

Cartels

Enforcement, Appeals & Damages Actions

Third Edition

CONTENTS

| | | |
|-----------------------|--|-----|
| Preface | Nigel Parr & Ruth Sander, <i>Ashurst LLP</i> | |
| Argentina | Marcelo den Toom, <i>M. & M. Bomchil</i> | 1 |
| Australia | Sharon Henrick, Wayne Leach & Peta Stevenson, <i>King & Wood Mallesons</i> | 12 |
| Austria | Dr Florian Neumayr, Dr Heinrich Kühnert & Gerhard Fussenegger, <i>bpv Hügel Rechtsanwälte</i> | 26 |
| Belgium | Dirk Arts, Karel Bourgeois & Marlies De Deygere, <i>Allen & Overy LLP</i> | 36 |
| Brazil | Ricardo Inglez de Souza, <i>De Vivo, Whitaker e Castro Advogados</i> | 46 |
| Canada | Randall J. Hofley, Mark Morrison & Dustin B. Kenall, <i>Blake, Cassels & Graydon LLP</i> | 55 |
| China | Zhan Hao, <i>AnJie Law Firm</i> | 68 |
| Cyprus | Elias Neocleous & Ramona Livera, <i>Andreas Neocleous & Co LLC</i> | 83 |
| Denmark | Olaf Koktvedgaard & Erik Kjær-Hansen, <i>Bruun & Hjejle</i> | 92 |
| European Union | Nigel Parr & Euan Burrows, <i>Ashurst LLP</i> | 99 |
| Finland | Ilkka Aalto-Setälä & Eeva-Riitta Siivonen, <i>Attorneys at law Borenius Ltd</i> | 116 |
| France | Leyla Djavadi, Séverine Sanglé-Ferrière & Jean-Louis Fourgoux, <i>Fourgoux et Associés</i> | 127 |
| Germany | Ulrich Schnelle & Volker Soyvez, <i>Haver & Mailänder</i> | 138 |
| India | Farhad Sorabjee & Amitabh Kumar, <i>J. Sagar Associates</i> | 150 |
| Ireland | John Meade, <i>Arthur Cox</i> | 157 |
| Japan | Catherine E. Palmer, Daiske Yoshida & Hiroki Kobayashi, <i>Latham & Watkins</i> | 168 |
| Kazakhstan | Aldash Aitzhanov & Kuanysh Kholtursunov, <i>JSC Centre for Competition Policy Development and Advocacy</i> | 178 |
| Luxembourg | Gabriel Bleser, <i>DSM DI STEFANO MOYSE</i> | 188 |
| Netherlands | Kees Schillemans & Tjarda van der Vijver, <i>Allen & Overy LLP</i> | 194 |
| Norway | Kristin Hjelmaas Valla & Henrik Svane, <i>Kvale Advokatfirma DA</i> | 205 |
| Poland | Małgorzata Modzelewska de Raad & Piotr Paśnik, <i>Modzelewska i Paśnik sp.j.</i> | 218 |
| Romania | Silviu Stoica & Mihaela Ion, <i>Popovici Nițu & Asociații</i> | 228 |
| Serbia | Raško Radovanović, <i>Petrikić & partneri AOD</i> <i>in cooperation with CMS Reich-Rohrwig Hainz</i> | 248 |
| Singapore | Mark Tan & Nicole Teo, <i>Rodyk & Davidson LLP</i> | 258 |
| Spain | Borja Martínez Corral, <i>Uría Menéndez</i> | 269 |
| Switzerland | Christophe Rapin, Martin Ammann & Daphné Lebel, <i>Meyeralustenberger Lachenal</i> | 279 |
| Taiwan | Christopher Campbell, Yi-Chin Ho & Belinda Lee, <i>Latham & Watkins LLP</i> | 299 |
| Turkey | Kayra Üçer, Süleyman Cengiz & Dr. Meltem Küçükayhan Aşcioğlu, <i>Hergüner Bilgen Özeke Attorney Partnership</i> | 306 |
| Ukraine | Sergey Denisenko & Pavlo Loginov, <i>Aequo Law Firm</i> | 317 |
| United Kingdom | Giles Warrington & Tim Riisager, <i>Pinsent Masons LLP</i> | 324 |
| USA | Mark Rosman, Jeff VanHooreweghe & Christopher A. Williams, <i>Wilson Sonsini Goodrich & Rosati PC</i> | 336 |

Taiwan

Christopher Campbell, Yi-Chin Ho & Belinda Lee
Latham & Watkins LLP

Cartel law and enforcement regime

The governing law for competition enforcement activity in Taiwan is the Taiwan Fair Trade Act (“TFTA”). The TFTA was enacted in February 1991 and has been amended several times, most recently in 2011. The stated purpose of the law is “maintaining trading order, protecting consumers’ interests, ensuring fair competition, and promoting economic stability and prosperity”.

