

Cartel regulations in Taiwan – present and future

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According to the Taiwan Fair Trade Act (TFTA), the term ‘concerted action’ (or ‘cartel’) refers to the conduct of any enterprise, by means of a contract, agreement or any other form of mutual understanding with a competing enterprise, to determine jointly 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, thereby restricting each other’s business activities and possibly interfering with the market mechanism with regard to the production or supply and demand of goods or services. It is noteworthy that a concerted action regulated by the TFTA only covers an action conducted by ‘horizontal’ enterprises competing at the same stage of production or sale.

Exemption

A concerted action is prohibited unless it meets one of the requirements stipulated in Article 15 of the TFTA, it is beneficial to the economy as a whole and in the public interest and has been approved by the Taiwan Fair Trade Commission (TFTC). To be specific, Article 15 of the TFTA provides the following eight types of exempted concerted action: (i) it unifies the specifications or models of goods for the purpose of reducing costs, improving quality or increasing efficiency; (ii) it entails joint research and development for the purpose of enhancing technology, reducing costs, improving quality or increasing efficiency; (iii) it develops a separate and specialised area for the purpose of rationalising operations; (iv) its purpose is for entering into agreements solely concerning competition in foreign markets, to secure or promote exports; (v) its purpose is for importing foreign goods to strengthen trade; (vi) its purpose is to limit the quantity of production and sales, equipment or prices to meet the demand expected during an economic downturn, meaning that the enterprises in a particular industry have

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difficulties in maintaining their business or face overproduction; (vii) its purpose is for improving operational efficiency or strengthening the competitiveness of small to medium-sized enterprises; and (viii) any other joint acts for the purpose of improving industrial development, technological innovation or operational efficiency.

Since a prior approval system is adopted for a concerted action, enterprises contemplating conducting a concerted action must submit the documents specified in Article 13 of the Enforcement Rules of the TFTA for prior approval. Then, the TFTC is required to make a decision within three months of receipt of an application but may extend that three-month review period once. The three months start from the time when all the required documents have been submitted to the TFTC. The approval granted by the TFTC shall specify a time limit not exceeding five years for the implementation of a concerted action and may attach conditions to the approval. Six months, or three months at the latest, prior to expiry of the approval, the enterprises may, with justification, file for an extension of the approval period for no more than another five years.

Leniency programme

In 2011, the TFTA introduced the leniency programme into the law and then in early 2012, the TFTC stipulated regulations on the leniency programme which specify the requirements for leniency, the maximum number of cartel participants eligible for leniency, the fine reduction percentage, the required evidence and confidentiality treatment. Ever since then, the adoption of the leniency programme has significantly affected the enforcement of cartel regulations in Taiwan and has proven to be an effective tool for the agency to investigate illegal cartel activities.

Pursuant to the TFTA, there are two consequences of violating the cartel prohibitions under the leniency programme. First, for any violation of the cartel regulations, the TFTC may order the violating party to cease and rectify its conduct or take necessary corrective action within the time prescribed in the order. In addition, it may impose upon such violating party an administrative penalty of between NTD100,000 and NTD50m, which can be doubled if the violating party fails to cease and rectify the conduct or take any necessary corrective action after the lapse of the prescribed period. Second, if the violation is deemed serious, the TFTC has the discretion to impose a fine of up to 10 percent of the violating party's revenue of the previous fiscal year.

Despite the foregoing, a party violating the cartel regulations 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 party has qualified for the exemption or reduction: (i) prior to the TFTC knowing about the unlawful cartel activities or commencing its ex officio investigation, the party 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; or (ii) during the TFTC's investigation, the party provides specific evidence that helps prove unlawful cartel activities and assists with the TFTC's subsequent investigation.

Only a maximum of five parties can be eligible for a fine exemption or reduction in a single case: that is, the first applicant can qualify for



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a fine exemption, while the fine for the second to the fifth applicants can be reduced by 30 to 50 percent, 20 to 30 percent, 10 to 20 percent, and 10 percent or less respectively.

It should be noted that a party that has coerced other parties to join or not to exit the cartel cannot be eligible for a fine exemption or reduction.

Enforcement activities in 2020

According to the statistics published on the TFTC's website, the fines imposed by the TFTC in 2020 generated approximately US\$20m. This is an increase from around US\$2m in 2019. Among those cases closed with fines during 2020, the highest fines came from the HDD suspension cartel case.

In its 1514th Commission Meeting held on 11 November 2020, the TFTC determined that Japanese corporation TDK Corporation, Thai corporation Magnecomp Precision Technology Public Co., Ltd. (MPT) and Japanese corporation NHK Spring Co., Ltd. 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 the supply and demand of the relevant product markets in Taiwan, and had therefore violated the cartel regulations under the TFTA. According to the TFTC, the HDD suspension is one of the HDD components, and its function is to allow the HDD head to float steadily above the HDD disk in order to smoothly read and write the data thereon.

As of 2016, there are only four manufacturers of HDD suspension in the global market, namely TDK Group (including MPT), NHK Group (including NHK), Hutchinson Technology Inc. and Suncall Corporation. All the HDD companies around the world were supplied by these four HDD suspension manufacturers. Other than those sold to the end consumers through retail channels, the HDDs imported to Taiwan are used in the assembly of desktop computers, laptop computers or as ancillary equipment for monitors. The value of HDD products imported to Taiwan is NTD10bn annually.

The TFTC then found that the HDD suspension market is an oligopoly market. HDD manufacturers that need to procure HDD suspension would usually turn to TDK Group and NHK Group for price quotes. Hence, through bilateral exchanges of sensitive information on prices and quantities of orders, these two competitors were able to verify the offers or orders made by the HDD manufacturers during contract negotiation, and were therefore able to maintain the prices of HDD suspension or limit the range of price reduction. Also, if they 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 had motivation to engage in concerted action.

Moreover, TDK Group and its competitor, NHK Group, had been in bilateral contact from May 2008 to April 2016. Hence, for violation of the cartel regulations under the TFTA, TDK (Japan), MPT (Thailand) and NHK (Japan) were respectively fined NTD159.09m, NTD159.09m and NTD285.55m, for a total of NTD603.73m. This case demonstrates that the TFTC can be heavy-handed on cross-broader



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cartel operations should the illegal conspiracy lead to restrictive effect on the Taiwanese market and adversely affect Taiwan consumers' benefits.

Key policies and outlook

While many major cities around the world have been in lockdown due to the COVID-19 pandemic, Taiwan has been very fortunate to continue life as normal. Thus, compared to its peers, it seems the TFTC's enforcement action has not slowed down. To prevent any COVID-19-related cartel issues, the TFTC actively monitors whether suppliers of masks, forehead thermometers, alcohol and other epidemic-prevention materials have jointly raised prices or hoarded. Also, the TFTC constantly coordinates with other governmental authorities in a joint effort to maintain market order.

In its enforcement plan for 2021, the TFTC indicated that it plans to conduct a research project on the topic of how an antitrust agency should respond when facing economic overhaul – taking the impact of COVID-19 as an example. Though nobody knows when the pandemic will come to an end, one thing we can be sure of is that the TFTC will endeavour to act efficiently to meet any unexpected challenges in these difficult times.

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