

THE PUBLIC
COMPETITION
ENFORCEMENT
REVIEW

FOURTEENTH EDITION

Editor
Aidan Synnott

THE LAWREVIEWS

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This article was first published in March 2022
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Published in the United Kingdom

by Law Business Research Ltd, London

Meridian House, 34–35 Farringdon Street, London, EC4A 4HL, UK

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Enquiries concerning editorial content should be directed
to the Publisher – clare.bolton@lbresearch.com

ISBN 978-1-80449-064-8

Printed in Great Britain by

Encompass Print Solutions, Derbyshire

Tel: 0844 2480 112

ACKNOWLEDGEMENTS

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

ACTECON

ANJIE LAW FIRM

BAKER & MCKENZIE (GAIKOKUHO JOINT ENTERPRISE)

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PREFACE

In the reports from around the world collected in this volume, we continue to see international overlap among the issues and industries attracting government enforcement attention. In the past year, we have also seen the emergence of cooperative policy efforts among several enforcement authorities. Two areas in particular – digital markets and pharmaceutical markets – have been the focus of cross-border initiatives. The G7 – Canada, France, Germany, Italy, Japan, the United Kingdom and the United States – along with Australia, India, South Africa, South Korea and the European Commission participated in a Digital Competition Enforcers Summit, which was hosted by the UK Competition and Markets Authority (CMA) in November 2021. Earlier in the year, the United States Federal Trade Commission, certain state attorneys general, the European Commission, the Canadian Competition Bureau and the CMA established a multilateral pharmaceutical working group.

In many jurisdictions, merger review and enforcement activity remain robust. Indeed, the United States agencies are dealing with an exceptionally high number of merger filings, reflecting a marked increase in deal activity. Meanwhile, in France, the Competition Authority (FCA) also saw a significant increase in merger activity and blocked a merger in the pipeline industry. According to our authors, this is only the second time the FCA has blocked a merger. Merger reviews were also up in Brazil. At the same time, however, the report from the United Kingdom notes that expectations for an increase in merger review activity at the CMA have so far not been realised and ‘there is no evidence, as yet, of the expected Brexit boom in notifications’. In Japan, the Fair Trade Commission (JFTC) ‘maintained a steady level’ of merger enforcement activity.

The policing of cartels continues to be a focus of several competition agencies around the globe. Many jurisdictions with active anti-cartel enforcement programmes have seen the return of dawn raids, which had been largely suspended in several countries after the onset of the covid-19 pandemic. For example, dawn raids in Japan targeted the utilities sector, which, as we read in that country’s submission, appears to be an area of focus for the JFTC. In Portugal, 2021 was ‘record year for dawn raids’, according to our authors. Authorities there targeted the financial, energy, healthcare and information services sectors. The Swedish Competition Authority conducted a dawn raid related to alleged price-fixing for covid-19 PCR tests. Our authors from Greece note that in the second half of 2021, authorities there conducted dawn raids on companies in ‘an impressive range of markets’.

Digital platforms have continued to attract scrutiny and regulatory action worldwide. In the United Kingdom, the CMA is establishing a Digital Markets Unit and has proposed legislation aimed at digital companies with ‘strategic market status’. Similarly, the European Commission has proposed a Digital Markets Act to regulate that sector in the European Union; and competition authorities of Member States have been involved in the negotiation

of that legislation. Numerous legislative proposals introduced in the United States are aimed at digital platforms, and the agencies here are continuing with litigation against several platform companies. Numerous other jurisdictions are engaged in legislative and enforcement activity in this area, including Japan, where the Digital Platform Transaction Transparency Act recently came into force. Companies operating in digital markets were also the subjects of enforcement activity in several other jurisdictions, including Argentina, Canada, France and Turkey. In addition to digital platforms, pharmaceutical companies are also seeing attention from competition enforcement authorities around the globe, including in the United Kingdom, the United States and Japan.