Article 14 is the key provision of the TFTA regarding cartel activity, and states that no enterprise shall engage in “concerted action” unless that action is beneficial to the economy as a whole and has been approved by the Taiwan Fair Trade Commission (“TFTC”). Article 7 of the TFTA defines “concerted action” as “the conduct of any enterprise, by means of contract, agreement or any other form of mutual understanding, with any other competing enterprise, to jointly determine the price of goods or services, or to limit the terms of quantity, technology, products, facilities, trading counterparts, or trading territory with respect to such goods and services, etc., and thereby to restrict each other’s business activities”. The TFTA expressly includes in this definition “a meeting of minds whether legally binding or not which would in effect lead to joint actions”. However, the TFTA excludes vertical agreements and limits the definition of “concerted action” to “horizontal concerted action at the same production and/or marketing stage which would affect the market function of production, trade in goods, or supply and demand of services”.

Key issues related to investigation and decision-making

Overview

The TFTC is the central authority in charge of competition policy and enforcement. The TFTA grants the TFTC the power of “investigation and disposition of any case” involving a violation of the TFTA, and to “investigate and handle... any violation of the provisions of [the TFTA] that harms the public interest”. To accomplish these goals, the TFTC is divided into various departments, with separate departments responsible for investigating conduct in the services and manufacturing industries.

As a general matter, TFTC investigations typically involve the following steps:

- Initial notification of an investigation to relevant parties.
- Issuance of requests for information to parties and third parties, including requests for documents and relevant sales data.
- Interviews of relevant parties regarding the alleged conduct.
- Issuance of a final decision by the TFTC.

The TFTC's powers are similar to those in other jurisdictions. However, TFTC investigations can proceed from the initial notice of investigation to a decision in six months or less, particularly if there is a leniency applicant or the case is already a subject of enforcement proceedings in other jurisdictions. This time frame can be significantly faster than in other jurisdictions, such as the United States and Europe. Moreover, the TFTC may rely heavily on the outcome of investigations in other parts of the world, for example, by relying on criminal guilty pleas in the United States. Obviously, the pace will vary from case to case, but both counsel and clients should be prepared for the process to move quickly once an investigation is under way.

During the investigation, the TFTC has the power to issue requests for information, ask parties and third parties to make statements to TFTC officials, request documents and other materials, and conduct on-site inspections of entities related to the investigation. Interviews of parties and witnesses typically take place in Taipei and can last anywhere from one hour to multiple days. Multiple entities under investigation may be interviewed on consecutive days. Interviews may not be transcribed verbatim, but the TFTC does generate a summary of the questions and answers during the interview, which is then included in the case file. Leniency applicants may also give multiple statements and respond to numerous requests for information as part of the conditions of leniency.

The TFTA allows parties to apply for access to relevant materials in the file, and should grant access unless the material constitutes a working document of the TFTC, contains national defence or business secrets, or disclosure is likely to infringe upon the rights and interests of a third party or obstruct the performance of official duties. This process effectively shifts the burden to apply for access to the case file to the party under investigation. Although in theory this process should allow parties the ability to view the evidence underlying the TFTC's case, in practice the TFTC may deny access on confidentiality grounds.

Punishment and fines

The TFTC is empowered to impose administrative fines on entities and individuals found to be in violation of the TFTA. Historically, Article 41 of the TFTA limited fines to a defined range of "not less than fifty thousand nor more than twenty-five million New Taiwan Dollars". However, in November 2011 the TFTA was amended to allow the TFTC to impose greater fines when the TFTC determines that an entity has engaged in a "serious violation" of Article 14. In such cases, the TFTA now allows the imposition of fines up to 10% of the total sales income of the enterprise in the fiscal year prior to the decision.

