Chapter 6  Cartels under the Taiwan Fair Trade Act: An Evolutionary Perspective

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Overview

The Taiwan Fair Trade Act ("TFTA") was promulgated in 1991 and took effect in 1992. Although more than twenty years have passed since its inception, cartel cases comprise a low percentage of the total number of cases that the Taiwan Fair Trade Commission ("TFTC") has decided. This chapter presents the experiences of regulating cartels by the TFTC from an evolutionary perspective. We first introduce background information on the TFTA. In particular, we review the recent amendments that incorporate the leniency program into the TFTA and the newly added power for the TFTC to impose significantly higher administrative fines for serious cartel violations. Leading cases are introduced, and problems arising from those cases are discussed to illustrate the evolution of the TFTA in response to the changes of domestic as well as global regulatory environments. We propose our suggestions for legal and policy changes at the end of this chapter. We recommend the revision of some of the prerequisites in the provisions of the TFTA governing concerted actions. In addition, the reviewing standard and applicable law choices require that the enforcement philosophy be slightly transformed to accommodate current developments in antitrust jurisprudence.

Introduction

1. The Taiwan Fair Trade Act ("TFTA") was promulgated in 1991 and took effect in 1992. Although more than twenty years have passed since its inception, cartel cases comprise a low percentage of the total number of cases that the Taiwan Fair Trade Commission ("TFTC") has decided. The most recent statistics show that of 3,928 violations since 1992, only 184 cases (less than 5%) were cartel cases.1 Whether Taiwan needed an actively enforced competition law, however, was a contestly debated issue from the very beginning of the TFTA legislation. Some have taken a sympathetic view towards cartels,2 arguing that under-enforcement is desirable in terms of Taiwan’s unique economic circumstances. Small and medium enterprises ("SMEs") form the basis of Taiwan’s economy. In spite of the potential restrictive effects of cartels on market competition, they may be considered a harmless phantom on the whole: they linger, but cause no competitive concerns that could not be offset by the benefits they bring to industries. Cartels are also a necessary means of enabling SMEs in Taiwan to compete with their frequently lager international rivals. Because of the open economy, it remained difficult and costly to organise cartels in Taiwan. In addition, given their relatively small economic scale, cartels have a negligible impact on domestic markets. In contrast, some have taken a more reproachful view, and place the blame on the TFTC’s

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1 Based on data collected by the TFTC up to July 2013, which is available at (http://www.ftc.gov.tw/upload/f1ac89b9-f173-493b-b4b6-f2453d5eb36c.pdf).
deficient investigative skills and poor case administration, as well as on the TFTA’s innate legislative defects. They state that cartels are not harmless; they are merely hidden by the deficiencies of the TFTC and the TFTA. In this chapter, we show that the first, pro-cartel viewpoint might not be correct. The externalisation of domestic anticompetitive harms from cartels to neighboring states is widely disfavored in an increasingly globalised world. It inevitably evokes backlash from the affected states and has adverse repercussions for domestic markets in the long run. With respect to the second, anti-cartel viewpoint, we argue for a path of reform stemming predominantly from the economic perspectives of competition law. The first part of this chapter, background information on the TFTA is presented. In particular, we review the recent amendments that incorporate the leniency program into the TFTA. Closely related to the amendments is the newly added power for the TFTC to impose significantly higher administrative fines for serious cartel violations.

The “affecting market function” requirement at page ¶6-052 illustrates how the TFTC has applied the law to investigate and prosecute cartels. Leading cases are introduced, and problems arising from those cases are discussed and analysed at ¶6-060, a Suggested Path for Legal and Policy Reforms.

2. In The rule of administrative action takes precedence over criminal liability at ¶6-054 we propose our suggestions for legal and policy changes. We recommend the revision of some of the prerequisites in the provisions of the TFTA governing concerted actions. In addition, the reviewing standard and applicable law choices require that the enforcement philosophy be slightly transformed to accommodate current developments in antitrust jurisprudence. Harmonising competition and non-competition policies under the TFTA at ¶6-055 concludes this chapter.

¶6-030 Background Information of the Taiwan Fair Trade Act

The enactment process of the TFTA lasted for more than a decade. The ministry of Economic Affairs began drafting the law in 1980, in response to the rapid structural changes occurring in the Taiwanese market. The original version was prepared by a German-trained law professor from National Taiwan University. The draft was revised later by the Ministry of Economic Affairs and the Executive Yuan to accommodate Taiwan’s special economic conditions and competing views on some of the subject matter in the original version. The finalised version of the draft was sent to Congress in 1986. It took five years for Congress to pass the law. Congressional debates during this period concerning the need for competition law in Taiwan were multifaceted. Opposing legislators were concerned about the law’s impacts on Taiwanese industries. Specifically, they warned that the law could

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handicap Taiwanese companies’ competitiveness overseas.\(^5\) However, legislators who held such disconcerting views were in the minority. Congress completed the three-reading legislative procedure and the TFTA was officially promulgated into law in February 1991. In consideration of the time needed by business to adapt to the newly implemented law, a “sunrise” provision that deferred the TFTA’s effective date to February 1992 was added at the end of the legislation (Art 49).

Since its inception, the TFTA has undergone six major changes, including the most recent amendments in 2011. More will be described later in this chapter regarding the 2011 amendments relating to cartels. The other revisions relevant to this chapter are the 1999 amendments. In 1999, Art 35 of the TFTA was revised to adopt the “administrative action takes precedence over criminal liability” (先行政後司法) principle for investigating cartel cases. Under this principle, criminal procedure could only be instigated when cartel defendants failed to cease, rectify, or take any necessary action to correct the alleged violations, or when they are recidivists.

The TFTA comprehensively covers the subject matter that one would encounter in the competition-law legislation of most jurisdictions. It comprises three major parts. The first part includes the typical “antitrust” provisions pertaining to the abuse of dominant positions by firms with market power, concerted actions among competitors, and mergers.\(^6\) For cases falling within this category, market structure analysis and competitive impacts resulting from the disputed business arrangements are usually the two central issues that the enforcement agencies will concentrate on. The second part deals with unfair competition activities. Cases in this category involve certain pre-defined categories of activities regarded by the legislators as detrimental to important consumer interests that merit protection irrespective of the structure of the markets in which such activities take place. Such a categorisation reflects simply a legislative choice and may not be consistent with economic-driven antitrust jurisprudence. This part covers several commercial activities that normally would be reserved for consumer-protection legislation in other jurisdictions. False advertising and pyramid sale schemes are the two notable examples.\(^7\) The TFTC would rely on more conduct-based approaches to review those cases. In addition, vertical restraints such as resale price maintenance, tying, territorial restriction, and exclusive dealing are also treated as unfair-competition practices. The market power threshold for triggering the TFTC’s investigation and disposition of vertical restraints is therefore usually insignificant.\(^8\) However, this is a rather controversial conduct classification and is currently under legislative revisions. It is likely that those activities will eventually be removed from the Chapter on Unfair Competition in the TFTA. The third part of the TFTA involves penalty provisions. Violations of the TFTA are subject to administrative fines imposed by the TFTC (Art 41). Victims of the violations are also entitled to bring civil suits for damages (Arts 30-32).

