

Taiwan's Competition Law—Now and Then

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The objective of competition policy, as recognized by countries around the world, is to ensure competition in the market is free and fair. Despite a consensus on such objective, the text and implementation of the relevant law vary significantly from jurisdiction to jurisdiction. In Taiwan, the Fair Trade Act ("TFTA") is the main competition legislation. This article is a survey of the TFTA, particularly the primary antitrust tools utilized by the Taiwanese authorities: merger controls and cartel regulations.

i. Legislation

Overview of the TFTA

The TFTA was promulgated in 1991 and last amended in 2011. Its scope is broader than that of the US Sherman Act, and can be divided into two parts: (1) restrictive business practices, which cover monopolies and the abuse of dominance, combination (merger control), concerted actions (cartel), fixing of resale prices, and other restrictive business practices (such as boycotts, discriminatory treatment, solicitation of trading counterparts by improper means, tying, and other restrictions imposed on trading counterparts' business activities without due cause); and (2) unfair trade practices, which cover counterfeiting, false advertisements, damage to business reputation, illegal multi-level sales, and other deceptive or obviously unfair conduct capable of affecting trading.

Regulatory Body

The Taiwan Fair Trade Commission ("TFTC") is in charge of the enforcement of the TFTA. The TFTC has various functions, from policy-making, market surveys to law enforcement. In order to enforce the law, the TFTC may, on its own initiative or upon complaint, investigate cases that involve anti-competition. In the investigation, the TFTC may (1) ask the parties and any third party to give a statement; (2) ask relevant agencies, organizations, enterprises, or individuals to submit books and records, documents, and any other necessary materials or exhibits, and (3) search or inspect the office, place of business, or other locations of the relevant organizations or enterprises. Though armed with the power to search, the TFTC does not pursue dawn raids, or unscheduled on-site visits, as much as its counterparts in other jurisdictions. As of the time of writing, no public record indicates that the TFTC has ever carried out a dawn raid on an entity under investigation.

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

Gaining More Independency

Starting from February 6, 2012, the TFTC is no longer under the supervision of the Executive Yuan (i.e., the Cabinet) and become an independent government body. With the enactment

of future legislation, the TFTC's decision may be submitted to the court directly in the event of any dispute, without having to be reviewed by the Executive Yuan first.

ii. Fundamentals of Merger Control

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

Types of Notifiable Combination

According to Article 6 of the TFTA, a "combination" is defined to include (i) a merger; (ii) holding or acquisition of at least one-third of the voting shares of or interest in another enterprise; (iii) a transfer or lease of all or a substantial part of an enterprise's business or assets; (iv) having an arrangement with another enterprise for joint operation on a regular, on-going basis, or the management of another enterprise's business based on a contract of entrustment; or (v) having direct or indirect control over the operation or personnel of another enterprise.

Filing Thresholds

According to Article 11 of the TFTA, if any or all of the parties to a combination meet any of the following thresholds, a notification must be filed with the TFTC prior to the closing of the proposed transaction: (i) as a result of the combination, any of the enterprises will acquire at least one-third (1/3) of the market share; (ii) any of the enterprise participating in the combination holds a market share of at least one-fourth (1/4) before the combination; or (iii) the preceding fiscal year's turnover of an enterprise participating in the combination exceeded the amount set forth by the TFTC (i.e., for a combination between non-financial enterprises, one of the enterprises generated an annual turnover of at least NT\$10 billion, while the other enterprise generated an annual turnover of at least NT\$1 billion).

Extraterritorial Transaction

The TFTC Disposal Directions (Guidelines) on Extraterritorial Mergers is stipulated for the purpose of handling merger filings related to foreign merger. Despite of the guidelines, the filing requirements (thresholds, timeframe, documents, etc.) for foreign mergers are the same as those for domestic transactions, though the TFTC will take the local effect into account while determining whether it will exercise the jurisdiction. That is, for an extraterritorial transaction, the TFTC will exercise its jurisdiction only when such combination has direct, substantial and reasonably foreseeable effect on the Taiwan market. Therefore, theoretically, a filing obligation can be avoided in a foreign-to-foreign combination that meets filing threshold based on a lack of local effect argument. However, it is the TFTC, but not the participating parties, to have the discretion to determine whether the local effect exists in the proposed transaction.

Sanction on the Violation of Filing Obligation

If a combination that meets a filing threshold is not notified, the TFTC may impose penalties including the prohibition of the combination, divestiture, transfer of the business acquired,

and/or removal of personnel designated by the enterprises if the TFTC discovers such violation. The TFTC also has the power to impose an administrative fine between NT\$100,000 and NT\$50 million.