A number of agencies have continued to bring actions against resale price maintenance (RPM). Indeed, as we read in the chapter from the United Kingdom, it is clear that RPM (particularly as it relates to online pricing restrictions) remains a top priority for the CMA. Indeed, following several fines imposed in 2020, the CMA issued a statement of objections to a lighting company. Swedish authorities also fined a lighting supplier. Elsewhere, French authorities fined eyewear manufacturers and companies involved in video surveillance, and Turkish authorities levied fines on fuel distributors. It is also notable that enforcement activity in labour markets appears to be increasing in several jurisdictions, including in the United States. The Turkish Competition Board and the Portuguese Competition Authority are also examining labour market issues.

In the coming year, we will watch with interest to see how competition regulation and enforcement continues to evolve around the globe.

Aidan Synnott

Paul, Weiss, Rifkind, Wharton & Garrison LLP

New York

March 2022

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 and became effective on 4 February 1992. On 22 January 2015, the Legislative Yuan approved the amendments to the TFTA.² The amendments, which took effect on 6 February 2015, are tantamount to the most sweeping reform of the TFTA since the legislation 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 enterprise³ has violated the TFTA; and
- e* handle any other matters related to fair trade practices.

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

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 TFPC may, on its own initiative or upon complaint, investigate cases that involve unfair competition. In the investigation, the TFPC 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 TFPC 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 TFPC.

Since 6 February 2012, the TFPC has not been under the supervision of the Executive Yuan,⁴ and it operates as an independent government body. If it is satisfied that one or more enterprises have violated the TFTA, the TFPC may impose administrative sanctions against the enterprises concerned. In addition, the new TFTA recognises the TFPC as an independent agency with expertise and competence to make decisions at the level of the executive system. Hence, enterprises punished by the TFPC may seek a remedy by filing a lawsuit against the TFPC with the administrative court directly without having to appeal against the TFPC'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 TFPC's order.

ii Enforcement agenda

The TFPC's goals are to promote free and fair competition and strong economic growth. It sets its priority objectives every four years. The TFPC's priority objectives for the period from 2017 to 2020 are as follows:⁵

- 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.

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 TFPC 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,⁶ 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.⁷

ii Significant cases

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

Background

At its 1,514th commissioners' 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 share, and to eliminate competition, to the extent of affecting supply and demand in the relevant product markets in Taiwan, and had therefore violated the restrictions on concerted actions set out in Paragraph 1, Article 15 of the TFTA.⁸ According to the TFTC, an HDD suspension is an HDD component that allows the HDD head to float steadily above the disk and read and write data smoothly. As at 2016, there were only four manufacturers of HDD suspension products on the global market, namely, TDK Group (including MPT), NHK Group (including NHK), Hutchinson Technology Inc and Suncall Corporation. All the HDD

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 the 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 the conduct or take necessary corrective action within the given period, or engages in the same or a similar violation after the TFTC order, the enterprise will face a criminal fine of up to NT\$100 million and the persons in charge will face a prison term of up to three years, a criminal fine of up to NT\$100 million, or both.

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

companies around the world were supplied by these four HDD suspension manufacturers. Other than those sold to end consumers through retail channels, the HDDs imported to Taiwan are used in the assembly of desktop and laptop computers or as ancillary monitor equipment; the value of HDD products imported to Taiwan amounts to NT\$10 billion every year. The TFTC found the HDD suspension market to be an oligopoly market. HDD manufacturers who need to procure HDD suspension products would usually turn to TDK Group and NHK Group for price quotes. In this context, through bilateral exchanges of sensitive information on prices and order quantities, 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 products or limit the extent of price reductions. Also, if they became aware that a competitor was adopting a low-price strategy, they could work together to come up with a response strategy to maintain their market share and profits. As such, TDK Group and NHK Group certainly had 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. As a result, TDK (Japan), MPT (Thailand) and NHK (Japan) have been fined NT\$159.09 million, NT\$159.09 million and NT\$285.55 million respectively, which is a combined total fine of NT\$603.73 million for violating the TFTA cartel regulations.

Implications

According to the Regulations for Calculation of Administrative Fines for Serious Violations of Articles 9 and 15 of the Taiwan Fair Trade Act, because the concerted action of these manufacturer was highly damaging to market orders and lasted eight years, and TDK Group and NHK Group respectively generated more than NT\$100 million from product sales to Taiwan during that period, the TFTC determined that their concerted actions constituted ‘serious violations’. Therefore, after weighing up the severity of the violation and the profits generated, 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. Notably, this case indicated that the amount of illegal profits generated would be a critical factor for the TFTA in determining whether an alleged violation of the TFTA should be deemed ‘serious’ and, accordingly, in deciding the amount of the fine.