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\(^5\) For other issues being debated, see Ibid at 272-80.

\(^6\) Chapter 2, Art 5 to14, of the TFTA.

\(^7\) See Art 21 (false advertising) and Art 23(pyramid sale scheme) of the TFTA.

\(^8\) See Art 18 (resale price maintenance), Art 19, and in particular, subpara 6. The most recently proposed amendment to the TFTA has moved most vertical restraints to Chapter 2, the antitrust section of the Act.
types of violations, including cartels, could incur criminal liability under Art 35 of the TFTA.

In what follows, we introduce in more detail the rules and requirements for establishing cartel violations under the TFTA. The main provisions on cartel are Arts 7 and 14 of the TFTA. Article 7 establishes the legal requirements for cartel determination. It provides that:

“The term “concerted action” as used in this Law means 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 term “concerted action” as used in the preceding paragraph is limited 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.

The term “any other form of mutual understanding” as used in Para 1 means other than contract or agreement, a meeting of minds whether legally binding or not which would in effect lead to joint actions.

The act of a trade association to restrict activities of enterprises by means of its charter, a resolution of a general meeting of members or a board meeting of directors or supervisors, or any other means, to restrict activities of enterprises is also deemed as horizontal concerted action as used in para 2.

In contrast, Art 14 prohibits all kinds of cartels that meet the requirements of Art 7 unless they are approved in written by the TFTC before they are implemented by cartel members. The pertinent part of Art 14 provides that:

“No enterprise shall have any concerted action; unless the concerted action that meets one of the following requirements is beneficial to the economy as a whole and in the public interest, and the application with the Central Competent Authority for such concerted action has been approved.”

¶6-031 The Substantive Requirements for Establishing Cartel Violations

Article 7 of the TFTA stipulates the following main requirements for prosecuting cartels. First, the members suspected of engaging in the concerted actions must be competitors in a horizontal relationship with each other – that is, operating within the same level of the production chain. By this definition, upstream and downstream firms forming vertical agreements will not be treated as a “cartel” under Art 7. Nevertheless, they might still violate the provisions governing vertical restraints. Second, an agreement or any form of communication of minds among competitors that would in effect lead to joint actions, whether express or implied, must exist.
Finally, the concerted actions must have affected or have the potential to affect the market function of production, trade in goods, or supply and demand of services.

It is worth pointing out that the TFTC has occasionally applied the provisions on unfair competition to cartel cases. For example, subpara 4 of Art 19 of the TFTA provides that:

“No enterprise shall perform any of the following acts which are likely to lessen competition or to impede fair competition…4. Causing another enterprise to refrain from competing in price, or to take part in a merger or a concerted action by coercion, inducement with interest, or other improper means….”

The TFTC has applied this provision in approximately 22% of the sanctioned cartel cases to punish an individual enterprise acting as a cartel ringleader. Doing so practically relieves the TFTC of the obligation to prove the existence of a collusive agreement among cartel members. Similarly, the TFTC only needs to prove that competition is likely to be lessened or impeded by the individual enterprise’s activity to establish the violation, which is much easier than having to prove that the activities distorted supply-and-demand functions in the market. The latter requirement mandates the TFTC to prove that market function has actually and negatively been affected by the concerted actions. Alternatively, by “likely” to lessen or impede competition, it refers to that the TFTC only needs to show a “danger” or possibility that market function will be distorted by concerted actions.

¶ 6-032 Exemptions

Cartel liabilities could be exempted under the two provisions provided in the TFTA. The proviso in Art 14 stipulates seven conditions upon which an enterprise could file a written application for exemption. Upon approval by the TFTC, the applicants would be exempted from any liability under the TFTA for a period specified by the TFTC. However, the TFTC can impose structural or behavioral remedies as conditions for granting the approval. The first type of exemption applies to concerted actions that have the potential to enhance efficiency. This includes cartels aiming to engage in cost-reducing or quality-improving production. Similar efficiency achieved through joint research and development or specialisation arrangements among competitors could also qualify. The second type of exemption is based on trade-policy considerations. For example, the exemption of “export cartels” could be granted to agreements exclusively concerning the competition in foreign markets for the purpose of securing or promoting exports. In contrast, joint actions in regard to the importation of foreign goods for the purpose of strengthening trade are capable of exemption under subpara 5 of the proviso. Finally, joint actions by competitors to survive a business recession (crisis cartel) or by SMEs to improve operating efficiency or enhance competitiveness could also be exempted.

9 See subparas 1, 2, & 3 of the proviso.
10 See subpara 4 of the proviso.
11 See subparas 6 & 7 of the proviso. Regarding export cartels, subpara 6 requires applicants to prove that the recession caused “the market price of products to be lower than the average production costs,
Additionally, the applicants could also resort to Art 46 of the TFTA for exemption. According to Art 46, when concerted actions are governed by other laws with respect to the subject matter of competition, such other laws shall take precedence. However, a critical, decisive qualifier for the exemption is that it can only be applied when those laws do not conflict with the legislative purposes of the TFTA. By this proviso, Art 46 has in effect elevated the TFTA to a status similar to the “basic law” of all economic regulations in Taiwan. The exemption has been asserted in recent years, most notably by professional associations in Taiwan to justify their self-regulation arrangements. The LifeLaw Online Legal Services, which will be discussed in more details later in section 2.3 offers a good example of this trend. The recurrent issue in these cases frequently centers on how the wording of “legislative purposes” should be interpreted. Although Art 1 of the TFTA has broadly included “maintaining trading order, protecting consumers’ interests, ensuring fair competition, and promoting economic stability and prosperity” as its main legislative purposes, the provision does not provide much guidance in practice.

¶6-033 Procedural Rules Relating to Cartel Investigations

Before the introduction of the leniency program in 2011, the TFTC enjoyed only limited investigative power under the TFTA. The agency could conduct ex officio investigations on suspicious violations and request defendants to submit documents or summon witnesses vital to the investigations. However, the TFTC lacked the power to search the residences or business premises of defendants, seizing incriminating evidence during investigations. The “dawn raid,” an effective investigative technique typically used by US and EU enforcement agencies, is a power reserved for the court and prosecutors in Taiwan. To facilitate more effective law enforcement, the draft of the most recent amendments has suggested incorporating the power of search and seizure by the TFTC into the TFTA.

The 2011 amendments formally introduced a leniency program into the TFTA. In its totality, the program might be viewed as a revised and shortened version of the EU leniency program. Under the new law, two types of applicants are entitled to file an application for immunity or reduction of administrative fines. The first type includes those who report and provide incriminating evidence sufficient to initiate an investigation by the TFTC (an “investigation-initiating” applicant.) In addition, those who report evidence with added probative value after the TFTC had commenced its own investigations are also permitted to make an application (an “investigation-assisting” applicant.) Under the authorisation of para 2 of Art 35-1, the TFTC further enacted the “Regulations on Immunity and Reduction of Fines in Illegal Concerted Action Cases” (the “Leniency Regulations”) to specify the legal requirements causing enterprises in a particular industry difficulty in maintaining their business or resulting in overproduction”.

