigation. For example, for a minor violation, if the TFTC cannot find solid evidence and the investigated party is willing to provide information and agrees to make corrections, the TFTC may elect to close the case;
e to have different rates for fines depending on the industry involved, and also raising the maximum fine for engaging in restrictive competition to NT$50 million for a first-time offender and NT$100 million for a repeat offender; and
f to extend the statute of limitations for the TFTC to investigate a case from three years to five years.

Although the proposed amendment was approved by the Executive Yuan on 6 December 2012, it is pending the Legislative Yuan's further review.

ii Analysis

Although the TFTC perceives itself as the guardian of market competition, which enforces the TFTA to ensure fair trade in Taiwan's markets and protects the public interest, it has been criticised for devoting most of its resources and efforts on unfair conduct, and neglecting anti-competitive conduct. While the TFTC dedicates most of its administrative resources to misleading advertising and illegal activities by multi-level marketing enterprises,[27] the public expects the TFTC to also crack down on anti-competition activities, such as abuse of market power or the formation of cartels,

27 According to data published on the TFTC's website, among the decisions made by the TFTC in 2013, 132 cases concerned unfair conduct (including misleading advertising), while 29 cases concerned anti-competitive conduct (including abuse of market power, illegal combination and illegal concerted action).

which have caused greater harm to the overall economy. One possible explanation for the TFTC's present tack is that the current legal framework does not grant the TFTC adequate regulatory power to efficiently investigate or correct unlawful anti-competition practices. Once the amendment bill to the TFTA comes into effect, the TFTC will be equipped with effective tools to exercise its regulatory power. At that time, the TFTC may fulfil its functions as the guardian of competition in both the anti-competition and unfair competition practices.

Meanwhile, it is likely that the introduction of the leniency programme into the amended TFTA will considerably transform how the TFTC enforces cartel regulations. Nonetheless, even if the leniency programme works well for the competition authorities in western countries while investigating a cartel, whether the same whistle-blower effect can be achieved in Taiwan remains to be seen, considering that competitors interact with each other in a different way in the west than in the east. Therefore, the effectiveness of the leniency programme merits continuing observation.[28]

28 See footnote 10.

Appendix 1

ABOUT THE AUTHORS

STEPHEN WU

Lee and Li, Attorneys-at-Law

Stephen Wu is the partner leading the competition law practice group at Lee and Li, and 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 – The International Who's Who of Business Lawyers 2012* and *2013*. He keeps abreast of the latest developments in global antitrust and competition laws, 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 a counsellor 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 laws.

WEI-HAN WU

Lee and Li, Attorneys-at-Law

Wei-Han Wu is a senior associate at Lee and Li. She joined Lee and Li in 2008 and her practice focuses on competition law, corporate investment, and mergers and acquisitions. She has assisted in several combination notifications for domestic and extraterritorial mergers, international cartel investigations and unfair competition cases.

LEE AND LI, ATTORNEYS-AT-LAW
7F, No. 201, Tun Hua N Road
Taipei 10508
Taiwan
Tel: +886 2 2715 3300
Fax: +886 2 2713 3966
stephenwu@leeandli.com
www.leeandli.com