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THE LAWREVIEWS

# TAIWAN

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## 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 and became effective on 4 February 1992. On 22 January 2015, the Legislative Yuan approved the amendments to the TFTA.<sup>2</sup> The amendments, which took effect on 6 February 2015, are tantamount to the most sweeping reform of the TFTA since it came into effect. The amendments cover a wide range of legal provisions under the TFTA, such as merger control, cartel enforcement, restrictive competition and unfair competition, which will have significant impact on companies' business operations as well as their compliance guidelines.

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 multilevel 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;
- d* investigate and determine whether an enterprise<sup>3</sup> has violated the TFTA; and
- e* handle any other matters related to fair trade practices.

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2 For those case precedents cited in this chapter, all provisions referred to are based on its original chapter numbers under the version of the TFTA at the time of the TFTC's decision or ruling.

3 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:

- 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\$50,000 to NT\$500,000. 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\$100,000 to NT\$1 million until the person cooperates with the TFTC.

As of 6 February 2012, the TFTC is no longer under the supervision of the Executive Yuan<sup>4</sup> 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 enterprises. In addition, the new TFTA recognises the TFTC as an independent agency with expertise and credibility to make decisions at the level of the executive system. Hence, enterprises punished by the TFTC may seek a remedy by filing a lawsuit against the TFTC with the administrative court directly without having to appeal against the TFTC's decision with the Executive Yuan first. Civil and criminal liabilities for violation of the TFTA should be determined by the courts. Except for business libel, enterprises will face criminal liabilities only if they fail to cease the violation pursuant to the TFTC's order.

## **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 2017 to 2020 are as follows<sup>5</sup>:

- a* to continue the aggressive enforcement of cartel regulations and to improve the effectiveness of the operation of antitrust funds;
- b* to actively participate in the international community of competition law, expanding international and cross-border cooperation and building a foundation for mutual assistance on global cases;
- c* to promote the concept of fair and efficient competition;
- d* to establish industry-specific guidelines to facilitate enforcement and compliance; and
- e* to actively investigate false or misleading advertisements and other unfair competition conduct to protect market order and consumer benefits.

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4 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.

5 At the time of this document, the TFTC has not yet announced its priority objective for the period from 2021 to 2025.

## 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,<sup>6</sup> 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 the 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.<sup>7</sup>

### ii Significant cases

#### *Record-breaking fine on power producers (2013)*<sup>8</sup>

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.

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 cartel case in the TFTC's enforcement history.

6 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.

7 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\$100,000 and NT\$50 million. If the perpetrating enterprise fails to discontinue or rectify its conduct or take any necessary measure as ordered, the TFTC may reissue its order and set another time limit, and may impose another administrative fine of between NT\$200,000 and NT\$100 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, or take necessary corrective action within the given period, or engages in the same or similar violation after the TFTA 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.

8 TFTA decision letter dated 15 March 2013, Ref No. 102035.

The IPPs filed an administrative appeal against the TFTC's decision with the Executive Yuan. Although the issue regarding whether the TFTC calculated the fines recklessly is still being disputed in the administrative appeal procedure,<sup>9</sup> the substance of the case (i.e., whether the action of the IPPs amounted to a concerted action) was further contested in the administrative litigation process after the Executive Yuan made a decision upholding the TFTC's second-time decision in September 2013. On 5 November 2014, the Taipei High Administrative Court (High Court) revoked the TFTC's decision mainly because as no market exists in the subject case, the IPPs cannot be deemed as competitors with the capability of competing with each other in quantity or price. The High Court stated that the subject case should be simply a contractual dispute, rather than a competition law matter.

The TFTC appealed to the Supreme Administrative Court. In July 2015, the Supreme Administrative Court revoked the High Court's judgment and remanded the case to the High Court on the basis that several issues, such as whether a relevant market exists, whether the IPPs reached a meeting of minds and whether the IPPs' conduct affected the market function, require further clarification. The TFTC filed an appeal against the judgment of the Taipei High Administrative Court. Then, in September 2018, the Supreme Court revoked and remanded the case again to the Taipei High Administrative Court. In May 2020, the Taipei High Administrative Court revoked the TFTC's decision in accordance with the following grounds: (1) no competitive relation existed: since the transmission of electricity relies heavily on geographical factor (i.e., the longer the distance of transmission, the greater the loss of electricity, IPPs would provide the electricity to the nearby area only). Therefore, the geographic market of provision of electricity should not be deemed as Taiwan. Furthermore, IPPs cannot decide the sale price of electricity by themselves and such price would not affect the quantity of the electricity purchased by Taiwan Power Company. As such, no competitive relation between the IPPs and Taiwan Power Company existed in the case; (2) the joint refusal of the amendment of the sale price of electricity should not be deemed as a conspiracy of concerted action: the IPPs jointly refused the amendment of the power purchase agreement and the adjustment of the sale price because Taiwan Power Company intended to apply such price to all the IPPs. Hence, the IPPs' joint refusal of such price cannot be deemed as sufficient evidence for proving that the IPPs are conspiring concerted action. According to the public information, the aforementioned decision was appealed to the Supreme Court; however, the trial proceeding is still pending.

