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Taiwan Sweeping changes to the law

Joyce C Fan, Wei-Han Wu
Lee and Li Attorneys at Law

Recent amendments to Taiwan's Competition Law have brought significant changes to the regime and how companies do business in Taiwan. Competition enforcement is likely to be more robust in the future, and the competition authority is expected to become increasingly sophisticated and powerful.

Taiwan's competition law, the Fair Trade Act (TFTA), has recently undergone the most significant set of amendments since its entry into force in 1991. These amendments, which cover key areas such as merger control, cartel enforcement, other restrictions of competition and unfair competition, will have a significant impact on how companies do business in Taiwan.

A more permissive approach to resale price maintenance?

The rule on resale price maintenance (RPM) has been amended from a per se prohibition to a rule-of-reason test. The change was designed to allow suppliers greater pricing flexibility with their distributors. However, examining the Taiwan Fair Trade Commission's (the TFTC) practice over the past two years, it seems the authority has taken a conservative approach in assessing when RPM may be acceptable. As such, companies should still be prudent in imposing any (direct or indirect) RPM measure.

More aggressive cartel enforcement

The updated TFTA contains enhanced measures to help the TFTC combat cartels.

The TFTC is now permitted to presume the existence of a cartel agreement on the basis of circumstantial evidence, such as market conditions, characteristics of the products or services involved, and profit and cost considerations. This substantially shifts the burden of proof regarding the absence of a cartel agreement among competitors from the TFTC to the companies under investigation. As a result, it will be easier for the TFTC to discover the existence of a cartel and to penalise the cartelists. However, to date, it has not been clear how this presumption rule is being applied in practice (for instance, the level of evidence required for the TFTC to make such a presumption and whether/how the parties under investigation can rebut it) due to the lack of publicised decisions.

A new whistleblower reward scheme

In mid-2015, the TFTC adopted a whistleblower reward scheme, described as an 'antitrust fund'. This financial reward scheme aims to encourage individuals to report illegal activities carried out by their employers and is seen as a complement to the pre-existing leniency programme. By obtaining information from whistleblowers that would otherwise be kept secret, the TFTC hopes that its chances of detecting and proving a cartel will be materially enhanced. Indeed, in 2016, the TFTC completed two cartel cases involving evidence obtained from third parties who received a financial reward for their assistance.

More generally, since the leniency programme came into effect in 2011, the TFTC has concluded several cartel cases through it, including the high-profile capacitor case in 2015 where the TFTC imposed fines totalling NT\$5.8bn (approximately US\$190m) on 10 international capacitor suppliers for price-fixing. This is the highest fine ever imposed on foreign enterprises by the TFTC. Its decision in that case was reached following parallel investigations launched in 2014 in the EU, Singapore and the US. Among

those agencies investigating the cartel, the TFTC was the first to render a decision and its fines were higher to date than those imposed in any other jurisdiction.

Catch-all exemption for pro-competitive co-operation

There is now a catch-all exemption under the amended TFTA to cover all types of pro-competitive co-operation. In the past, concerted actions could only be exempted when they were related to specific types of co-operation, such as product specifications or product models, joint research and development, or joint importation of foreign goods. Under the amended TFTA, the provision is now very broad, covering 'any other joint acts for the purposes of improving industrial development, technological innovation, or operational efficiency'. This is positive for companies although it remains to be seen how the provision will be applied in practice.

Gearing up for dawn raid powers

The TFTC does not currently have the power to conduct dawn raids in its investigations. However, the agency is proposing a draft amendment to the TFTA that will give it these powers in the context of investigating abuses of market power and cartel cases. According to the draft amendment, the TFTC will (with a court warrant) be able to search the work premises (including electronic records, etc) of any company under investigation and those of a relevant third party, as well as the personal residences of relevant employees. The TFTC will also be able to seize any items it discovers that may serve as evidence. While there is no definite timeline for the amendment, the proposal reflects the TFTC's continued focus on aggressive enforcement of abuse of market power and cartel cases, and its goal of keeping pace with its peers in other jurisdictions.