12 See Art 27 of the TFTA.
13 See Art 28 of the proposed amendments of the TFTA. The most recent version of the amendments was sent to Congress for legislative proceedings in December 2012. The draft is available at http://www.ftc.gov.tw/internet/main/doc/docDetail.aspx?uid=1179&docid=12594 (last visited on August 29, 2013).
for both types of applications. The program imposes several obligations which candidate applicants are required to fulfill. For example, they should immediately cease the illegal actions, and cooperate completely, honestly and continually with the TFTC during investigations (Art 6). The same article also prohibits the applicant from forging, concealing, or destroying relevant material or evidence. In addition, an applicant is prohibited from revealing any information regarding the investigation to any person before the final decision on the case is made, without the approval of the TFTC.

Under Art 7 of the Leniency Regulations, full immunity from fines will be granted to the first applicant upon the fulfillment of the conditions set by the TFTC. Art 7 is applicable to both investigation-initiating and investigation-assisting applications. For investigation-assisting applicants who do not qualify for full immunity, the TFTC has the discretion to reduce the fine by between 30% to 50% for the first applicant, 20% to 30% for the second applicant, 10% to 20% for the third applicant, and up to 10% for the fourth applicant (Art 8). Unlike the US antitrust authorities’ leniency policy, the Leniency Regulations allow cartel initiators or instigators to file for immunity or fine reductions. This difference in the legislation is partly attributable to the difficulty in practice in verifying the role an applicant played in a cartel. In theory, initiators or instigators could also be the parties more likely to possess and provide the information with higher probative value to the TFTC. Similar to the EU model, applicants who coerced the participation in, or restrained the withdrawal from, the cartels will be prohibited from applying for immunity from fines, but they still qualify for fine-reduction applications (Art 2).

The Calculation of Administrative Fines

Due to the rule that administrative action takes precedence over criminal liability, cartels have never been criminally prosecuted in Taiwan, nor have we seen private litigation brought by cartel victims to seek damages. The incentive to “ride the coattails” of public enforcement and sue based on evidence gathered from TFTC investigations appears to be low. Cartels are predominantly punished using administrative fines and deterred using administrative prosecution. As the efficacy of the leniency program is highly sensitive to the penalty reductions which leniency applicants may obtain from cooperating with the government, the statutory fines for cartel violations should not be too low. Therefore, the 2011 amendments revised para 2 of Art 41 of the TFTA to increase the maximum fines for serious cartel violations to 10% of the total sales income of the previous fiscal year. In comparison with the previous maximum penalties of NTD25 million for first-time violators, the penalty increase is substantial. In 2012, under the authorisation of the TFTA, the TFTC further promulgated regulations related to some of the requirements for calculation of fines. For example, “total sale income” will be measured by the total business

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14 In summary, investigation-initiating applicants must provide novel evidence to the TFTC, potentially enabling the TFTC to acquire information regarding cartel skeleton, the time and place a collusive agreement was made, and the contents of that agreement to initiate an investigation (Art 4). Investigation-assisting applicants must detail how and to what extent they were involved in the cartel, providing any evidence in their possession and proving the culpability of the cartel (Art 5).

revenue in the fiscal year preceding the TFTC’s final decision. In addition, whether concerted actions constitute serious violations will be evaluated by the violators’ motives and purposes, the scope and extent of the effect of the actions, the period for which the actions lasted, the market structure in which the actions occurred, and the violator’s market position. More specifically, concerted actions will be deemed serious violations if one of the following two conditions is met:

1. The sale amount of the relevant products or services during the period of the violation exceeds NTD100 million; or

2. The gains from the violations exceed the maximum fines stipulated in para 1 of Art 41.

The amounts of total fines are reached by first calculating a basic amount for violations and then adjusting it with the specified mitigating or aggravating factors enumerated in the Regulations. The basic fine is fixed at 30% of the total sales income from relevant products or services during the period of violation. The fines could be reduced if the defendants cease their actions immediately when investigations begin or cooperate genuinely with the investigations. In contrast, if the defendants are initiators or instigators of the cartels, recidivists of Art 14, or refuse to cooperate with the TFTC’s investigations, the fines could be increased.

¶6-040 A Narrative of Cartel Cases under the TFTA

In the following paragraphs, various cases are discussed to describe the experience of the TFTC in enforcing the TFTA against cartels. These cases are grouped chronologically into three phases. The first ten years after the implementation of the TFTA might be viewed as a “learning-by-doing period” for both the TFTC and the enterprises. The second phase involved a more mature competition agency facing more complicated and challenging issues. The third phase can be considered “a globalised era for the TFTA,” heralded by several international cartel cases that involve Taiwanese enterprises.

¶6-041 The Early Years of the TFTA

As a young agency reorganised from a previous price-control government division, the challenges facing the TFTC in the early years were vast. To spread the seed of competition culture, the TFTC had to dispel not only a deep-rooted business philosophy that placed more stress on cooperation than on rivalry, but also its own inexperience in advocating the merits of a liberalised market. The difficulty of addressing these challenges was evidenced in the way the TFTC handled bid-rigging cases during this enforcement period. Before the enactment and promulgation of the Government Procurement Act in 1998, bid-rigging arrangements for government projects were governed by the TFTA. By enthusiastically investigating such cases, the TFTC attempted to use prosecution to highlight its position as the “guardian” of market competition in Taiwan. For example, in a notorious 1994 bid-rigging case concerning the installation of electricity distribution pipelines for the state-owned Taiwan Power Company, 61 bidding contractors were punished for conspiring to
allocate bidding areas and maintain the bid prices submitted for the project. The TFTC subsequently sent the case to the office of the District Attorney for criminal investigation. However, in a subsequent, similar case that involved a power line renovation project for a public high school, the TFTC relied on Art 24, the main provision governing unfair-competition conduct in the TFTA, to punish individual bidders for rigging the bidding process. In this case, the defendant bidder paid other bidders to withdraw from bidding or act as “dummy” bidders to win the project. Because the bid amount involved in this project was less than NTD 4 million the TFTC held that the bid-rigging arrangement could not affect market function. Thus, Art 24 was applied to sanction the defendant for using unfair bidding methods to secure business opportunities.

Competition-advocacy challenges linger to this day; however, the evidentiary burden was somewhat neutralised by the equally inexperienced defendants during this period. The discovery of collusive agreements and evidence in this enforcement period was actually easier than it was in subsequent years. This was due to a business community still oblivious to the legal risk of collaborative actions. Additionally, as more than 40% of those cases were orchestrated by trade associations through members’ meetings, minutes or documents indicating collusive intent or consensus among members were difficult to conceal.