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. However, according to the decisions ruled by the courts so far, it seems that the courts did not address too much on the application of the Fine Formula. Rather, the courts emphasised more the market definition and elements of a concerted action. Nonetheless, in this case,

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9 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 re-evaluate whether the old punishment provision, which capped the fine at NT\$25 million for a first-time offence, should be considered when imposing fines on each IPP.

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.

### ***The Hard Disk Drive (HDD) Suspension Products case (2020)***

#### *Background*

In its 1514th Commission Meeting held on 11 November 2020, the TFTC determined that Japanese corporation TDK Corporation (TDK), Thai corporation Magnecomp Precision Technology Public Co, Ltd (MPT) and Japanese corporation NHK Spring Co, Ltd (NHK) had exchanged sensitive information on hard disk drive (HDD) suspension products to avoid price competition, to jointly maintain or expand their market shares, and to eliminate competition, to the extent of affecting the supply and demand of the relevant product markets in Taiwan, and had therefore violated the restrictions on concerted actions set forth under Paragraph 1, Article 15 of the TFTA.<sup>10</sup> According to the TFTC, the HDD suspension is one of the HDD components and its function is to allow the HDD head to float steadily above the HDD disk in order to read and write the data thereon smoothly. As of 2016, there are only four manufacturers of HDD suspension on the global market, namely, TDK Group (including MPT), NHK Group (including NHK), Hutchinson Technology Inc and Suncall Corporation. All the HDD companies around the world were supplied by these four HDD suspension manufacturers. Other than those sold to the end consumers through retail channels, the HDDs imported to Taiwan are used in the assembly of desktop computers, laptop computers or as an ancillary equipment of monitors; the value of HDD products imported to Taiwan reaches NT\$10 billion every year. Then, the TFTC found that HDD suspension market is an oligopoly market. HDD manufacturers who need to procure HDD suspension would usually turn to TDK Group and NHK Group for price quotes. Hence, through bilateral exchanges of sensitive information on prices and quantities of orders, these two competitors were able to verify the offers or orders made by the HDD manufacturers during contract negotiation, and were therefore able to maintain the prices of HDD suspension or limit the range of price reduction. Also, if they become aware that a competitor is adopting a low-price strategy, they could work together to come up with a response strategy in order to maintain their market shares and profits. As such, TDK Group and NHK Group indeed had the incentive to engage in concerted action. Moreover, TDK Group and its competitor NHK Group had been in bilateral contact from May 2008 to April 2016. Hence, for the violation of the cartel regulations under the TFTA, TDK (Japan), MPT (Thailand) and NHK (Japan) have been fined, respectively, NT\$159.09 million, NT\$159.09 million and NT\$285.55 million, which equals a total of NT\$603.73 million.

#### *Implications*

According to the Regulations for Calculation of Administrative Fines for Serious Violations of Articles 9 and 15 of the Taiwan Fair Trade Act, since the concerted action by such manufacturers is highly damaging to the market orders and lasted eight years, and the TDK Group and the NHK Group have respectively generated more than NT\$100 million from their product sales to Taiwan during the period of their violation, the TFTC determined such

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10 TFTA decision announced on 11 November 2020. The full context of the decision letter has not been published.

concerted action as ‘serious violations’. Therefore, after weighing the severity of the violation and the profits generated therefrom, and considering the application of Articles 4 to 7 of the above Regulations, the TFTC decided to fine TDK, MPT and NHK heavily in accordance with Paragraph 2, Article 40 of the TFTA. It is notable that this case indicated that the amount of illegal profits generated from the violation of the TFTA would be a critical factor for the TFTC to determine whether an alleged violation should be deemed ‘serious’ and to decide the amount of the fine accordingly.

