



# MARCHING THROUGH THE NEXT TWENTY YEARS: RECENT DEVELOPMENTS OF THE TAIWAN FAIR TRADE LAW

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The year 2012 marks the 20th anniversary of the enactment of the Taiwan Fair Trade Law (“FTL”). Since its inception, the law has undergone five major changes, including the most recent amendments of 2011. Recent developments of the FTL reflect both the experiences of the Taiwan Fair Trade Commission (“TFTC”) and its intention to improve the effectiveness of law enforcement.

## I. REVISIONS OF SUBSTANTIVE RULES

The most remarkable change effected by the 2011 amendments is the incorporation of the leniency program into the FTL. The program follows the EU model, granting full immunity from administrative fines to the first cartel whistleblower. Cartel leaders or initiators are also qualified for the program.<sup>1</sup> Fines for subsequent informants are proportionally reduced according to the timing of their application. To encourage application, the statutory maximum fine for cartel violations is increased further, to 10 percent of the violators’ total sales income from the previous fiscal year.

The other major revision is to hold endorsers in testimonial advertisements to be jointly and severally liable with the advertisers. The revision is evidently a response to the increasingly popular trend of involving celebrities in commercials in Taiwan.

## II. INSTITUTIONAL RESTRUCTURES

Under the newly enacted Organizational Law of the Fair Trade Commission, the commissioner is nominated by the Premier and approved by the Congress rather than by the President. By repositioning the TFTC outside the executive branch, the law expects to enhance the independence of the agency.

Furthermore, the number of commissioners is reduced from nine to seven, with each holding a four-year staggered term. Unlike the current non-staggered

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<sup>1</sup> The leader and initiator are not excluded because, in practice, verifying the role an applicant plays in a cartel is generally difficult.

three-year term limit, the new law aims to facilitate experience-sharing among commissioners of different sessions.

In recognition of the growing influences of economic theories on competition law, a new Office of Information and Economic Analysis will also be established in early 2012. Comprised principally of staffs with economics and statistics backgrounds, the Office will function both as a "provider" of expert opinions and "check-and-balancer" on economic issues in individual cases.

### III. CASE DECISIONS

#### A. CARTELS

Lifelaw, an online company, and 130 participating lawyers began providing legal services to website and mobile-phone users at prices much lower than those charged for in-person consultations. Upon members' complaints, the Taiwan Bar Association ("TBA") sent letters to participating lawyers, reporting their violations of the Code of Ethics and suggesting their immediate withdrawal from the partnership. In 2010, the TFTC fined the TBA for collusion. The TBA challenged the TFTC's decision for failing to recognize the TBA as a non-commercial organization and its goal of pursuing public interest. The case was later vacated and remanded in administrative appeal proceedings and is currently pending in the TFTC.

Milk became a highly relevant topic toward the end of 2011. The three major milk suppliers, totaling a market share of more than 80 percent,<sup>2</sup> were revealed to be fixing the retail prices of milk. Although the suppliers argued that the price changes were merely suggestive and independently established, the TFTC inferred the existence of a collusive agreement from several "plus factors." Market characteristics, such as homogeneous products, and oligopolistic market structures with high entry barriers and low demand elasticity led the TFTC to conclude that individual price increases on separate dates in September 2011 were simply a means to test competitors' reactions. The real purpose was to reach a consensus to raise prices in October. Despite their very different cost structures, the suppliers failed to justify their nearly universal degree of price increases as independently established.

In the first week of October 2011, the four largest convenience stores in Taiwan raised the prices of freshly brewed coffee containing milk ingredients by exactly five New Taiwan Dollars per cup, irrespective of their sizes. Although analytically identical to the milk cartel case, the definition of a relevant product market in this case was controversial. The TFTC maintained that "coffee brewed and sold at the convenience stores" was an independent market, due in large part to the convenience of one-stop shopping they provided to customers. Regardless

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<sup>2</sup> Wei Chuan Foods Corporation (37.03 percent), Uni-President Enterprises Corporation (29.56 percent), and Kuang Chuan Dairy Co., Ltd. (17.55 percent).

of the fact that convenience stores were offering quantity discounts afterwards, such promotions were considered as being implemented to maintain brand loyalty and market power.

## **B. MERGERS**

Mergers are rarely banned under the FTL. The case on instant noodles in 2010 was a noticeable exception. It involved the acquisition by the leading supplier of instant noodles in Taiwan of the stocks of the second-largest suppliers. Applying in-depth economic analysis, the TFTC directly measured the cross elasticity between instant noodles and several potential substitutes such as snacks or frozen foods. The results revealed low substitutability among those products. Instant noodles, therefore, were treated as a separate relevant market. With the post-merger Herfindahl-Hirschman Index increased by more than 2000, it made the unilateral effect more of a concern in this case. The TFTC was particularly alarmed by the degree of sale diversion from the largest to the second-largest suppliers if the former were to raise its price after the acquisition.

By contrast, the Supreme Administrative Court recently vacated and remanded a merger case banned by the TFTC in 2010. The merging parties were also the leading and second-largest suppliers in the rolled steel markets of Taiwan, with a post-merger market share of more than 50 percent.<sup>3</sup> However, the court was skeptical of the merging firm's ability to raise the prices after the merger. Because steel was a standardized product subject to the World Trade Organization's zero-tariff policy, competition from abroad constrained the merging firm's ability to abuse its market power.

## **IV. CHALLENGES AHEAD**

While the TFTC is becoming more experienced, challenges for the agency loom large. The TFTC must delineate more clearly the boundary between competition and industrial policies in the future. The force of globalization will also further involve the FTL and TFTC in the process of harmonizing international competition law. In marching through the next twenty years, the TFTC should prepare itself for fashioning an enforcement policy capable of balancing these two demanding tasks.

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<sup>3</sup> Yieh United Steel Corporation (37.52 percent) and Tang Eng Iron Works Co., Ltd (21.21 percent).