More rigorous merger control

The TFTC has been fairly aggressive on the merger control front in recent years and this is expected to continue in terms of both its substantive review and sanctions for failure-to-notify cases.

In December 2016, the TFTC announced an amended jurisdictional test, adding a new threshold regarding 'global revenues'. As a result of this amendment, merging parties now need to consider their global revenues as well as their revenues in Taiwan when assessing whether a filing is triggered.

Before the recent amendments to the TFTA, the TFTC did not aggressively investigate failure-to-notify cases and, where it did, it imposed only small fines – generally NT\$3m (approximately US\$100,000) or less. Under the amended TFTA, however, for transactions (including foreign-to-foreign transactions) that fail to notify, the TFTC has the power to impose an administrative fine of up to NT\$50m (approximately US\$1.65m).

In addition, the TFTC is now able to exercise its power to impose remedies, including prohibiting the transaction, ordering divestiture, transferring of shares/business, and/or the removal of personnel designated by the companies in failure-to-notify cases. Based on publicly available information, the TFTC has already imposed penalties in a number of domestic transactions.

As yet, the highest fine imposed in the TFTC's enforcement history for violation of merger control rules is NT\$10m (approximately US\$330,000). In addition to fines, there are also cases where the TFTC has ordered the unwinding of a transaction, disposal of the shares acquired or removal of directors designated by the acquirer. It is anticipated that similar penalties will be imposed on foreign-to-foreign transactions in the future.

Possible exemption for foreign-to-foreign transactions

Since December 2016, the TFTC has been able to waive jurisdiction over a pure foreign-to-foreign transaction where it anticipates no local effect on the Taiwanese market. In practice, parties to an offshore transaction are free to assess and decide whether a filing is required in Taiwan. However, the TFTC reserves the discretion to determine ultimately whether a waiver should be granted. To date, the TFTC has not published any waiver decision, nor detailed guidelines on assessing local effect. However,

in view of the intensified enforcement against failure to notify, parties to an offshore transaction should seek advice before determining whether a filing can be avoided in Taiwan.

Extended waiting period and information rights for targets of hostile takeovers

Since June 2017, the waiting period for a TFTC merger filing has been extended to 30 business days with a possible extension of an additional 60 business days. In addition, the TFTC is now required to provide necessary information to, and seek opinions from, the target in a hostile takeover so as to safeguard the target's right to information and to express opinions.

The TFTC's decision in the Nokia/Microsoft case

The TFTC has demonstrated that it is ready to handle complex cases and is confident in imposing remedies in its merger reviews. On 19 February 2014, the TFTC cleared Microsoft's proposed acquisition of Nokia subject to two behavioural remedies, one imposed on each company. In August 2016, in ruling on an appeal by Nokia, the Supreme Administrative Court of Taiwan upheld the TFTC's decision and held that the TFTC has the legal authority to impose conditions that ensure that the overall economic benefit of a transaction outweighs the adverse impact of restricted competition.

Looking ahead

The amended TFTA has already been making an impact on Taiwan's competition law enforcement. With enhanced investigation powers, the TFTC is expected to be more aggressive, especially in terms of cracking down on international cartels. The TFTC is also expected to become increasingly sophisticated in merger review, and take a harder stance towards failure-to-notify cases.

'The [TFTC] continued to sharpen its legal tools in 2016 after amendments to the [TFTA] took effect in February 2015. These amendments represent the most comprehensive overhaul of the TFTA since the TFTC was established in 1992. Following this sweeping reform, the TFTC has been better equipped to maintain its independence and take enforcement action effectively against anticompetitive practices.'

Chia Lin Yen

Head of the International Affairs Section at the Taiwan Fair Trade Commission – April 2017

'[We] hope to add [into the law] the investigative power to conduct search-and-seizure operations. In this way, [we] can have direct access to key evidence of the illegal behaviour of companies or access a company's internal production and marketing materials, so that we can achieve the purpose of improving the effectiveness of investigations.'

Huang Mei-ying

Chairwoman of the Taiwan Fair Trade Commission – February 2017