### **iii Trends, developments and strategies**

#### ***Circumstantial evidence***

In the past, the TFTA often had difficulty securing direct evidence to prove the existence of a cartel. To improve the TFTA’s enforcement effectiveness, the new TFTA permits the TFTA to presume the existence of an agreement on the basis of circumstantial evidence, such as market conditions, characteristics of the products or services involved, and profit and cost considerations, etc. By way of this amendment, the new law substantially shifts the burden of proof regarding the existence of an agreement among competitors from the TFTA to the enterprises that are investigated or penalised. Thus, in the future, for an enterprise under investigation, it is advisable to present evidence in a timely manner to prove that its business decision was made independently and reasonably to rule out any possibility of being viewed as participating in a price-fixing scheme due to parallel activities in the market.

#### ***Leniency programme***

The 2011 amended TFTA introduced the leniency programme for cartel participants (Article 35) and imposed a higher fine for cartel violations (Article 40). Under the authorisation of the amended TFTA, the TFTA promulgated the regulations for the leniency programme in early 2012, which specify, inter alia, the requirements for leniency, the maximum number of cartel participants eligible for leniency, the fine reduction percentage, the required evidence and confidentiality treatment. The adoption of the leniency programme is expected to affect the enforcement of cartel regulations in Taiwan significantly.<sup>11</sup>

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

For any violation of the prohibitions against concerted action, the TFTA 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\$100,000 and NT\$50 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.

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

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 TFTA agrees in advance that the enterprise qualifies for the exemption or reduction:

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11 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).

- a 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;
- b 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
- c 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 to 50 per cent, 20 to 30 per cent, 10 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.

### ***Fine calculation formula***

According to the 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 through the fine formula.<sup>12</sup> Pursuant to the fine formula, a 'serious' concerted action is one that materially affects the competition status of the relevant market where the total amount of turnover of the relevant products or services during the period the cartel is active exceeds NT\$100 million; or the total amount of gains derived from the cartel exceeds the maximum fine under the TFTA (i.e., NT\$50 million).

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 turnover 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. Further, the TFTC holds the view that the 10 per cent cap should be based on the violating party's 'global' revenues instead of Taiwanese sales only.

## **iv Outlook**

### ***Cartel enforcement in the wake of covid-19***

Since in Taiwan life is carrying on as usual, the TFTC's enforcement action seems not to be slowing down amid the covid-19 pandemic. According to public information, the TFTC's fines for cartels soared in 2020, in particular as a result of the approximately NT\$604 million fine given to the *HDD Suspension Cartel* case in November 2020. While the TFTC did not close any investigation into an international or serious cartel by imposing high fines in 2019, the *HDD Suspension Cartel* case in 2020 is the main reason for the sharp increase in the fine record.

Going forward, as long as Taiwan maintains control of the spread of covid-19 as it did in 2020, there should not be any substantial delay in the TFTC's enforcement. Nonetheless, since it generally takes years for the TFTC to conclude an international or serious cartel case,

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12 This fine formula can also be applied to serious violations of the monopoly regulations.

it is also possible that no decision will be made in 2021; in that case, the fines would decrease accordingly. However, such fluctuation is common concerning the investigation period for a serious cartel case and certainly does not mean the TFTC has lessened its scrutiny of cartel activities.

### 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.<sup>13</sup> Two or more enterprises as a whole will be deemed to have the status of a monopolistic enterprise if they do not in fact engage in price competition.

An enterprise meeting one of the following requirements may be deemed 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:<sup>14</sup> the market share of the enterprise in a relevant market reaches 50 per cent; the combined market share of two enterprises in a relevant market reaches two-thirds; and 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 8 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 9 of the TFTA).

#### ii Significant cases

##### *Largest-ever fine on Qualcomm (2017)*<sup>15</sup>

At its commissioners' meeting on 11 October 2017, the TFTC ruled that Qualcomm Incorporated (Qualcomm) has a monopolistic market position in the baseband chip markets of code-division multiple access, wideband code division multiple access, long-term evolution and other cellular communication standards, but that:

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

14 The monopoly threshold may be amended in the wake of the new TFTA.

15 TFTC decision letter dated 20 October 2017, Ref No. 106094.

- a* it refuses to grant licences to competing chip companies;
- b* it requests that companies enter into restrictive clauses;
- c* it refuses to grant licences to enterprises that do not enter into licence agreements;
- d* it enters into exclusive rebate clauses with specific enterprises; and
- e* the conduct involved in its overall licensing model caused harm to competition in the baseband chip markets, which directly or indirectly prevents other enterprises from competing through unfair means that are in violation of Article 9.1 of the TFTA.

