The Public Competition Enforcement Review

Fifth Edition

Law Business Research

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Fifth Edition

Law Business Research Ltd

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FOREWORD

It is immediately apparent from the reports in *The Public Competition Enforcement Review* that competition enforcement remains vigorous across the world. An overwhelming majority of authorities continue to prioritise anti-cartel enforcement and 2012 witnessed, in the United States and the EU, some of the highest cartel fines ever to be imposed in respect of individual cartels. Authorities in newer competition law regimes such as India, China and Taiwan followed suit. There was a common focus on illegal conduct within the context of trade associations and bid rigging.

The Business and Industry Advisory Committee – representing business within the framework of the OECD – and its Competition Committee regard the pursuit and elimination of 'hardcore' cartel conduct as a priority. Businesses suffer when markets are not working effectively and are victims of cartel behaviour as much as consumers and society as a whole. But caution must always be exercised to ensure that justifiable, even pro-competitive, conduct is not inadvertently swept up into an offending category. The reports for Australia, India and the United Kingdom describe developments that serve as a reminder that many commercial activities – including information exchange, price parallelism and certain trade association activities – need to be analysed in context (and not simply presumed to be anti-competitive).

International cooperation and the convergence of laws and procedures are important objectives for many of the authorities covered in this book. There is a good reason for this. Not only did the infringing companies in many of the cartels uncovered have their headquarters outside the country imposing the penalties but, more generally, globalisation – particularly the transformation of regional markets into worldwide markets – has increased the propensity for conduct and transactions to be scrutinised by numerous competition authorities in parallel. Convergence of laws and procedures holds many attractions for competition authorities and business alike. But convergence is a complex matter. The keynote article in *The Public Competition Enforcement Review*, 'Public v. Private Enforcement: Rethinking the Thirst for Competition Litigation', is a strong reminder that a thoughtful approach to convergence is always needed. There may

be a logic to aligning a new regime with the most established regimes but in practice that may not be the most appropriate approach to every aspect of the law and policy.

To ensure that the law and related procedures develop optimally, authorities must take stock of what is working (and what is not working), reflecting on achievements but also re-examining fundamentals. This *Review* makes a useful contribution to the process of reflection with its timely and authoritative comments on the past year's developments and trends. *Ex post* evaluations (where an authority evaluates whether its intervention was appropriate and achieved its objectives) are also essential. These studies are becoming more common, particularly in the merger control sphere. They can be used in well-established regimes, but also by those countries that have newly amended their rules. The reports for Brazil, China and India describe major progress in respect of merger control activity. Evaluations can ensure that improvements are made in the early years to keep the merger control regime on track. A key work stream for the OECD is looking at how *ex post* evaluations are conducted, what methodologies function best in practice and how the process can be improved. Like the competition authorities, international competition organisations such as the OECD and ICN can usefully carry out evaluations of their own measures and recommendations. The OECD is setting a good example by evaluating its own merger recommendations from 2005.

The country reports also describe a substantial amount of enforcement activity taking place in relation to abuse of dominance. The wide variety of cases being brought by different competition authorities suggests that this area is perhaps the least convergent in terms of substantive competition law. This has been the case for so long that it is not surprising but nor is it without risk. The chapter for Argentina expresses concern that dominance cases may be targeted to achieve price control objectives. In Australia, misuse of market power is identified as a key priority. The US authorities are moving away from a policy that 'favoured extreme caution' in this area and are debating the scope of appropriate enforcement against unfair methods of competition. This *Review* encapsulates the fierce debates under way. International organisations should continue to help build consensus on the key elements of an abuse of dominance case. In 2012 the OECD produced a useful report on excessive pricing discussing how to ensure that intervention is principled and evidence-based.

It is also apparent that competition authorities are continuing to address industry sectors with growing global importance, including media and communications, the high-tech sector, the digital economy and financial services. The issues are complex and the global implications of intervention can be immediate. The OECD has developed roundtable reports on all these sectors where business input is a key contribution to the debate given the fast-evolving technological environment.