No cases better illustrated this feature than a series of investigations by the TFTC on price-fixing arrangements in the liquefied petroleum gas (“LPG”) industry. LPG is the most important energy source for household consumption in Taiwan. At that time, they were supplied by four major producers and importers and then transported by eleven distributors through 119 filling plants to nearly 3,700 LPG retailers around the island. With the exception of the production market, the industry appeared to be moving toward a competitive environment. In reality, however, it was locally monopolised. Cross-regional sales were significantly constrained by the rather labor-intensive mode of transportation used in this industry. Most transactions between consumers and retailers were delivered by motorcycle, averaging a maximum loading capacity of 3-4 cylinders per ride. In addition, the technologies for producing natural gas, which was transported through fixed pipelines directly to household users, are substantially different from those of the LPG. The capacities held by each supplier also vary. Those different

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16 (83) Gong-Chu-Tzyh No. 027 (1994).
17 In 1994, the rule that “administrative action takes precedence over criminal liability” was not yet incorporated into the TFTA.
18 (86) Gong-Chu-Tzyh No. 003 (1997). Article 24 of the TFTA provides that “[i]n addition to what is provided for in this Law, no enterprise shall otherwise have any deceptive or obviously unfair conduct that is able to affect trading order.”
20 The number was calculated based on the 2003 data. See CHUANG CHUN-FA & ANDY C. M. CHEN, THE INTRODUCTION OF COMPETITIVE MECHANISMS INTO TAIWAN’S MARKETS FOR HOUSEHOLD GAS FUEL AND ITS RELATIONSHIP WITH THE TAIWAN FAIR TRADE ACT 5-15 (Research project commissioned by the TFTC, FTC-92-C04, 2003).
characteristics have rendered substitution between these two products unlikely or very time-consuming in Taiwan. This also explained why the TFTC has traditionally considered both products as two separate relevant markets.21

An industry characterised by the tendency toward localised monopolisation was a hotbed for collusion. Complaints regarding price fixing, quantity allocation, and territorial restrictions by LPG distributors and retailers gradually filled the TFTC’s office. Most of the alleged violations were coordinated by local LPG trade associations. Therefore, the existence of collusive agreements could be directly determined by or inferred from the minutes or documents circulated in members’ meetings. Even in cases where trade associations were not involved and evidence was absent, one could still be surprised by members’ willingness to reveal incriminating information. It was not uncommon to find testimonies gathered during the investigation process that detailed the times, places, participants and conclusions of the cartel meetings. A lack of understanding of the coverage of the law on cartels was one of the reasons why the LPG cartel members were not reluctant to disclose their legally questionable endeavors. During this enforcement phase, the widely held view in the industry was to equate “fair” trade with “reasonable” competition. This could be substantiated by the justifications raised by cartel defendants across industries to fend off the TFTC’s charges. For example, cartel members often argued that concerted actions were merely suggestive, ineffective, or necessary for avoiding cutthroat competition. The arrangements of uniform prices or allocation of customers or sale territories were deemed to be beneficial for the industry’s long-term development.22

However, the TFTC’s incomplete, and sometimes incoherent, market analyses during this enforcement phase might be equally responsible for the misguided interpretation of the TFTA by businesses. In particular, the discussion of how the investigated collusions have affected the functions of market supply and demand was frequently short, unclear, or even non-existent. A study of 62 case samples in 200323 showed that the market-function analysis was omitted in nearly half of these cases (48.4%). Where market-impact evaluations were conducted, various criteria were used as the assessing criterion. Market share was used in 17.7% of the cases but with rather wide-ranging thresholds for violations.24 In 29.1% of the cases, the TFTC

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21 The TFTC Guidelines on the Business Conducts Undertaken by LPG Distribution Center, para 2 (March 5, 2012).

22 See (81) Gong-Chu-Tzyh No. 016, 1992 (a local egg cartel argued that fixing wholesale prices and allocating sale territories could avoid “vicious” competition among members); (83) Gong-Chu-Tzyh No. 131, 1994 (arguing that fixing the commission fees and discount rates of three dominant financing companies would reduce issuing costs and reach “reasonable” interest rates for initial and secondary markets); and (84) Gong-Chu-Tzyh No. 054, 1995 (asserting that the agreement to fix the periods for payments was merely a “goal” and “expectation” necessary to protect steel producers from the risk of defaults by downstream buyers).

23 Chuang, supra note 19, at 171.

24 Regarding the defendants, a market share that ranged above 8.7% to 67% was considered able to affect market function. See Liao Yi-Nan, The Representative Decisions by the Administrative Court in the Past 20 Years since the Implementation of the Fair Trade Act, in Symposium on 20 Years’ Enforcement of the Fair Trade Act: Retrospective and Prospective 15, 32-33 n. 12 (The Fair Trade Commission ed. September, 2012).
had relied on the number of cartel participants to establish the cartels’ anticompetitive impact on the markets. The potential to affect market supply and demand in the remaining cases (4.8%) was simply asserted by the TFTC from the concerted actions themselves. The absence of a consistent reviewing criterion was problematic and misleading. Cases which did not engage in an evaluation of market effects created an impression on the public that cartel activities could by their very nature be presumed to have anticompetitive effects on the market. However, this was contradicted by subsequent cases in which the TFTC conducted detailed market analysis to exonerate the alleged collusive arrangements for their immaterial market impacts. Concerted actions having the potential of affecting “the function of supply and demand” may have different economic connotations from those that simply “affect trade”. The TFTC is thus legally required to adopt an effects-based rule-of-reason approach.

¶6-042 The Years of Transforming to More Effect-based Enforcement and New Challenges

The TFTC began to accumulate experience as more investigations and decisions were undertaken during the first decade. In-depth and effect-based analyses were also more often observed in cartel cases during the second phase. This is in part a product of influence from the international antitrust community. The TFTC became an observer of the OECD Competition Committee in 2002. Through this very important platform, the TFTC had the opportunity to meet and exchange enforcement experiences with the major competition agencies around the globe. Another more indirect influence came from domestic legislative changes. The Administrative Procedure Act promulgated in 1999 mandated the decisional procedures by government agencies to be more transparent and their discretionary power to be exercised in a non-capricious manner. To adapt to the new legislation, Congress further amended the TFTA in 2002 and added Art 27-1 to specify the rights of and conditions for parties or related persons in cartel cases to access the documents and evidence produced during the investigations. As it was becoming less costly for the investigated parties to review the evidence and challenge the TFTC’s decisions in subsequent administrative litigation, these changes spurred the TFTC to strengthen its defenses to avoid losing in court. However, a transforming TFTC was matched by increasingly complicated business arrangements and more knowledgeable defendants. To respond to the arguments raised by defendants, the TFTC faced a new challenge of discovering the analytical frameworks that could be convincingly applied to deal with cartel issues.


To a certain degree, the entangled CD-R Patent Licensing case represented the beginning of this enforcement phase.25 This case offered the TFTC a rare opportunity to venture into a field involving new and complicated patterns of transactions

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25 For the TFTC’s decisions on this case, see (90) Gong-Chu-Tzyh No. 021 (2001)(CR-R Patent Licensing I); (91) Gong-Chu-Tzyh No. 069 (2002)(CD-R Patent Licensing II). The case had been appealed several times. For the decisions by the administrative courts, see Sue-Tzyh No. 00908 (Taipei High Administrative Court, 2003); Pan-Tzyh No. 00553 (The Supreme Administrative Court, 2007);
brought about by technological advancements. The case originated from complaints filed by several Taiwanese CD-R producers in 2001, alleging unreasonable royalties and anticompetitive licensing terms from the CD-R patent holders. At the time of the dispute, the patents for producing CD-R were held by Sony, Philips, and Taiyo Yuden Co. and were licensed in Taiwan through patent-pool arrangements. Specifically, they were licensed in packages and the licensees were prohibited from challenging the validity of the patents included in the pool.