Therefore, a fine of NT\$23.4 billion was imposed on Qualcomm. This is the largest fine ever imposed in the TFTC's enforcement history.

The TFTC's decision has sparked intense debate among the local industries and governmental agencies. In particular, Taiwan's Ministry of Economic Affairs expressed its concern that the TFTC has punished a company that has always been a valuable partner for the Taiwanese communications and semiconductor industry, and believed that the TFTC should have considered Taiwan's broader economic policy goals before handing down the heavy fine on the chipmaker. More rarely, out of a total of seven commissioners, three issued dissenting opinions criticising the decision, implying that the TFTC's internal view on the subject matter is split.

Qualcomm filed an appeal against the TFTC's decision with the Intellectual Property Court. On 9 August 2018, the TFTC and Qualcomm reached a litigation settlement whereby Qualcomm agreed to abide by and implement specific commitments relating to licensing cellular standard essential patents to the Taiwanese handset manufacturers, and thus lifted the TFTC's antitrust concern on Qualcomm's SEP licensing practices. In addition, Qualcomm agreed not to contest the fine instalment amounts already paid, totalling NT\$2.73 billion, and committed to undertake commercial initiatives for investments in and collaborations with Taiwan over a five-year period.

The TFTC said that after comprehensive consideration, it reached the settlement with Qualcomm based on public welfare. This is the first time the TFTC has settled in litigation proceedings. As part of the settlement, Qualcomm need not pay the remainder of the fine that was initially imposed. The TFTC expects that this case would not only effectively form a sound competition environment for the cellular communication industry but also bring a positive impact on the semiconductor, cellular communication and 5G technology development in Taiwan.

The settlement, however, has been criticised by many scholars, who are concerned that if the fine can be substituted by investment, the settlement conveys the message to the public that companies can engage in antitrust behaviour in Taiwan. In addition, the licensing commitments made by Qualcomm are very ambiguous, which may not solve the licensing problems. Finally, while most countries around the world are preventing companies from engaging in antitrust behaviour and have imposed significant fines on Qualcomm, Taiwan is on the opposite track.

With respect to the criticism, the TFTC responded that as the competent authority in charge of matters pertaining to antitrust law, it shall consider not only market competition but also economic situation that is affected. The TFTC entered into the settlement because the harm and impact to companies and industries in Taiwan due to the lengthy administrative litigation procedure may be hard to recover from, and because the commitment made by Qualcomm can achieve the purpose of imposing the significant fine and benefit companies and industries in Taiwan.

### iii Trends, developments and strategies

#### *Increase of maximum fine*

Under the TFTA and according to the fine formula, 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. As noted in the *Qualcomm* case, the TFTC has applied the fine formula to hand down a hefty penalty in a monopoly case.

### iv Outlook

In November 2018, the TFTC published the draft amendments to Articles 39, 41 and 47-1 of the TFTA. Among the amendments, the TFTC proposes a provision regarding 'suspension of statute of limitations' for anticompetitive matters, such as abuse of dominance and cartels. To be specific, the five-year statute of limitations period for the TFTC to penalise the violating party of an anticompetitive matter will be suspended upon the launch of investigation by the TFTC. According to the TFTC, the aforesaid amendment aims to tackle the situation whereby the TFTC often runs short on time to close a complicated case involving multiple foreign companies and voluminous evidence within the current five-year period. The draft amendments are still subject to review by the Executive Yuan and then need to pass the three rounds of reading by the Legislative Yuan. Thus, whether and when the amendment will come into effect is currently unknown at this time.

## IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

### i Significant cases

#### *Blu-ray patent pool*<sup>16</sup> (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.<sup>17</sup> 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.

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16 TFTA decision letter dated 31 March 2011, Ref No. 100002.

17 Although combination should be deemed helpful to lower transaction costs for Taiwanese enterprises when applying for licences, to prevent the participating parties from stifling competition through the patent pool the TFTA 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 TFTA'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 this 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 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 it 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 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 among 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.<sup>18</sup> 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.

## **ii Trends, developments and strategies**

### ***Guidelines for 4C enterprises and financial industry***

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.