In April 2012, the TFTC adopted regulations that define the term "serious violations" under the new law. Under the new regulations, a "serious violation" is described as "unlawful conduct that has seriously affected market competition and order". The regulations set out various factors relevant to that determination, including:

1. The scope and extent of the market competition and order affected.
2. The duration of the damage to market competition and order.
3. The market status of the enterprise in violation and the structure of the corresponding market.
4. The total sales and profits obtained from the unlawful conduct during the violation period.
5. The type of concerted action – joint product or service price decision, or quantity, trading counterpart or trading area restriction.

Conduct may also constitute a serious violation if the total product sales achieved during

the violation period exceeds NT\$100 million, or the total profits obtained from the unlawful conduct exceed the upper limit for administrative fines under the TFTA (*i.e.*, NT\$25m).

The TFTC has already relied on these provisions in an attempt to impose significant fines on entities found to be in violation of the TFTA's anti-cartel provisions. In early 2013, the TFTC issued its first decision based on the new 10% threshold and imposed record fines on nine power companies that totalled NT\$6.32bn. The decision was ultimately reversed in November 2014; however the TFTC's reliance on the new "serious violation" regime to impose such a large fine may portend a new, more assertive approach to cartel cases in the future. And while it is too early to predict precisely how this will impact the behaviour of entities doing business in Taiwan, likely the TFTC will rely on its greatly increased fining authority to expand and enhance its enforcement activities.

Leniency regime

The TFTC's leniency program is another new feature of Taiwanese competition law. Article 35-1 of the TFTA, adopted in November 2011, establishes a framework for leniency that can provide either fine immunity or fine reduction to qualifying applicants. The options available to a leniency applicant vary depending on whether the applicant applies for leniency prior to or during the TFTC's investigation, and based on the quality of information and evidence that the applicant provides to the TFTC.

Application Prior to Investigation (Article 35-1, Subparagraph 1)

Article 35-1, Subparagraph 1 permits leniency if the applicant files a complaint informing the TFTC of its illegal conduct, submits evidence of the violation, and assists in the investigation "before the [TFTC] is aware of the said illegal conduct or initiated an investigation". In such cases, the applicant must provide evidence that it is "able to assist the central competent authority to initiate an investigation". This means that the applicant must provide "concrete details of the concerted action in which they have been involved" that the TFTC does not already possess (or that the TFTC is unaware of), an outline of the concerted action in question, the time and location of the mutual understanding, and the content of the mutual understanding. If the TFTC has already obtained sufficient evidence to initiate the investigation when the application is submitted, or the investigation has already been conducted, the TFTC may reject the application.

Application During Investigation (Article 35-1, Subparagraph 2)

Article 35-1, Subparagraph 2 permits leniency if the applicant reveals the illegal conduct, submits evidence and assists the investigation, "during the period in which the [TFTC] investigates the said illegal conduct". When an entity applies under this provision, the evidence submitted must assist the TFTC to "establish that the involved enterprises have violated" Article 14, Paragraph 1 of the TFTA. This means one of two things:

- the applicant "provides a statement of concrete details of the concerted action in question, along with evidence that the applicant has already obtained at the time of application and is capable of proving the violation of the said concerted action"; or
- the applicant provides a statement and evidence that "are able to assist the central competent authority in the investigation on the concerted action in question".

Applicants seeking fine immunity must provide evidence that falls in the first category, while those applying for fine reduction may provide evidence that falls in the second category. If the TFTC has already obtained enough evidence to establish such a violation when the application is submitted, the application may be rejected.

Conditions for leniency

Approval of leniency involves various conditions, including that the applicant withdraw from the concerted action immediately upon filing an application, or at a later time which the TFTC specifies. Moreover, from the time the application is filed, the applicant must follow the TFTC's instructions and provide "honest, full and continuous assistance" during the investigation. This includes turning over evidence, providing facts the TFTC may request, and allowing the TFTC to question staff members. The applicant also must not conceal or misrepresent any information related to the concerted action, destroy or alter evidence, or disclose its application to any other parties before the case is concluded.

Fine immunity versus fine reduction

Applications for fine immunity are available both before and during a TFTC investigation if the applicant is the first to apply, meets the relevant criteria, agrees to all leniency conditions, and no other enterprise in the investigation has been granted leniency. An applicant that applies during an investigation is eligible for fine reduction if the applicant is either not the first to apply or is not able to submit evidence "capable of proving the violation", and the applicant meets the relevant criteria and agrees to all leniency conditions. The first qualifying applicant for fine reduction is eligible for a 30% to 50% reduction; the second qualifying applicant is eligible for a 20% to 30% reduction; the third qualifying applicant is eligible for a 10% to 20% reduction; and the fourth qualifying applicant is eligible for a reduction up to 10%.