Overall, the level and nature of enforcement described in the country reports demonstrates that competition authorities across the world have succeeded in 'holding the line' when budgets and even the role of competition law itself has been under fire. The chapters in this publication prove that the competition authorities did not let the rules slip in the face of economic difficulties. However, ongoing reflection is needed now

to ensure that there is a good understanding of how companies and governments respond to current economic challenges. Reflections in this post-crisis time will be essential for ensuring that business and regulators play their part in ensuring that the events leading to the global recession are not repeated. Surveying policies, objectives, enforcement and trends, *The Public Competition Enforcement Review* contributes to such reflections.

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April 2013

Chapter 25

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: (1) 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 (2) 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 (1) draft and formulate fair trade policies and regulations; (2) review fair trade matters; (3) conduct studies on particular markets or business activities and economic conditions; (4) investigate and determine whether an enterprise[2] has violated the TFTA; and (5) handle any other matters related to fair trade practices.

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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.

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.

The TFTC may, on its own initiative or upon complaint, investigate cases that involve unfair competition. In the investigation, the TFTC may (1) ask the parties and any third party to give a statement; (2) ask relevant agencies, organisations, enterprises, or individuals to submit books and records, documents, and any other necessary materials or exhibits; and (3) 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 he or she 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 then 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. Below are the TFTC's priority objectives for the period from 2013 to 2016:

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.

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

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

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

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 and/or marketing stage which would affect the market function of production, trade in goods, or supply and demand of services.[6]

ii Significant cases

Sanction on recycling companies for price fixing (2012)

In a decision dated 22 February 2012, the TFTC found that 12 companies engaged in the recycle of waste electrical and electronic equipment ('WEEE recycling companies') had illegally colluded in the recycling of waste electrical and electronic equipment and related affairs ('the WEEE conspiracy'). Also, the TFTC found that 13 companies engaged in the recycle of waste computer appliances ('WCA recycling companies') had conspired in the recycling of waste computer appliances and related affairs via a scheme similar to that in the WEEE Conspiracy ('the WCA conspiracy'). In fact, there are overlapping companies in both the WEEE conspiracy and the WCA conspiracy since most of the WEEE recycling companies also recycled waste computer appliances.

In Taiwan, a company intending to conduct the WEEE or WCA business must first be registered with the Environmental Protection Administration ('EPA'). A qualified recycling company may proceed with the collection and disposal of the waste and then apply for subsidies from the EPA. As the WEEE recycling companies or WCA recycling

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 or not, 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 necessary corrective measure. The TFTC may further impose an administrative fine between NT$50,000 to 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 between NT$100,000 and NT$50 million, until the enterprise has discontinued or rectified its illegal conduct or has taken necessary corrective measure. Moreover, the latest amended TFTA provides that in case the violation is deemed serious, the TFTC has the discretion to impose a fine 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 engage 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 and detention, a criminal fine of up to NT$100 million, or both.

companies are all qualified recycling companies, they are competitors. Any concerted action among them is within the purview of cartel regulations.

In the WEEE conspiracy, according to the TFTC's investigation, the WEEE recycling companies executed a joint waste electrical and electronic equipment recycling agreement ('joint agreement') and stipulated guidelines for recycling the WEEE. Among other things, the price for acquiring the WEEE, the volume of the WEEE each company is responsible for processing, each company's transacting parties, and allocation of expenses accrued are stipulated therein, and each company would apply for subsidies from the EPA based on the volume of the WEEE it processed under the joint agreement. Meanwhile, in order to ensure the compliance with the joint agreement, the following arrangements were made: each WEEE recycling company should provide a NT$3 million performance bond to their management committee; for audit purposes, every two WEEE recycling companies should periodically check each other's daily recycling status report; and a fine is imposed on any non-compliance.

Furthermore, according to the guidelines, WEEE recycling companies jointly set up a 'members' meeting' to oversee a management committee and an administration committee, which are responsible for calculating the inventory, daily reporting, allocation of recycling volume among members, and settlement of relevant payments. The members' meeting is generally held every three months and the management committee's meetings are convened monthly so as to allocate the recycling volume among the WEEE recycling companies, regardless of the members' varied capital expenditure, cost structure and distribution capability. Under the above arrangement, a WEEE recycling company with a higher recycling capacity would have to give away the waste it collects to members with a lower capacity. As a result, most companies' utilisation rates were low and the market price for acquiring the WEEE was inflexible, which eventually stifled the competition in the market.