With respect to the cartel allegations, both the TFTC and the courts focused predominantly on the technical legal issue of whether the three patentees qualified as “competitors” under Art 14 of the TFTA. Based on the testimonies of the expert witnesses, the TFTC held that the three patentees were technologically capable of entering into each other’s markets. Accordingly, they should be treated at least as potential competitors in the relevant market. On appeal, the administrative courts denied the TFTC’s interpretation of competitor in this case. Instead, they argued that the patents involved in this case were complementary for the production of CD-Rs. Because Sony, Philips, and Taiyo Yuden’s technologies were not substitutable, it was not deemed likely for them to “compete” in the market.

It is regrettable that the issue of whether the defendants were competitors consumed so much of the courts’ cartel analysis. Given that the status of the parties as “competitors” was a precondition for liability under TFTA statutory prohibition, the courts’ conclusion that these parties were not actual competitors with each other naturally prevented them from probing into the theoretically more fundamental questions, such as the competitive effects of the patent pool. We return to this policy issue, and argue for the abolishment of the “competitor” requirement from the TFTA in Part IV.

(b) Circumstantial Evidence and the “Agreement” Requirement:
The Cement and Petroleum Cartel Cases

Better informed and well-represented enterprises have also made the TFTC’s findings of collusive agreements more susceptible to legal challenges. At the center of the debate was the TFTC’s inference of the existence of collusive agreements, based on the circumstantial evidence in the relevant cases.

The Cement Cartel was one of the leading cases in this respect. It originated from several complaints filed by individual enterprises, trade associations, and government agencies in 2001. The complaints alleged that 21 Taiwanese cement producers and distributors had engaged in concerted actions to deter competition

Pan-Tzyh No. 611 (The Supreme Administrative Court, 2009); Pan-Tzyh No. 419 (The Supreme Administrative Court, 2009); Pan-Tzyh No. 588 (The Supreme Administrative Court, 2009).

26 See Gong-Chu-Tzyh No. 094136 (2005). The investigation and litigation of this case lasted more than five years. It was the first case in which a Taiwanese government agency initiated a public hearing proceeding according to the Administrative Procedure Act to assist in its investigations and decision. In recognition of its efforts in this case, the TFTC was chosen by the Global Competition Review as “Team of the Year” in 2005. See Taiwan’s FTC Chosen as ‘Team of the Year’ for 2005 by London-based GCR, available at (http://www.cens.com/cens/html/en/news/news_inner_3375.html).
in the cement market. The facts involved were rather complicated, but the TFTC uncovered the following:

- the defendants had inefficiently invested in creating new sale outlets and cross-acquisition among members before exhausting their current production capacities for the purpose of saturating local markets and deterring entry by the international cement conglomerate Cemex and other importers;
- members had negotiated the exits of some of the smaller competitors and agreed to underutilise silo capacities to restrain domestic competition;
- members had agreed to substitute imports with domestic cement;
- the defendants eventually agreed with international competitors not to sell in each other’s territories. They also agreed to share the use of silos installed in each other’s markets;
- after the formation of the international cartel, domestic prices for cement were significantly augmented by rationed supplies and shortened order periods;
- cartel members exchanged information and negotiated with Japanese steel producers to gradually reduce their annual imports of granulated blast furnace slag, a substitute for cement, to Taiwan. The cartel in turn caused the import prices for the substitute to increase substantially.

The TFTC treated the aforementioned arrangements as “facilitating mechanisms” for cartels. According to the TFTC, they were strategically implemented to reduce the costs of organising the cartel and detecting cheating by cartel members. Such a theoretical observation led the TFTC to conclude that those arrangements could not have been made without cartel members’ having some form of collective and collusive mindset. Although whether the use of those mechanisms could be equated with the existence of a collusive agreement is still heatedly debated, the Supreme Administrative Court found in favor of the TFTC in 2011.27

Similar challenges arose in the Petroleum Cartel case.28 In a market dominated by only two petroleum companies, the China Petroleum Co. (“CPC”) and Formosa Petrochemical Corporation (“FPC”), the movement of gas prices in Taiwan had followed a very “sticky” pattern that economic theories associate with oligopolies. Namely, a price change by one supplier was swiftly or even simultaneously matched by the other. Beginning in 2003, the TFTC conducted an ex officio investigation on the pricing strategies in the gas market of Taiwan. The TFTC was especially concerned by the identical and simultaneous adjustments of the wholesale prices by both petroleum companies for nearly 20 times in a 2-year period. The investigations indicated that price adjustments were usually initiated and pre-announced through the media by the CPC. Almost without exception, the FPC matched the adjustments shortly after the announcements were made. Based on the following reasons, the TFTC concluded that a collusive agreement could be inferred from this sort of conscious parallelism.

27 Pan-Tzyh No. 600-616 (The Supreme Administrative Court, 2011).
28 Gong-Chu-Tzyh No. 093102 (2004); Gong-Chu-Tzyh No. 094079 (2005).
First, unlike retail prices, which directly influenced the final consumers’ purchase decisions, the CPC did not need to pre-announce the adjustments of its wholesale prices to the public. In fact, it was not in the CPC’s business interests, and was therefore economically irrational to disclose its wholesale price information to the FPC, if the CPC took competition from the FPC seriously.

Secondly, price pre-announcements enabled the initiator of price adjustments to “test the waters” in the market. The CPC could signify its intent to increase prices to the FPC, and re-adjust prices based on the FPC reaction. This shortened the time required to detect the rival’s corresponding moves and reduced the uncertainty inherent in the formation of a cartel.

Finally, once the strategy of price pre-announcement was repeated a number of times, it had the effect of inducing the rival to interpret a subsequent price pre-announcement as an invitation from the initiator to fix market prices. The TFTC indicated the repeated identical price increases by the CPC and FPC to support its conclusion. According to the TFTC, the cost structures of the CPC and FPC were considerably different. Therefore, it was difficult to offer a plausible explanation for their identical pricing pattern without linking it to a mutual understanding to engage in concerted actions.

After several appeals by the CPC and FPC, the Administrative Supreme Court vacated part of the TFTC’s decision in 2009. The court sustained the TFTC’s inference of agreement from the related economic evidence. However, it stressed that the TFTC advised in an earlier “warning letter” to the defendants that their wholesale gas prices should be independently determined based on individual costs. Nowhere in the letter had the TFTC specified that identical or simultaneous price adjustments would constitute a collusive agreement and was in violation of the TFTA. The court appeared to indicate that as inferring collusive agreements from identical and simultaneous price increases were still controversial in both theory and practice, the TFTC should reveal its intention of relying on that inference to prosecute cartels to the parties before it was actually implemented. According to the court, the failure to disclose such an intention violated the principle of protecting reliance interests, as emphasised in administrative law.

(c) Cartels among Professional Associations

Inferring collusive agreements from circumstantial evidence may be controversial, but it could be equally challenging for the TFTC even if direct evidence was readily available. This could be evidenced by the TFTC’s experience in dealing with cases asserting exemptions under Art 46. An increasing number of cases involved applying this Art to challenge TFTC decisions against professional associations during the enforcement phase. Considering that almost all professional services in Taiwan are currently governed by their own specific legislation, with various degrees of authorisation for self-regulation, this trend was not surprising.