Enterprises intending to apply for immunity but which do not yet have all of the required information may file a marker application requesting preservation of their priority status. After an application has been received and approved, the TFTC is required to keep the identity of the applicant confidential unless the applicant agrees otherwise.

Rights of appeal

There is an established procedure for appealing an adverse TFTC decision. The first step is an appeal to the Administrative Appeal Committee ("AAC") and Executive Yuan. The penalised entity and the TFTC may submit multiple rounds of briefing explaining their respective positions, and the AAC will issue a decision either upholding or reversing the TFTC's decision. The AAC has the power to hold hearings on appeals, but in practice may simply issue a decision based on the parties' briefing.

If the AAC upholds the TFTC's decision, an appealing party may file a complaint with the Taipei High Administrative Court to initiate an administrative litigation proceeding. The administrative litigation proceeding is divided into two stages: the preliminary hearings and the oral debate hearing. The preliminary hearings are handled by a single judge, and are intended to investigate the facts and evidence under dispute. During this phase, the parties may submit multiple rounds of briefing and evidence, and there may be several hearings before the court. After the investigation is concluded, a panel of three judges (including the judge that presided over the preliminary hearings) will hear the parties' factual and legal arguments at the oral debate hearing. Thereafter, the panel will issue a judgment either revoking the TFTC's decision or dismissing the administrative complaint.

After the High Administrative Court issues its opinion, either party may file an appeal to the Administrative Supreme Court within 20 days of the opinion. The Administrative Supreme Court rarely holds hearings, and reviews the judgment to see if the lower court failed to apply, or wrongfully applied, the law. The High Administrative Court will overrule the lower court if it finds error; otherwise, it will dismiss the appeal.

Recent cartel enforcement activity

TFTC activity declined in 2013 in terms of the volume of cases processed. The total number of cases received in 2013 declined by 6.7% from the previous year, and the number of cases initiated by complaint declined by 17.1%. TFTC data for the first quarter of 2014 indicates that there may be a similar decline in 2014; the number of cases initiated by complaint decreased from 135 complaints per month in 2013, to 111 per month. The number of *ex officio* investigations the TFTC opened also declined, from over 400 in 2012 to 306 in 2013. The number of actual TFTC decisions increased slightly from 203 in 2012, to 214 in 2013. Further, the number of TFTC decisions involving restrictive business practices (which includes cartel cases) has remained relatively steady over the past two years, at just less than 30 decisions per year. Concerted action cases make up a significant portion of such decisions. In 2013, concerted action cases made up 24% of TFTC restrictive business practice decisions, and from January to October 2014, concerted action cases have constituted approximately 21% of such decisions.

TFTC activity continues to affect a broad range of industries; however, certain industries reflect a significantly higher level of TFTC activity. The number of TFTC complaints in the wholesale and retail trade continued to climb in 2013, increasing by 6.3% from 2012, and making up over 40% of all TFTC complaints in 2013. The manufacturing industry, combined with the information and communication industry, also continue to make up significant portions of the TFTC's complaints. Complaints resulting in decisions are also concentrated in those three industries, with just over 50% of decisions occurring in the wholesale and retail trade industry; 13.6% of decisions in the information and communication industry; and 13.6% of decisions in the manufacturing industry.

Cartel enforcement continues to be a significant piece of the TFTC's overall activity, and during the past year the TFTC imposed fines in several concerted action cases. In October 2013, the TFTC found that four turkey meat suppliers violated the TFTA by collectively demanding that a turkey meat supplier stop supplying their competitors. The TFTC concluded that the arrangement was intended to maintain the price of turkey meat and avoid price competition. The TFTC found a violation of Article 14 and imposed an administrative fine on the offenders.