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**

Since people have heavily relied on large technology companies to provide them with a more convenient lifestyle in recent years, these companies have gained more and more influence on society and have also changed the market structure by using innovative methods to provide their services. Although these technology companies do bring many benefits to people's lives and have diversified the possibility of human consumption patterns, people who want to enjoy novel services have to provide their personal data as an exchange. Therefore, these companies hold a significant amount of users' data, which brings about market power. This ongoing phenomenon inevitably leads to the concerns regarding new competition issues and consumer protection. As a result, the TFTC has announced that it will put the digital economy as its regulatory priority and dedicate sources to analyse the potential competition issue arising therefrom. In summary, the TFTC aims to enhance its regulatory power over the aforementioned 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 the digital and platform economy to swiftly detect any unlawful conduct that could stifle competition. Meanwhile, on par with the international trend, the TFTC indicates that it will dedicate more resources to research or even investigate the monopoly issues in the digital platform sectors, especially for those tech giants who hold a large amount of consumer data, if any potential violation is found.

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

## V MERGER REVIEW

### i Significant cases

#### *Combination between hypermarkets with supermarkets<sup>19</sup> (2020)*

At its 9 December 2020 commissioners' meeting, the TFTC conditionally cleared the proposed combination which entails the acquisition of 100 per cent of the shares in Wellcome by Carrefour. According to the TFTC, Carrefour and Wellcome overlap in hypermarkets/supermarkets, and thus the proposed transaction is a horizontal combination. After considering the parties' market shares in the relevant markets, market structure, market concentration and other factors, the TFTC determined that the acquisition would not have a substantial impact on market competition. Furthermore, after the acquisition, the TFTC believes that the parties could offer consumers more favourable prices and convenient services than before through their large-scale purchases at reduced costs; therefore, the benefits to consumers would be enhanced.

Nonetheless, the TFTC indicated that Uni-President group, as one of Carrefour's current upstream suppliers, holds a 40 per cent shareholding of Carrefour. Thus, the terms on which products are provided may constitute a discriminatory treatment against other suppliers post-closing. In addition, after the acquisition, Carrefour would have stronger bargaining power, which means that small and medium-sized suppliers may have to withdraw from the sales channels of the merged entity because of their lack of bargaining power. Consequently, the diversity of products might be impaired. To alleviate the aforementioned concern, the TFTC has imposed the following conditions on the parties pursuant to Paragraph 2, Article 13 of the Fair Trade Act:

- a* If the minority shareholders of Carrefour (i.e., Uni-President group) are also its actual or potential suppliers, the transactions between Carrefour and its minority shareholders should be at arm's length, and Carrefour cannot provide favourable business terms and conditions to such minority shareholders without any justification.
- b* Within three years of the closing of the acquisition, Carrefour should maintain its special transaction programme for small and medium-sized suppliers (whose annual trading value is less than NT\$1 million) and ensure that overall, any amendment to the programme should not put those small and medium-sized suppliers in a less favourable position.
- c* Within three years of the closing of the acquisition, Carrefour should not terminate its purchases from small and medium-sized suppliers without justifiable cause and should give such suppliers an opportunity to require Carrefour's management to review any decision to terminate.
- d* Within three years of the closing of the acquisition, Carrefour should provide the TFTC with certain information and documents (i.e., copies of supply contracts between Carrefour and its minority shareholders that are still in effect, a report on the amounts purchased from the small and medium-sized suppliers, and so on) for the TFTC to verify that Carrefour has complied with the conditions above.

19 TFTC decision announced on 9 December 2020.

## **ii Trends, developments and strategies**

### ***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.

### **iii Outlook**

The current Taiwan merger control rules still implement a dual filing threshold system (i.e., the turnover filing threshold and market share filing threshold). Though proposed several times, the TFTC's suggestion to remove the market share filing thresholds has not yet passed the Legislative Yuan's final review. Whether the TFTC will continue to advocate such amendment in the coming year remains to be seen.

## **VI CONCLUSIONS**

The increasing prominence of the digital economy has had a significant impact on people's economic activities and changed existing business models in recent years. Giant technology enterprises have collected large amounts of data from their consumers and used this data to provide innovative goods and services. Since people have grown dependent on the convenience given by these technology companies, the companies have penetrated people's lives more than ever. This situation reversed the traditional notion of competition in many aspects. For instance, data might become a potential source of market power. Furthermore, the digital economy is characterised by network effect and economy of scale, which can render competition issues more complex. Therefore, the TFTC has not only committed to devote more efforts to the digital market but has also set the scrutiny of the digital economy as its key priority in 2019 so as to keep up with the international trend of further supervision of the behaviour of giant technology corporations. Since some changes are necessary to create a better competitive environment in Taiwan, we expect that the TFTC can revisit and recalibrate certain established concepts of competition laws to cope with emerging challenges that might be incurred by the digital sectors. All in all, we are looking forward to a sound and prosperous business environment in Taiwan in the future.

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