29 See Pan-Tzyh No. 523 & 524 (The Supreme Administrative Court, 2009).
The recent *Lifelaw Online Legal Services* vividly illustrated the issue. The case involved a ban on member lawyers by the Taiwan Bar Association ("TBA") to provide online legal services. The complainant in the case had begun offering online legal services through its "Lifelaw" website in 2005. Consultations were provided by 130 participating lawyers on various legal issues to website and mobile-phone users at prices more than five times lower than those charged for in-person consultations. The services were provided 24 hours a day and by 2009 more than 210,000 people had used the service. The TBA sent letters through local bar associations to the participating lawyers, indicating potential violations of the Code of Ethics promulgated by the TBA. It suggested that they immediately withdraw from the program. The letter effectively forced the participating lawyers to terminate their relationship with Lifelaw and eventually led the complainant to shut down the website in 2009.

In a complaint to the TFTC, the complainant alleged that the TBA had orchestrated a cartel having the effect of restraining market competition for legal services. In response, the TBA argued that payments made by the users were divided between the complainant and participating lawyers at a ratio of 40% to 60%. Therefore, it was equivalent to a "brokerage fee" paid by the lawyers to the complainants for soliciting cases. Article 12 of the Code of Ethics prohibited this type of arrangement. Furthermore, the TBA argued that law is a unique profession that is driven by the quest to ensure that public interests are protected rather than maximizing profits. The Code of Ethics was thus interpreted and implemented in this case to maintain the integrity of the legal profession, and to ensure that the public-interest goal would not be compromised. The TBA also asserted that the Code of Ethics was legally authorised by the *Attorney Regulation Act*. It should therefore be immune from antitrust review under Art 46 of the TFTA. The TBA emphasised that banning online legal services prevents consumers from being defrauded by unethical lawyers. Therefore, the manner in which the TBA interpreted the Code of Ethics in this case was consistent with the purpose of the TFTA in furthering a fairer competition environment. In 2010, the TFTC found for the complainant and fined the TBA a sum of $17,000. However, the decision was later vacated and remanded in the administrative appeal proceedings.

¶6-043 A Globalised Era for the TFTA

The incorporation of the leniency policy and the increased fines heralded the third enforcement phase for the TFTA. It was also an era in which the TFTA had to be enforced in an increasingly globalised business environment. Unfortunately, this legal development was largely triggered by several international cartels involving Taiwanese enterprises. In particular, the continuing *International LCD Cartel* cases substantially reshaped the enforcement landscape of the competition law and policy in Taiwan.

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30 Gong-Chu-Tzyh No. 099060 (2010); Gong-Chu-Tzyh No.101053 (2012).
31 Yuan-Tai-Su-Tzyh No. 0990106262 (2010); Yuan-Tai-Su-Tzyh No. 1010144559 (2012).
32 For a discussion of this case and its impacts and implications for Taiwan, see Andy C. M. Chen, *The LCD Cartel: Impacts and Implications for the Competition Policy of Taiwan*, working paper presented at the
In 2006, the US Department of Justice ("DOJ") and the European Commission filed charges against the major suppliers of thin film transistor liquid crystal display ("TFT-LCD"; "LCD") for their attempts to fix global prices for LCD panels. The LCD panels are used in various consumer electronic devices, and Taiwanese producers are among the top five global suppliers. Both agencies asserted that the cartel members held nearly sixty “crystal” meetings in Taipei from 2001 to 2006 to discuss the prices for various sizes of LCD panels. Most of the investigated Taiwanese companies settled with the DOJ and the European Commission. Some of their executives have served or are serving jail terms in the United States. Only one company, AU Optronics ("AUO") brought the case to the American courts. Samsung, who was the first to report the case to the DOJ and the EC, was exempted from liability under the leniency programs in both jurisdictions.

None of the investigated suppliers was an American or EU company. However, both the US and EU applied the “extraterritorial effect” doctrine to establish their jurisdiction over the case. AUO challenged that the decisions on jurisdiction were made without taking note of the principle of international comity. However, the Commission held that the meetings had the potential to create “substantial, direct, and foreseeable” effects within the EEA areas, which is sufficient to establish extraterritorial jurisdiction under EU competition law. AUO further asserted that both the DOJ and the European Commission failed to prove the existence of a collusive agreement on prices among the LCD suppliers. Even if such an agreement could be inferred, it had never been implemented and therefore could not have affected competition in the US or EU market. But both the DOJ and European Commission emphasised that implementation was not a prerequisite for the cartel violations. The verdict was returned on 13 March 2012. The jury found that the AUO and two of its executives had conspired with other LCD makers to fix LCD prices.

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33 Up to May 2012, the top five global large-sized LCD panel suppliers and their respective market shares in terms of shipment volume are LG (Korea, 28.1%), Samsung (Korea, 22.8%), Chimei Innolux (Taiwan, 17.3%), AU Optronics (Taiwan, 17.2%), and Beijing Optoelectronics Technology Co. Ltd. (China, 4.5%). See Sweta Dash, Chinese Suppliers Shine in Large-Sized LCD Panel Market in Q1 (June 5, 2012), available at (http://www.isuppli.com/Display-Materials-and-Systems/News/pages/Chinese-Suppliers-Shine-in-Large-Sized-LCD-Panel-Market-in-Q1.aspx).


This case offered legislators, antitrust practitioners and researchers in Taiwan the opportunity to reflect upon the effectiveness of the TFTA in prosecuting cartels. Initially, the issue regarding the proper interpretation of the “function of market supply and demand” requirement in the TFTA re-emerged in this case. The ensuing enforcement actions by the TFTC ended up with a no-violation decision due partly to the TFTC’s finding that the suggested LCD prices during the meetings had never been followed by members worldwide during the alleged violation period. Therefore, the TFTC concluded that the market function had not been affected either. It also exposed the weakness of the TFTA in deterring international cartels. Before the recent amendments, the TFTA capped the maximal fine for collusive arrangements at NTD100 million (less than US$3 million). The legislation lacked the deterring effects that one might expect from the US and EU laws. Mechanisms to facilitate cartel investigations were either inadequate or non-existent. These legislative shortfalls eventually led to the legal changes introduced earlier.

The leniency program was first applied to an international cartel involving four global CD-ROM producers: HLDSK, PLDS, TSSTK, and Sony Optiars Inc. According to the TFTC, the four companies had engaged in bid-rigging activities in the international markets for computer CD-ROMs from 2006 to 2009. They exchanged information regarding individual submitted prices and company capacities and outputs, subsequently agreeing on the winning bidders for several overseas bids proposed by Dell and the Hewlett-Packard Company. In its decision, the TFTC found that the four defendants held a market share of more than 75% in the CD-ROM market. Dell and Hewlett-Packard controlled approximately 10% of the market for personal or desktop computers in Taiwan, and 90% of their demands for computer CD-ROM were met through biddings. Based on those statistics, the TFTC concluded that the cartel had affected the function of the CD-ROM market in Taiwan. The evidence in this case was provided by a participating member through the leniency program. The applicant was later granted full immunity from all administrative fines.