Review Timeline

If the TFTC does not make any objection to the filing within 30 calendar days following the filing date (with complete documents and information), the parties to the proposed transaction are free to proceed with the merger. The TFTC may shorten the 30-day waiting period or extend the period up to 60 calendar days if it deems necessary. If the TFTC finds that the filing information or documents are incomplete, it may request the parties to make supplemental filing, and the clock will not start to run until the supplemental filing is duly made.

International Cooperation for Merger Review

So far, no public evidence suggests that the TFTC has 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 other agencies' opinions to make its decision on a merger filing.

Landmark Case-Blu-ray patent pool (2011)

On March 31, 2011, the TFTC conditionally permitted a proposed combination for the joint operation of One-Blue, LLC ("One-Blue") by Hitachi, Panasonic, Philips, Samsung, Sony and Cyberlink¹. One-Blue will act as a licensing agent for the patent pool to license essential blue-ray disk (BD) patents for the manufacturing of backward-compatible BD products.

¹ Though combination should be deemed helpful to lower transaction costs for Taiwanese enterprises when applying for licenses, in order to prevent the participating parties from stifling competition through the patent pool, the TFTC attaches six necessary conditions to eliminate any disadvantages from possible competition restraints, and to ensure the overall economic benefit as follows: (i) 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, (ii) the participating parties and One-Blue should not restrict licensees' scope of technology use, trading counterparts and product prices., (iii) the participating parties and One-Blue should not forbid licensees from challenging the essentiality and validity of the licensed patents, (iv) the participating parties and One-Blue should not forbid licensees from researching and developing, manufacturing, using and selling competing products and/or adopting competing technologies during the license term or after expiration of the license., (v) the participating parties and One-Blue should not refuse to provide licensees with the content, scope and term of the licensed patents, and (vi) the participating parties are required to provide executed copies of the pool agreements for the TFTC's review.

Upon the consummation of the combination, the participating parties will respectively acquire a 1/6 shareholding and then jointly operate One-Blue.

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

As to the competition analysis, the TFTC held that the proposed combination would not give rise to competition restraints due to the following arrangements in the applicable pool agreements: (i) 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, (ii) the patent pool will be open to all patent holders and thus is not a closed pool and all licensors of the patent pool are required to conduct individual licensing activities for any licensee requesting individual licenses on a RAND (reasonable and non-discriminatory) basis, (iii) 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, (iv) licensors cannot have access to licensees' information provided for the application of per-batch license before each shipment of product., (v) 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 (vi) licensors are not prohibited from using competing technologies or developing competition standard or products.

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

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

This case is noteworthy because this is the first time the TFTC reviewed a case concerning a patent pool. Therefore, the TFTC's views of market definition, recognition of patent essentiality review mechanism, and standards for competition assessment of a patent pool are expected to serve as guidelines for future patent pool filing.

iii. New Direction in Cartel Regulations

Cartels are named as "concerted action" under the TFTA. Article 7 of the TFTA defines a

concerted action as the conduct of any enterprises, by means of contract, agreement or any other form of mutual understanding with a competing enterprise, to jointly determine the price of goods or services or to limit the terms on quantity, technology, products, facilities, trading counterparts, or trading territory with respect to such goods and services, thereby restricting each other's business activities.

A cartel prohibited under the TFTA is limited to a concerted action between or among competitors (i.e., market players at the same production and/or marketing level) that may result in an anti-competitive effect (i.e., interfere with the market mechanism with regard to production or supply and demand of the goods in question).

Prohibition and Exemption

Under the TFTA, a concerted action is prohibited unless (i) it meets one of the requirements stipulated in Article 14 of the TFTA and is beneficial to the economy as a whole and in the public interest, and (ii) the parties file an application with the TFTC for the establishment of such coordination and have obtained TFTC's approval².

Sanction on Violation of Cartel Regulations

If any enterprise is found to have conducted a concerted action without the TFTC's approval, the TFTC may, pursuant to Article 41 of the TFTA, order it to discontinue the illegal conduct, or set a time limit for it to rectify the conduct or take necessary corrective measure, and impose an administrative fine between NT\$50,000 to NT\$25 million. If the violating party fails to act as ordered, the TFTC may continue to order the violating party to cease the violation, or set another time limit for the violating party to comply, and may impose successive administrative fines of NT\$100,000 to NT\$50 million until the violating party complies. Furthermore, according to the 2011 newly amended TFTA, a fine up to 10% of each enterprise's turnover of last fiscal year can be imposed if the TFTC deems the violation to be serious. The raise of the maximum fine, besides being a deterrent against cartel violation, can also be interpreted as a complementary measure for the leniency program because it may prompt violators to apply for leniency.