In April 2014, the TFTC found that 16 asphalt businesses had violated Article 14 by jointly raising the price of asphalt. After receiving reports of potential anticompetitive conduct, the TFTC set up a special task force to investigate, and thereafter questioned each of the asphalt businesses as well as 40 other interested parties. The TFTC concluded that the businesses collaborated to manipulate transactions in the asphalt market by collecting NT\$200 per ton of asphalt from bid winners of affected projects. In April 2014, the TFTC found that the businesses had violated Article 14 of the TFTA and imposed administrative fines ranging from NT\$500,000 to NT\$5m— for a total of NT\$39.5m. Describing the opinion, the TFTC stated that “[o]nce concrete evidence of violation is established, the FTC will impose heavy punishments without any mercy”.

On the other hand, some of the TFTC's key prior cartel decisions have been overturned on appeal. In March 2013, the TFTC imposed a record fine of NT\$6.32bn on nine independent power companies. The TFTC had ruled the companies had a mutual understanding with respect to power rates in Taiwan between August 2008 and October 2012. This was the first case in which the TFTC invoked the new provisions of Article 41 for “serious violations” that allow for fines of up to 10% of the offender's total sales in the year prior to the decision. In November 2014, the Taipei Administrative High Court revoked the TFTC's decision

and ruled that the nine companies could not be classed as competitors in an open market, because they were each contractually obliged to sell all of their electricity to state-owned Taiwan Power Company (Taipower).

In the same month, the Administrative High Court overturned the TFTC's decision in a case concerning alleged concerted action in the ODD industry, the first case in which the TFTC had used the new leniency framework in the TFTA. Revoking the TFTC's decision as to the appealing entity, the Administrative High Court ruled that the TFTC failed to establish jurisdiction over the alleged conduct and that the statute of limitations had expired. These cases underscore the importance of assessing a robust appellate strategy in cases involving the TFTC.

Conclusion

Given the TFTC's considerable authority to investigate alleged anticompetitive behaviour and fine enterprises it determines are in violation of the TFTA, companies doing business in Taiwan should not underestimate the potential regulatory risk. Moreover, recent reversals of several large fines underscore the need for enterprises facing investigation to assess a robust appellate strategy for any TFTA-related investigation.

**Christopher Campbell****Tel: +1 415 391 0600 / Email: christopher.campbell@lw.com**

Christopher Campbell is a litigation associate in the Antitrust & Competition and White Collar Defense & Investigations Practice Groups in the San Francisco office of Latham & Watkins. Mr. Campbell represents major U.S. and Asian-based companies in the technology, financial and transportation industries with respect to civil and criminal antitrust litigation in the U.S. and abroad.

**Yi-Chin Ho****Tel: +1 213 891 8988 / Email: yichin.ho@lw.com**

Yi-Chin Ho is a litigation partner in the Antitrust & Competition and White Collar Defense & Investigations Practice Groups in the Los Angeles office of Latham & Watkins. Ms. Ho's practice focuses on representing Taiwanese and Chinese companies, based in the U.S. and abroad, in the high tech and manufacturing industries, in antitrust and trade regulation and international cartel price-fixing class actions pending in various jurisdictions in the U.S. Ms. Ho also serves as managing counsel to oversee antitrust compliance issues in multiple jurisdictions outside of the U.S. Ms. Ho is a native speaker of Mandarin Chinese and Taiwanese. Ms. Ho is a regular speaker regarding antitrust and trade regulation and compliance training issues to Taiwanese and Chinese companies. Ms. Ho was recognised as one of the "Top Women Litigators in California" for her representation of significant trans-Pacific price fixing litigation matters.

**Belinda Lee****Tel: +1 415 395 8851 / Email: belinda.lee@lw.com**

Belinda Lee is a litigation partner in the Antitrust & Competition Practice Group in the San Francisco office of Latham & Watkins. Her practice focuses on the defence of Asian-based companies in multi-jurisdictional cartel matters.

Latham & Watkins LLP

505 Montgomery St., Ste. 2000, San Francisco, CA 94111, USA. Tel: +1 415 646 7802 / Fax: +1 415 395 8095
355 South Grand Avenue, Los Angeles, CA 90071, USA. Tel: +1 213 485 1234 / Fax: +1 213 891 8763
URL: <http://www.lw.com>

Other titles in the *Global Legal Insights* series include:

- Banking Regulation
- Bribery & Corruption
- Corporate Real Estate
- Corporate Tax
- Employment & Labour Law
- Energy
- Litigation & Dispute Resolution
- Mergers & Acquisitions
- Merger Control

Strategic partners:



www.globallegalinsights.com