On 15 March 2013, the TFTC imposed a record fine of US$ 213.08 million (NTD6.32 billion) on nine independent power producers (IPPs) for collusion after the breakdown of several price renegotiations between the Taiwan Power Co. (“Taipower”) and the nine defendants. The TFTC came to its conclusion after relying on implicating evidence that in the TFTC’s opinion was the “smoking gun” for the violation. In particular, the following were interpreted by the TFTC as agreements among the IPPs to collectively boycott rate renegotiation with Taipower.

1. Through meetings organised by the trade association, the IPPs formed a common understanding that the rate adjustments were unreasonable.

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38 The TFTC’s decision on this case was not officially published and is on file with the author.
40 For more detailed comments on this case, see Andy Chen, The Taiwan Fair Trade Commission imposes record fines on independent power producers for collectively refusing to adjust the rate for wholesale electricity (Gong-Chu-Tzyh), 15 March 2013, e-Competitions Bulletin March 2013, Art. No 52501.
2. Based upon this understanding, the members agreed to ignore or purposefully postpone the responses to Taipower’s inquiries regarding the schedules for renegotiation meetings. Each member also agreed to circulate the information contained in its responses to Taipower to other members for their reference.

3. In their subsequent meetings, the IPPs also agreed to refrain from discussing with Taipower substantive issues concerning rate renegotiation or proposing any ideas for rate adjustments to Taipower. In addition, “sample questions” likely to be raised during rate renegotiation were prepared to assist individual IPPs to complicate and prolong the renegotiation process.

4. A detailed plan of division of labor among member IPPs regarding the manner of dealing with the government was formulated by the association. All member IPPs were advised to exchange any information available to them regarding Taipower’s actions or responses with other members.

5. To consolidate the responses to questions from the media and the public, most of the member IPPs agreed to hire a public relations company as the spokesperson for the member IPPs.

The decision was the first case in which the TFTC applied the recently amended rules allowing the agency to impose a fine up to 10% of the defendants’ business turnover in the preceding year.

¶6-050 The Legal and Policy Issues Emerging from the Enforcement Experiences of the TFTA

In addition to chronicling the growth of a young agency, the previous section at the same time highlighted some of the legal and policy issues brought about by the demand for more erudite analysis on cartel and market competition. With respect to the legal issues, the TFTC’s interpretation of the “agreement” and the “affecting market function” requirements leaves much to be desired. Whether it is advisable to limit the TFTA’s jurisdiction to cover only horizontal cartels is a policy issue which merits our reconsideration. Moreover, some antitrust commentators in Taiwan have called for the abolishment of the rule of “administrative action takes precedence over criminal liability” to enhance the effectiveness of the TFTA in curtailing cartels. This suggestion hinges on several critical pre-conditions, such as the ability of prosecutors to manage cartel cases, indicating that it is an impractical short-term solution. Finally, the cases against professional associations have stimulated the debates on the issue of how the conflicts between competition policies and industry or trade policies might be reconciled. Another challenge to the TFTC is responding to the public-interest and non-economic justifications for cartels. We discuss those issues in the next section.

¶6-051 The “Agreement” Requirement

In the Cement and Petroleum Cartel cases, the endeavors of the TFTC to incorporate recent economic thinking into its decisions on the “agreement” requirement were
both evident and praiseworthy. The *Petroleum Cartel* case typified the enduring intellectual struggle in antitrust jurisprudence to invent a way of integrating the economic insights into the oligopoly market to assist the detection of truly harmful contractual arrangements. Similarly, the *Cement Cartel* case is an application of the widely cited raising-rivals’costs theory formulated by Professor Salop and other commentators.\(^{41}\) According to this theory, inefficient business strategies such as artificially idling production capacity or pre-purchasing input not currently in need could be practiced by firms to increase rivals’ competing costs without generating any redeeming benefits for the firms in the short run. Nevertheless, those strategies could be implemented to generate long-term effects of market preemption and foreclosure. Both types of theories demonstrate the *possibilities* that incriminating circumstantial evidence could be connected to collusive understanding or agreements among competitors. To transform these possibilities into definitive judgments of illegality, however, requires the courts to refute the alternative, particularly the pro-competitive, explanations of that evidence. Some jurisdictions, such as the United States, have adopted a relatively higher standard for conducting that kind of legal evaluation. Under that standard, proof of conspiracy must include evidence tending to exclude the possibility of independent action.\(^{42}\)

In comparison, the TFTC and the courts did not follow a coherent standard for such determination, nor have they provided useful guidelines to assess competing interpretations of parallel behavior or strategic business arrangements under Art 14.\(^{43}\) Based on the reasoning in the decision, it is tempting to conclude


\(^{42}\) For example, in Monsanto, the Court maintained that terminating the plaintiff’s dealership in response to complaints from non-terminated distributors who alleged price-cutting by the plaintiff was insufficient to infer the existence of collusive agreements between the manufacturer and non-terminated distributors. The correct standard should be “there must be evidence that tends to exclude the possibility that the manufacturer and non-terminated distributors were acting independently.” *Monsanto Co. v Spray-Rite Service Corp.*, 465 US 752, 764 (1984) In *Matsushita*, the Court further argued that,

“[T]o survive a motion for a summary judgment, a plaintiff seeking damages for a violation of § 1 of the Sherman Act must present evidence ‘that tends to exclude the possibility’ that the alleged conspirators acted independently. Thus, respondents here must show that the inference of a conspiracy is reasonable in light of the competing inferences of independent action or collusive action that could not have harmed respondents.”


\(^{43}\) In its 397th Commissioner Meeting in June 1999, the TFTC passed a resolution enunciating certain criteria for reviewing concerted actions. According to the resolution, concerted actions are informal and legally non-binding types of cooperation that require a level of collaboration that remains insufficient to constitute a contract in law. Objectively, they must include ex ante negotiations or communications among the participating members. Furthermore, the TFTC emphasises that participating members must be mutually reliant on each other in terms of the concerted actions. Thus, the TFTC excluded ad hoc matching or imitating behaviors by participating members from the category of concerted actions because the participants did not lose their liberty to make independent business decisions. However, this descriptive statement did not add clarity to how a coherent inference of collusive agreement could be made from circumstantial evidence.
that the mere *possibility* that the observed parallel behavior could result from the mutual understanding of cartel members is sufficient to establish the existence of agreements. This lack of clarity has rendered the application of the TFTA unpredictable and sometimes arbitrary. As previously mentioned, in certain cases, the TFTC has switched to the anti-unfair-competition provisions in the TFTA, such as para 4 of Art 19 or Art 24, to punish key individual members of a cartel rather than the cartel as a whole for coercing or inducing others to join or using unfair methods of competition to organise. This change in enforcement standard could undoubtedly facilitate cartel prosecution by the TFTC. However, determining whether the conduct of an individual cartel member could be qualified as “coercive” and “unfair” led the TFTC to play a role similar to that of a common-law court rather than a market competition regulatory agency. This distracts the TFTC from investigating the market effect of cartels, instead forcing it to focus on fine-tuning and balancing the rights and obligations involved in specific contractual relationships. Thus, its decisions tend to be ad hoc, exacerbating the ambiguity of TFTA enforcement against cartels.

