



# Cartels

Enforcement, Appeals and Damages Actions

# 2019

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# Taiwan

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## **Overview of the law and enforcement regime relating to cartels**

The governing law for competition enforcement in Taiwan is the Taiwan Fair Trade Act (“TFTA”). The TFTA was enacted in February 1991, and took effect in 1992. The most recent comprehensive amendments to the TFTA, as it concerns cartel enforcement, took place in February 2015. The stated purpose of the law is “maintaining trading order, protecting consumers’ interests, ensuring free and fair competition, and promoting economic stability and prosperity”.

Article 14 of the TFTA defines “concerted action” as when “competing enterprises at the same production and/or marketing stage, by means of contract, agreement or any other form of mutual understanding, jointly determine the price, quantity, technology, products, facilities, trading counterparts, or trading territory with respect to goods or services, or any other behavior that restricts each other’s business activities, resulting in an impact on the market function with respect to production, trade in goods or supply and demand of services”. Article 14 expressly defines the phrase “any other form of mutual understanding” to mean “other than contract or agreement, a meeting of minds whether legally binding or not which would in effect lead to joint actions”.

Article 15 is the key provision of the TFTA regarding cartel activity. Article 15 prohibits any enterprise from engaging in “concerted action” unless that action is beneficial to the economy as a whole, is in the public interest, and has been approved by the Taiwan Fair Trade Commission (“TFTC”) as falling under one of eight permissible categories: (1) standard-setting; (2) research and development; (3) specialisation; (4) exporting; (5) importing; (6) certain actions related to an economic downturn; (7) certain actions related to small and medium-sized business; and (8) a catch-all category that allows for approval of certain actions aimed at development, innovation, and efficiency.

Parties engaged in permissible concerted action may file an application for approval with TFTC. Such applications are relatively rare, however. In 2017, the TFTC received seven applications for approval, up by two from the year before, but down from 15 in 2015. *See* 2017 Statistical Yearbook of Fair Trade Commission, at 41–42. The TFTC approved three applications for concerted action in 2017. *Id.* at 50. In 2017, all three approved applications for approval for concerted action were pursuant to category 5 (“joint acts in regards to the importation of foreign goods, or services for the purpose of strengthening trade”). *Id.* at 50; TFTA Art. 15, Subparagraph 5.

## **Overview of investigative powers in Taiwan**

### Investigatory Powers and Procedures

The TFTC is the central authority in charge of competition policy and enforcement in

Taiwan. The TFTA grants the TFTC the power to “investigate and handle...any involvement in the violation of the provisions of [the TFTA] that harms the public interest”. To accomplish this purpose, the TFTA provides that the TFTC may:

- require the parties and any related third party to appear to make statements;
- require the parties and any related third party to submit books, records, documents, and any other necessary materials or exhibits;
- dispatch personnel for any necessary onsite inspection of the office, place of business, or other locations of the parties and any related third party; and
- seize articles obtained from the investigation that may serve as evidence, only as necessary for the investigation, inspection, verification or preservation of evidence.

The TFTC’s 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 are not necessarily 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.

TFTC investigations can proceed quickly relative to investigations in other jurisdictions – a decision can be issued as soon as six months after the initial notice of investigation, particularly in cases where the TFTC has the assistance of a leniency applicant. 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.

#### No Search Warrants or Dawn Raids

The current TFTA does not grant the TFTC the power to conduct dawn raids or otherwise apply for search warrants of target enterprises. Although the proposed 2015 amendments included a provision that would have granted the TFTC this power, the proposal did not pass. Various commentators expect that the dawn raid power will be proposed during the next round of amendments to the TFTA, and Dr. Huang Mei-Ying, who assumed the role of Chairperson of the TFTC in February 2017, has stated that she hopes to add the search and seizure power to the TFTA. Granting the TFTC the power to conduct unscheduled search and seizures would bring its powers more in line with that of competition authorities in other jurisdictions, such as China, Japan and the United States. In November 2017, the TFTC held bilateral discussions with the Japan Fair Trade Commission to exchange views on search and seizure power but, for the moment, the TFTA remains unchanged.

### **Overview of cartel enforcement activity during the last 12 months**

The TFTC’s most recent statistics cover enforcement activity in 2017. The TFTC reports that in 2017, it opened 2,288 new investigations. Of those, 328 cases were self-initiated and 1,960 were reported. Roughly 73% of reported cases (1,671 cases) were initiated in the form of a complaint – down from approximately 80% in the year before – and the large majority of new complaints targeted a business enterprise. The number of total reported cases in 2017 represents a small decline from 2016. In 2017, the TFTC closed 2,022 cases by decision or otherwise – up 5.9% from the year before. Of the 141 complaints closed by decision, 36 complaints or 25.7% were decided in favour of the enterprise. None of those cases involved concerted action investigations.