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 between competitors from the TFTA to the enterprises that are investigated or penalised. Thus, in the future, an enterprise under investigation is advised to present evidence in a timely manner to prove that its business decisions were made independently and reasonably, and to rule out any possibility of being viewed as participating in a price-fixing scheme because of parallel activities in the market.

Leniency programme

The 2011 amended TFTA introduced the leniency programme for cartel participants⁹ and imposed a higher fine for cartel violations.¹⁰ Under the authorisation of the amended TFTA, the TFTC 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.¹¹

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 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 the 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 TFTC has the discretion to impose a fine of up to 10 per cent of the violating enterprise's revenue of the previous fiscal year.

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

- 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.¹² 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

9 Article 35.

10 Article 40.

11 Stephen Wu, Yvonne Hsieh and Wei-Han Wu, 'Leniency programme in Taiwan: The impact of a "whistle-blower" system in Eastern culture', *Competition and Antitrust Review* (2013).

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

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. Aggravating factors include having previously been punished for violating cartel or monopoly regulations within the past five years, and mitigating factors include providing full cooperation during the TFTA investigation. Further, the TFTA holds the view that the 10 per cent cap should be based on the violating party's 'global' revenues rather than only Taiwanese sales.

iv Outlook

Increased incentives for whistle-blowers

Under the TFTA, 30 per cent of the amounts collected as fines imposed for violations of the TFTA, among other sources, is set aside in an antitrust fund to reward whistle-blowers who report suspected violations. In addition, the TFTA has announced the Measures for the Payment of Rewards for Reporting Illegal Joint Acts (the Measures), which prescribe in further detail the scope, qualifications, payment procedure and other information regarding these rewards.

In November 2021, to encourage reporting of cartels and collusive conduct, the TFTA passed an amendment to the Measures, doubling the maximum reward available. Following the amendment, the maximum reward an individual can receive for uncovering cartel conduct has been increased from NT\$50 million to NT\$100 million. Moreover, whistle-blowing rewards will still be paid even if the case does not lead to sanctions. In other words, even if because of minor circumstances no fine is imposed, where the act is determined to be illegal concerted conduct, a reward of between NT\$50,000 and NT\$1 million per person may still be awarded to each whistle-blower, depending on the value of the evidence provided.

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.¹³ 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 criteria may be deemed a monopolistic enterprise (although not if it has a market share of less than 10 per cent or its total sales in the preceding fiscal year are less than NT\$1 billion):¹⁴

- 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; or

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.

c the combined market share of three enterprises in a relevant market reaches 75 per cent.

An enterprise that fails to meet or is otherwise an exception to any of the criteria above may still be deemed monopolistic if the establishment of that enterprise or any of the goods or services supplied to a relevant market by that enterprise are subject to legal or technological restraints, or there exist any other circumstances affecting the supply and demand of the market and the ability of others to compete is impeded.¹⁵

While the possession of monopoly power is not illegal per se, a monopolist is prohibited from abusing its dominant position by 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 a transaction to provide preferential treatment without proper cause; and
- d* engaging in any other acts abusing its dominant market position.¹⁶

ii Significant cases

Largest-ever fine on Qualcomm (2017)¹⁷

At its commissioners' meeting of 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 communications standards, and that:

- 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* its conduct of its overall licensing model caused harm to competition in the baseband chip markets through unfair means in violation of Article 9.1 of the TFTA, directly or indirectly preventing other enterprises from competing.

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 had punished a company that had 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 to the chipmaker. Furthermore, and most unusually, 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 decision with the Intellectual Property Court. On 9 August 2018, the TFTC and Qualcomm reached a litigation settlement

15 Article 8 of the TFTA.

16 Article 9 of the TFTA.

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

whereby Qualcomm agreed to abide by and implement specific commitments relating to licensing cellular standard essential patents (SEPs) to the Taiwanese handset manufacturers, and thus lifted the TFTC's antitrust concerns about 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 its settlement with Qualcomm in the interests of 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 initially imposed. The TFTC expects that this case would not only effectively establish a sound competition environment for the cellular communications industry but also have a positive impact on semiconductor, cellular communications 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 with 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 and 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 has taken the opposite direction.