As to the WCA conspiracy, the TFTC concluded that the WCA recycling companies colluded with each other through a scheme similar to that underlying the WEEE conspiracy.

Since the WEEE conspiracy and WCA conspiracy constituted a prohibited cartel under the TFTA, the TFTC imposed fines of NT$121.9 million in total on the WEEE recycling companies and fines of NT$18.1 million in total on the WCA recycling companies. The TFTC's fine on each company ranges from NT$25 million to NT$200,000 depending on their scale of operations, motive for the violation and duration of participation in the conspiracy.

Sanction on dairy products suppliers and convenience stores 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, 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, and 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 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, though 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, is impossible unless the convenience stores have colluded.

In both the 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 can be circumstantial evidence for their conspiracies.

Afterwards, 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. While it is common market practice to raise the coffee price by NT$5 each time, no evidence can 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 be merely a price leader or price follower or parallel pricing conduct, which is not illegal from an academic perspective. Also, it is doubtful whether the relevant market should be narrowly defined as 'convenience store coffee market', which is an oligopolistic market. Without a clear market definition, the TFTC is unable to confirm whether the alleged price increase, if due to an illegal conspiracy, can have any effect on the relevant market. Based on the

reasons above, the TFTC's decision was revoked. According to the news release, the TFTC plans to appeal against the Taipei High Administrative Court's judgment with the Supreme Administrative Court.

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 cartels violations (Article 41). On 6 January 2012, the regulations for the leniency programme ('the Regulations') came into effect. The Regulations specify, among others, 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.

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 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 the 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 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;
- only a maximum of five companies can be eligible for fine exemption or reduction in a single case, that is, the first applicant can qualify for fine exemption and the fine for the second to the fifth applicant 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; or
- 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 case (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 the TFTC dealt with a cartel through the leniency programme introduced into the Act at the end of 2011.

According to the TFTC, from September 2006 to September 2009, those four ODD manufacturers, during or before the bidding procedure held by HP and Dell, exchanged their bidding prices and expected bid ranking through e-mails, telephone calls and meetings. Also, in several bidding cases, they agreed on the final price and ranking in advance while exchanging other sensitive information such as capacity and amount of production among themselves. A market survey indicated that the four ODD manufacturers jointly occupied at least 75 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 last November. 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 last year. The case is also significant for it involved a global cartel and the public record suggests that the TFTC sought assistance from competition authorities in the United States and 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 its 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 by jointly agreeing on a reduction in capacity or implementing an alliance and revenue pool agreement without the TFTC's approval.

In its resolution on 29 November 2001, the TFTC confirmed that the execution by two local airlines of a free endorsement agreement for the Taipei–Taichung route is not subject to its approval because such an agreement will 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 the merger control law which regulates the high-level integration of resources between the enterprises, or governed by the cartel law which regulates the coordination of the economic activities of competitors without fully integrating their resources.[7]

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 in order 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.

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 in order 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.[8]

Facilitating practices theory

The TFTC's 2004 sanction on CPC and FPC for fixing gasoline prices is the first time that the TFTC decided a concerted action case involving facilitating practices, and is

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

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

highly indicative of the TFTC's future approach to such cases. 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

In order to assist Taiwanese enterprises establish internal compliance rules to curb their risk of violating antitrust laws of other countries, in December of 2011 the TFTC published its Guidelines on Setting up Internal Antitrust Compliance Programme ('the Guidelines') and 'Antitrust Compliance-Dos and Don'ts' ('the 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: (1) developing a corporate culture where legal compliance is essential, (2) stipulating policies and procedures that everyone should observe, (3) providing education or training programmes, (4) establishing audit, review and report mechanisms, (5) creating proper rewards and punishments, and (6) designating a meant for contact or consultant.

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 to 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.