In 2017, the TFTC imposed a total of NT\$23.422 billion in fines against parties investigated for anticompetitive conduct, which was an enormous increase over 2016. The vast majority of this amount was attributable to the TFTC’s October 2017 fine of NT\$23.4 billion against

Qualcomm for violations of the TFTA. In August 2018, that dispute was resolved by settlement and the original fine was replaced by settlement terms, which included Qualcomm's agreement not to contest NT\$2.73 billion of the original fine amount and its agreement to various behavioural commitments to domestic Taiwanese handset manufacturers and chip suppliers.

### **Key issues in relation to enforcement policy**

The 2015 amendments to the TFTA made several significant changes related to cartel enforcement. First, the amendments added a provision that allows the TFTC to presume a mutual understanding of concerted action based on "market condition[s], characteristics of the good or service, cost of profit considerations, and economic rationalisation of the business conducts". TFTA Art. 14. This addition, which effectively allows the TFTC to prove concerted action through circumstantial evidence, has been viewed by commentators as largely shifting the burden of proof of concerted action from the TFTC to the target enterprises.

Second, the amendments increased the statute of limitations for the TFTC to impose sanctions for violations of the TFTA from three years to five years. TFTA Art. 41. This change provides the TFTC with more time to investigate and build a case against a target enterprise before imposing sanctions, and provides leniency applicants with more time to come forward, which could lead to a higher volume of filed cases in the coming years.

Finally, the 2015 amendments made a significant change to the appeals process. Previously, the TFTA required penalised parties to first appeal a decision of the TFTC to the Administrative Appeal Committee of the Executive Yuan ("AAC"). Under the current law, parties may skip the appeal to the AAC and appeal findings of liability directly to the administrative courts. TFTA Art. 48.

### **Key issues in relation to investigation and decision-making procedures**

The TFTC publishes flow charts that detail the procedures and steps taken during investigations and applications for immunity in concerted action cases. *See generally* TFTC Regulations and Case Handling. Compared to other jurisdictions, however, such as the United States or the European Union, neither the TFTC nor the TFTA makes clear whether a party under investigation is entitled to details of the TFTC's case theory or evidence. Because the 2015 amendments to the TFTA appear intended to globalise and modernise the law, however, increased transparency could be the subject of future TFTA amendments.

### **Leniency/amnesty regime**

The TFTA's leniency programme was introduced in the 2011 amendments to the TFTA. Article 35 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.

#### *A. Application Prior to Investigation (Article 35, Subparagraph 1)*

Article 35, Subparagraph 1 provides for leniency if the applicant files a complaint or informs the TFTC of 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 [TFTC] to initiate an investigation”. See Regulations on Immunity and Reduction of Fines in Illegal Concerted Action Cases (“Immunity Regulations”), Art. 3. 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. *Id.* Art. 4. If the TFTC has already obtained sufficient evidence to initiate the investigation when the application is submitted, the TFTC may reject the application. *Id.* Art. 3.

#### B. *Application During Investigation (Article 35, Subparagraph 2)*

Article 35, 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” TFTA, Art. 15. This means the applicant must provide “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 a statement and evidence that “are able to assist the [TFTC] in the investigation on the concerted action in question”. See Immunity Regulations, Art. 5. 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. *Id.* Similar to applications submitted prior to an investigation, the TFTC retains the right to reject an application submitted during an investigation if the TFTC has already obtained enough evidence to establish the named parties’ involvement. *Id.* Art. 3.

#### C. *Conditions for Leniency*

Several conditions attach to a grant of leniency, including that the applicant withdraw from the concerted action immediately upon filing an application, or at a later time which the TFTC specifies. 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. *Id.*, Art. 6, subparagraph 2. This includes turning over evidence, providing facts the TFTC may request, and allowing the TFTC to question employees. 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. See *Id.*, Art. 6.

#### D. *Fine Immunity Versus Fine Reduction*

Fine immunity is 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 already been granted leniency. An otherwise qualifying applicant that applies during an investigation is eligible for fine reduction only if the applicant is either not the first party to apply or is not able to submit evidence “capable of proving the violation”. Immunity Regulations, Art. 5, Subparagraph 1. 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 of up to 10%. *Id.*, Art. 8.

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.

*Id.* Art. 11. 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.

#### E. *Related Amendment: The Antitrust Fund*

The 2015 amendments empowered the TFTC to develop an “Antitrust Fund”, which has commonly been referred to as a “Whistleblower Fund”. The stated purpose of the fund is to “strengthen the investigation and sanction over concerted actions and promote the healthy development of market competition”. TFTA Art. 47-1. The TFTA provides for the fund to be capitalised by 30% of the fines collected under the TFTA, among other sources, which can be used to reward parties that report illegal concerted action.