In addition to the administrative punishments above, a violation of cartel regulations may also carry criminal liabilities. That is, if any enterprise is ordered by the TFTC pursuant to Article 41 of the TFTA to cease, rectify or take necessary measures to correct its violation of

² Article 14 provides the following seven conditions under which a concerted action may be approved by the TFTC: (1) Standardization of the specifications or models of goods for the purpose of reducing costs, improving quality, or increasing efficiency; (2) Joint research and development on goods or markets for the purpose of upgrading technology, improving quality, reducing costs, or increasing efficiency; (3) Development of a separate and specialized area for the purpose of rationalizing operations; (4) Execution of agreements not to compete in foreign markets for the purpose of securing or promoting exports; (5) Joint importation of goods for the purpose of stimulating trade; (6) Joint acts limiting the quantity of production and sales, equipment, or prices for the purpose of meeting market demand orderly (in an economic downturn, market prices of products are lower than the average production costs so that the parties in a particular industry have difficulty maintaining their business or encounter over-production); or (7) Joint acts for the purpose of improving operational efficiency or strengthening the competitiveness of small-medium enterprises.

the cartel regulations under the TFTA, but fails to follow such order or repeats the violation, its responsible person may, pursuant to Article 35 of the TFTA, face a jail term of up to 3 years, while the enterprise may receive a criminal fine of up to NT\$100 million.

Leniency program

In November of 2011, the leniency program for cartel participants was introduced into the amended TFTA. Later on, in January of 2012, the regulations governing the enforcement of the leniency program (the "Regulations") came into effect. The Regulations specify, among others, requirements for leniency, maximum number of cartel participants eligible for leniency, fine reduction percentage, required evidence and confidentiality treatment. The adoption of the leniency program is expected to significantly affect the enforcement of cartel regulations in Taiwan.

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

- before the TFTC knows about the unlawful cartel activities or commences its ex officio investigation, the enterprise voluntarily reports to the TFTC the details of its unlawful cartel activities, provides key evidence, and assists with the TFTC's subsequent investigation; or
- during the TFTC's investigation, the enterprise provides specific evidence that helps prove unlawful cartel activities and assists with the TFTC's subsequent investigation.
- only up to five enterprises can be eligible for fine exemption/reduction in a single case, that is, the first applicant can qualify for fine exemption and the fine for the second to the fifth applicant can be reduced by 30%~50%, 20%~30%, 10%~20%, and 10% or less respectively.
- an enterprise who has ever coerced other enterprises to join or not to exist the subject cartel cannot be eligible for the fine exemption/reduction.

Compliance Program

In order to assist Taiwanese enterprises to establish internal compliance rules to curb their risk of violating the TFTA and antitrust laws of other countries, in December of 2011 the TFTC published "Guidelines on Setting up Internal Antitrust Compliance Program" ("Guidelines") and "Antitrust Compliance-Dos and Don'ts" ("Principles of Conduct").

According to the Guidelines, an enterprise should stipulate an antitrust compliance program appropriate for its business strategies and corporate culture. The program should cover at least the following measures to ensure compliance: (1) developing a corporate culture where legal compliance is essential, (2) stipulating policies and procedures which every one should observe, (3) providing education or training programs, (4) establishing audit, review and report mechanisms, (5) creating proper rewards and punishments, and (6) designating a main contact or consultant.

In order to allow each enterprise to grasp what are and are not permissible, the TFTC published the Principles of Conduct including types of violation under the TFTA and antitrust laws of other jurisdictions. The Principles of Conduct lists dos and don'ts for concerted

action (cartel), restrictions on resale price, monopoly and abuse of market power.

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

iv. Outlook

In merger control enforcement, the TFTC seems accommodating toward M&A activities, judging from the fact that only five combinations were blocked in the past five years. But, questions regarding combinations in highly-regulated industries such as telecommunications and mass media sector remain to be solved through practice.

As to cartels, it is foreseeable that the introduction of the leniency program into the amended TFTA will considerably transform how the TFTC enforces cartel regulations. Nonetheless, even if the leniency program works well for the competition authorities in Western countries while investigating a cartel, whether the same "whistle-blower" effect can be achieved in Taiwan remains to be seen, considering how competitors interact with each other is different in the West and East. Therefore, the effectiveness of the leniency program deserves continuing observation.

Meanwhile, after the TFTC gained greater independency in February of 2012, sweeping amendments to the TFTA are expected to be proposed to fortify the TFTC's power. In particular, the amendments may authorize the TFTC to apply for a warrant to search and detain through collaboration with judicial personnel, which will probably lead to more rigorous TFTC investigations. Moreover, investigation efforts may likely be boosted by extended statute of limitations, from three to five years. In any event, the newly enacted and the pending legislation will undoubtedly overhaul competition law enforcement in Taiwan.