Fine calculation formula

According to the amended TFTA, if the TFTC considers a concerted action to be serious, it may impose a fine up to 10 per cent of the violating enterprise's revenue of the previous fiscal year. The TFTC has published draft rules on the calculation of fine ('the Draft Formula') for the public comment. Pursuant to the Draft Formula, a 'serious' concerted action is one that materially affects the competition status of the relevant market, where (1) the total amount of turnovers of the relevant products or services during the period the cartel is active exceeds NT$100 million, or (2) the total amount of gains derived from the cartel exceeds the maximum fine under the TFTA (i.e., NT$50 million).

In addition, the fine imposed on a serious cartel should be reached based on the 'basic amount' and 'adjusting factors', according to the Draft 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. A 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.

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.[9] 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.

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 into 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 is 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).

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

i Significant cases

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

The 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 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 2001 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 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 courts found that (1) the three companies were not competitors as their technologies were not substitutable in making CD-Rs; hence their joint licensing did not constitute a concerted action; and (2) 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 they abused monopoly power by (1) improperly maintaining the formula to calculate the licence fees even when the market had drastically changed; (2) refusing to provide important trade information on the licensed patent technologies; and (3) prohibiting their trading counterparts from contesting the validity of the patent, are types of abuse 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 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 request of the licensees 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 validity. The above-mentioned conducts have violated the prohibitions on abuse of market power provisions under the TFTA.[10]

Sanction on internet operator for preventing another enterprise from competing (2005)

Trade-Van Information Services Co ('TVIS') was an incumbent internet operator for the customs clearance market. It was accused by Universal EC Inc (which joined the market of customs clearance internet services in early 2003, 'Universal EC') of being engaged in competition restraint, such as employing improper loyalty discount to restrain the users from trading with its competitors, refusing to connect with other networks, establishing unreasonable rate for network connections, and refusing its competitors to use the EDI standard format.

In its decision dated 24 February 2005, the TFTC found that TVIS had the advantages of first mover, customer base, market share, network externality, and two-sided market and was able to eliminate the competition; hence, it was a monopoly under the TFTA. During January 2003, TVIS promoted a preferential programme for customs clearance internet services, under which customers who promised to use exclusively TVIS's customs clearance internet services could have a 60 per cent discount. If the users failed to keep the promise (for example, if they wished to switch to Universal EC within one year after participating said programme), TVIS may terminate the preferential programme and charge them the difference between the preferential amount paid and the original rate. The cost of switching trading counterparts increased and the degree of inducement for the users to switch to Universal EC therefore decreased. An entry barrier was formed for entering the market of customs clearance internet services for Universal EC. TVIS's action violated Article 10 of the TFTA because it directly or indirectly prevented by unfair means any other enterprises from competing. The TFTC imposed an administrative fine of NT$1.5 million on TVIS.

Cease-and-desist order to OTC Exchange (2002)

The ROC Over-the-Counter Securities Exchange ('the OTC Exchange') was established to undertake trading of over-the-counter securities. In its decision dated 27 August 2002, the TFTC found that the OTC Exchange relied upon its monopolistic power to conceal cost information when negotiating with IT firms and to inappropriately increase the cost burden of those firms without first reaching a consensus with them. Although its costs did not increase in tandem with the range of transmission methods developed through the innovations and efforts of the IT firms, the OTC Exchange levied monthly 'fixed charges' on the IT firms tied to the various kinds of transmission methods. This

10 In 2010, the Executive Yuan dismissed the three companies' appeal against the TFTC's 2009 decision. The three companies appealed to the Taipei High Administrative Court. The case is pending before the court.

should be considered an extortion of the efforts and accomplishments of downstream IT firms to gain exorbitant profit and hinder the effective competition strived for by IT firms. The OTC Exchange thus abused its monopolistic market position by improperly setting, maintaining, or changing the compensation for goods or services.

In order to prevent the OTC Exchange from further abusing its monopolistic position and pursuing exorbitant profits by imposing spurious standards for its information fees that inappropriately hinder the competition of downstream IT firms, the TFTC ordered the OTC Exchange to cease the acts in question within three months and adopt the necessary corrective measures but did not impose any administrative fine.

iii Trends, developments and strategies

On 5 February 1999, the requirement that monopolistic enterprises be announced by the TFTC was taken out from 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 task force 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 (1) opportunities for companies in the information and communications technology ('ICT') sector to utilise source code made available by Microsoft in new product development and (2) a licensing environment based on fair competition. It has been proven that the use of administrative settlement helps (1) reduce wastage of administrative resources and avoid time-consuming lawsuits, (2) encourage compliance with the TFTA by enterprises, and (3) implement competition law and competition policy.