### **Administrative settlement of cases**

The TFTC publishes guidelines that govern the administrative settlement of cases and investigations. The current guidelines went into effect in February 2012. Settlements may be proposed by either the TFTC or the target enterprise. Proposed settlements must be submitted by a Commissioner for review during a TFTA Commissioners’ Meeting. In deciding whether to approve a settlement, the commissioners consider: “(1) the legality and appropriateness with regard to the mutual concession of the FTC and counterpart; (2) the maintenance of public interest; and (3) the potential harm incurred by the interested party due to the constitution of settlement contract”. See Fair Trade Commission Disposal Directions on Handling Administrative Settlements, ¶ 2. The TFTA reserves the right to “withdraw or alter” a proposed settlement prior to it becoming final due to a party’s violation of the settlement’s terms or when otherwise “necessary”. *Id.* ¶ 7. Parties that do not qualify for leniency can consider settlement as another route to resolution of an investigation.

The frequency of TFTA settlements is unknown (the TFTA does not publish statistics on the cases resolved by settlement), but the TFTA’s August 2018 settlement with Qualcomm was the first litigation settlement justified on the basis of public welfare in the TFTA’s history of appearing before the Intellectual Property Court. It has been the subject of significant criticism by legislators who suspect the settlement was directed by high-level government officials. Members of the Control Yuan, a supervisory agency, announced an investigation into the settlement, and lawmakers have also called for an investigation. The critical reaction to the TFTA’s settlement of the Qualcomm matter may cause the TFTA to proceed more cautiously with respect to enforcement actions and settlement resolutions involving large multinational corporations.

### **Third party complaints**

Third parties may report suspected violations of the TFTA to the TFTA. The TFTA is required to review a third party’s report to assess whether a formal investigation should be opened.

### **Punishment and fines**

#### Civil Penalties

The TFTA is empowered to impose administrative fines on entities and individuals found to be in violation of the TFTA. Any party found to have engaged in illegal concerted action may be ordered to cease the conduct or take corrective action, and may be fined no less than NT\$100,000 and not more than NT\$50 million. TFTA Art. 40. The 2011 amendments to the TFTA added a provision that provides for an additional administrative fine if a party is found to have engaged in a “serious violation”. In the case of a serious violation, the TFTA

may impose a penalty of up to 10% of an enterprise's total sales income from the previous fiscal year, of which a penalty does not contribute to the fine limits that otherwise apply. *Id.* In April 2012, the TFTC adopted regulations that define the term "serious violation" under the new law. The regulations, titled *Regulations for Calculation of Administrative Fines for Serious Violations of Article 9 and Article 15 of the Fair Trade Act*, describe a "serious violation" as "unlawful conduct that has seriously affected market competition and order". The regulations set out factors that should be considered in determining whether a violation is "serious":

- (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; and
- (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\$50 million).

#### Criminal Penalties

Article 34 of the TFTA provides that in certain circumstances, criminal penalties may be imposed in addition to the civil penalties described above. Specifically, if a party is ordered to cease conduct or take corrective action, but fails to do so or repeats the violation, the TFTA provides for imprisonment of the responsible persons for not more than three years, and/or a fine of not more than NT\$100 million.

#### **Right of appeal**

Prior to the 2015 amendments, penalised parties were required to first appeal a decision of the TFTA to the AAC. If the party was dissatisfied with the AAC's decision, only then could the party file an appeal with the High Administrative Court. The 2015 amendments repealed the AAC requirement, and parties may now appeal a TFTA decision directly to the High Administrative Court. TFTA Art. 48. The High Administrative Court reviews TFTA decisions for errors of both fact and law.

After the High Administrative Court issues its opinion, either party may file an appeal to the Supreme Administrative Court. In contrast to the High Administrative Court, the Supreme Administrative Court reviews decisions only to determine if the lower court failed to apply, or wrongfully applied, the law. The Supreme Administrative Court can affirm or overrule the lower court, and it can dismiss the appeal entirely.

The TFTA reports that no cases were appealed in 2017. *See* 2017 Statistical Yearbook of Fair Trade Commission, Table 23.

#### **Developments in private enforcement of antitrust laws**

Private enforcement is authorised under the TFTA. Chapter V provides for damages or an injunction ("removal of infringement" and "prevention" of an infringement) when a violation of the TFTA results in infringement of another's "rights and interests". TFTA Arts. 29, 30.

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Article 31 provides for punitive damages in cases of intentional violations, but the amount cannot exceed three times the proven amount of damages. The statute of limitations for private actions is 10 years from the time the conduct occurs or two years from the damaged party's discovery of the conduct. TFTA Art. 32.

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