With respect to this criticism, the TFTC responded that, as the authority with competence for antitrust law matters, it shall consider not only market competition but also the affected economic situation. The TFTC entered into the settlement because the harm caused and impact of lengthy administrative litigation proceedings on companies and industries in Taiwan could be difficult to recover from, and because the commitment made by Qualcomm achieved the purpose of imposing a significant fine and benefiting 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 applicable in the prosecution of a violating party by the TFTC in respect of an anticompetitive matter will be suspended upon the launch of an investigation by the TFTC. According to the TFTC, this amendment aims to tackle the situation whereby the TFTC often fails 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 three rounds of reading by the Legislative Yuan. Thus, it is currently unknown when, or whether, the amendments will come into effect.

IV SECTORAL COMPETITION: MARKET INVESTIGATIONS AND REGULATED INDUSTRIES

i Significant cases

*Blu-ray patent pool*¹⁸ (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.¹⁹ 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 concluding the combination, the participating parties will respectively acquire a one-sixth shareholding and then jointly operate One-Blue.

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

As regards competition analysis, the TFTC held that the proposed combination would not give rise to competition restraints because of 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 licences before each shipment of product;

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

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

- 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 regards 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 costs of individual negotiations and accumulated royalties could be expected to be higher than those for licences granted 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 transaction costs and avoid the risk of infringement and litigation, in turn promoting 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.²⁰ In adopting the same rationale to analyse both One-Blue and One-Red cases, the TFTC seems to have set up reliable case precedents for patent holders to follow and observe if they intend to establish patent pools.

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 for the regulation of industries in which business models change often, in order to protect the overall economy. To this end, from time to time, the TFTC 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.

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

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.

During the past year, the TFTC has been actively engaging in discussions with relevant authorities, including the Ministry of Economic Affairs, Ministry of Culture, National Communications Commission and others, with respect to competition concerns and news media bargaining code issues, and announced that the first version of the White Paper on the digital economy is expected to be released to the public in the first quarter of 2022. As the White Paper is the first official regulatory document in Taiwan on digital platforms and is likely to cover a wide range of platforms, such as search engines, social networks, instant messaging applications and e-commerce platforms, it is advisable for digital platforms to monitor the development of these mechanisms and laws in this area.

V MERGER REVIEW

i Significant cases

Combination between hypermarkets with supermarkets²¹ (2020)

At its 9 December 2020 commissioners' meeting, the TFTC conditionally cleared a proposed combination entailing the acquisition by Carrefour of 100 per cent of the shares in Wellcome. According to the TFTC, Carrefour and Wellcome overlap in hypermarkets and supermarkets, 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.

21 TFTC decision announced on 9 December 2020.

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 discriminatory treatment of 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 the minority shareholders without 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.

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

In 2021, the TFTC overhauled a number of its merger control regulations to enhance the efficiency of its merger review processes and the quality of its decisions. In particular, the TFTC promulgated the Guidelines on the Provision of Pre-filing Consultation Services (the Consultation Guidelines) on 18 August 2021 to launch its prior-consultation service to enterprises planning to submit merger filings to the TFTC. Through the consultation service, the TFTC will assist participating parties by answering questions about the proposed

transaction, such as whether it meets the definition of a combination, whether any filing threshold has been reached, which entities should be named as the participating or notifying parties in the merger filing, what documents should be submitted for merger review and which type of merger review procedure will apply.

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, not only has the TFTC committed to devote more efforts to the digital market, it also set scrutiny of the digital economy as its key priority in 2021 to keep up with the international trend of increased supervision of the behaviour of giant technology corporations. Changes are necessary to create a more effective competition environment in Taiwan and, along with the soon-to-be released White Paper (which may shed more light on the TFTC's focus and its attitude to the digital sector), we expect that the authority will continue to deliberate on potential mechanisms and legislative proposals regarding the digital economy. All in all, we are looking forward to a sound and prosperous business environment in Taiwan in the future.

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ISBN 978-1-80449-064-8