Regulation on oligopolists

In the TFTC's 2004 decision to penalise CPC and FPC, the two oligopolists in the petrol industry, 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 abused monopoly power. Given the difficulty in proving an improper price change, the TFTC decided fixing of petrol prices by CPC and FPC a concerted action involving facilitating practices.

Increase of maximum fine

Under the amended TFTA, the maximum fine for monopolistic enterprises' abuse of market power is increased from NT$50 million to 10 per cent of the violating enterprise's revenues in the previous fiscal year. At the current stage, 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. Also, 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 (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.[11] One-Blue will act as a licensing agent for the patent pool to license essential

11 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

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.

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.

As to 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 licenses on a RAND (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 as for BD technology, Taiwanese enterprises are in a position to adopt technologies that have been developed by others. If this combination is prohibited, Taiwanese BD products manufacturers will 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 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

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.

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. 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 (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, though the transaction was not successfully concluded eventually 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 Chairman, Vice Chairman, 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 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 types of conditions: (1) preventing Dafu and its affiliates (collectively 'Dafu Group') from further combination with other SOs to abuse Dafu Group's market power; (2) preventing Dafu Group from further vertical combination with channel providers to abuse its market power; (3) ensuring digitalisation of cable television and developments of digital

convergence; and (4) demanding information from Dafu Group to check its compliance with the conditions imposed by the TFTC.[12]

12 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 the 'TWM Group'), or directly or indirectly acquire or own any shares in a TWM Group company; (4) no director, 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, 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 (i) implement digitalisation of cable television and two-way network construction, (ii) fulfil the Digital Convergence Plan announced by the Executive Yuan to popularise the digital cable television services, (iii) obtain a licence from channel providers to broadcast through IPTV and reasonably relicense such rights to IPTV operators to ensure the fair competition among different platforms, and (iv) 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: (i) names of the channels and copies of the distribution/agent agreements for the channels being produced or distributed by Dafu Group, (ii) information related to pricing, licensing fees, discounts, and licensees of such channels, and (iii) 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 chairman of the board, directors, supervisors, managers or articles of incorporation of each Dafu Group company to the TFTC for its records.

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 ('THSR') 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 Civil Air Transportation Enterprises ('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.

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: (1) substitutability of other air routes originating from areas close to the point of departure, (2) substitutability between air, high-speed rail, conventional rail, road, and water transportation modes,[13] and (3) other factors relevant to the definition of domestic air transportation markets.

Market share

Besides considering such information as the service volume, sales quantity, service value, and sales value of the enterprise compared to 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:

13 When assessing substitutability between different routes and different modes of transportation, the following factors should be considered: (1) distance travelled and time required for journey, (2) passenger characteristics and time cost of journey, and (3) whether service providers have the ability to collectively or individually make small but significant non-temporary price adjustments without adversely affecting their profitability.

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 2010 to 2013, the industries that affect the overall economic growth and people's daily lives or welfare will be the priority targets for the investigation. The industries include telecommunications, banking and finance, real property, oil, liquefied petroleum gas and gravel. The TFTC aims to enhance its regulatory power over those industries, starting from 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 CONCLUSIONS

i Pending cases and legislation

Since the TFTC gained a higher level of independence in February of 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 power to search and detain to the TFTC;
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; 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 in unfair conduct but neglecting anti-competitive conduct. While the TFTC dedicates most of its administrative resources to misleading advertising and illegal activities by multi-level marketing enterprises,[14] the public expects the TFTC to also crack down on anti-competition activities, such as abuse of market power or the formation of cartels, 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 fulfill 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 deserves continuing observation.

14 According to the data published on the TFTC's website, among the decisions made by the TFTC in 2012, 129 cases are about unfair conduct (including misleading advertising), while 28 cases are about anti-competitive conduct (including abuse of market power, illegal combination and illegal concerted action).

Appendix 1

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