**¶6-052 The “Affecting Market Function” Requirement**

As demonstrated earlier, whether a cartel was capable of affecting market function was either neglected or lukewarmly assessed in the passing of the TFTC’s decisions. In cases where more specific criteria, such as market share, were used, the thresholds for violations were inconsistent. The only potential conclusion from the TFTC judgment regarding the required effect on market function is that those decisions all seemed based on the rather vague concept of “offences of abstract danger” (abstraktes Gefährdungsdelikt), a legal concept from German criminal law. Simply put, *abstraktes Gefährdungsdelikt* refers to the types of offences considered illegal as long as they are implemented. The rationale behind this legal categorisation is that certain types of conduct are too detrimental to personal lives, liberty, or public safety to be undertaken by any person in society. In the civil-law system, offences of abstract danger are a product of legislative choices. In theory, these choices must be made based on evidence that shows a reasonable consensus regarding the irreversibility of the harms that the offenses would have caused if they were not initially banned. In practice, however, the term is becoming a misnomer. Offences can be classified as abstractly dangerous without any evidence that indicates their propensity to create immediate or remote danger. Consequently, as we argue in the next section, applying “abstract danger” theory to the TFTA is both controversial and inappropriate.

The TFTC has also failed to declare and adhere to a clear rule when carrying out the market definition process. That failure has in some cases led the TFTC to selectively rely on misplaced economic theories to reach its conclusions on relevant market and market impacts. For example, in October 2011, the four largest convenience store chains in Taiwan raised the prices of freshly brewed coffee that contained milk products by exactly five NTD per cup, irrespective of their size. The definition of 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 that they provided to customers. By “one-stop shopping”, however, the TFTC was actually referring to the
fact that customers could fax documents, pay their phone bills and buy their concert tickets while purchasing a cup of coffee brewed by the convenience stores. The TFTC’s application of the “one-stop shopping” theory in this case was counter-intuitive and unpersuasive. It may, however, be far-fetched to argue that because customers could buy coffee and perform other actions in convenience stores, they would treat coffee sold at coffee shops or chain stores as not interchangeable for that sold by the convenience stores.

¶6-053 The “Horizontal Competitor” Requirement

Limiting cartel members to include only horizontal competitors is based on the assumption that horizontal restraints are competitively more pernicious than non-horizontal restraints. And because cartels are usually subject to stricter reviewing standards, such as the rule of illegal per se, it is justifiable to confine its coverage only to the most harmful type of violation. But first, the dichotomy of “horizontal” versus “vertical” restraints based on their different impacts on market competition is not airtight. Economic theories have demonstrated that vertical restraints could be a means to facilitate horizontal conspiracy at either the upstream or downstream markets.44 Put differently, cooperation among horizontal competitors could reduce transaction costs, increase the transparency of market transactions, facilitate the dissemination of useful information for consumers, and eventually enhance interbrand competition, just as vertical restraints potentially do.

Secondly, the administrative courts in the CD-R Cartel case appeared to have lost sight of the fact that the definition of competitor in antitrust cases should include potential competitors. That is, it should include those that are not currently in the relevant market but able to make timely and sufficient market entry if the incumbent attempts to gain any non-competitive gains. From this perspective, the CD-R Cartel case adopted too static a view towards the cartel defendant’s legal standing under the TFTA. It neglected the fact that, technologically speaking, the three defendants were quite likely to patent around each other’s protected patents and to compete in each other’s original markets without significant delays. Should the administrative courts’ view be prevalent, it would provide future defendants a channel to manipulate the TFTA to avoid cartel liabilities. Competitors, be they existing or potential, could divide their intended cartel into several individual product and geographical markets of collusion in which cartel members are strategically assigned the responsibility to provide non-competing products in each individual colluding market. Under the administrative courts’ interpretation of the TFTA, the arrangement in each specific individual market would not be held to be a violation of the TFTA. But they could in effect form a cartel having ostensible anticompetitive outcomes if those separate but agreed upon assignments were added together and assessed as an integrated whole.

¶6-054 The rule of “Administrative Action Takes Precedence over Criminal Liability”

The lack of effective enforcement against cartels in Taiwan has led an increasing number of commentators in Taiwan to criticise the rule that administrative action takes precedence over criminal liability, as espoused in Art 41. They suggest abolishing the rule and allowing prosecutors to enjoy parallel investigative power with the TFTC. Behind this policy suggestion lies two central assumptions regarding cartel enforcement in Taiwan. First, the current enforcement level is sub-optimal. A substantial number of cartels have escaped liability because the DOJ failed to exercise its investigative power concurrently with the TFTC. Secondly, parallel investigations would deter cartels more effectively with no or negligible probability of over-deterrence.

Whether the two assumptions hold needs to be empirically verified by future research. Regardless of the evaluation methods adopted for that purpose, the arguments for changing the current rule should not be based simply on the fact that the number of penalised cartel cases continued to rise after the implementation of the rule in 1999. Two additional points must be questioned before enacting the proposal to abolish the rule. First, unlike the United States, the Department of Justice in Taiwan does not have a special division of prosecutors experienced in the enforcement of antitrust law. Most of them are not trained to deal with complicated economic issues and theories regarding market competition. It is predictable at least in the short term that prosecutors in Taiwan will tend to deal with cartel cases by resorting to criminal-law doctrines. That in turn will lead to either under or over-deterrent outcomes depending on the facts involved in each individual case. Secondly, concurrent jurisdictions and divergent enforcement philosophies between the TFTC and prosecutors in the DOJ could further increase the possibility of conflict of judgments. This problem could be more evident in issues such as the inference of collusive agreements and evaluation of market impacts. When such conflicts occur, the law enforcement process is rendered more unpredictable.

¶6-055 Harmonising Competition and Non-competition Policies under the TFTA

The conflict between competition and non-competition (for example, trade or industrial) policies is a challenging antitrust concern confronting competition agencies around the world. Similarly, harmonising the conflict is a recurring task that these agencies strive to accomplish, frequently under great pressure from legislatures or interest groups. If the problem is inappropriately resolved, competition policy could become a tool for implementing protectionism against foreign competitors or granting cronyism for domestic enterprises. Taiwan is no exception to this dilemma. However, the major problem with the current enforcement status of the TFTA with respect to Art 46 is the absence of a coherent framework rooted in competition law.

46 Ibid at 92-93.
analysis. As a result, arguments supporting and refuting exemption in most Art 46 cases appear to be based upon very divergent and parallel theoretical foundations. The *Lifelaw Online Legal Services* case\(^ {47}\) demonstrated clearly this enforcement conundrum. The defendant argued for liability exemptions by stressing the uniqueness of the industries they were in and the necessity of engaging in concerted actions to improve their performance in their respective industries. In the case of professional associations, “public interest” is the additional justification for their self-regulating but competition-restrictive mandates. Although the TFTC is more experienced in applying competition theories to question the “uniqueness” justification, the public interest or similar non-economic justifications continue to pose challenges to the TFTC. Aside from refuting the justification from legal technicalities, the TFTC is still in search of an analytical framework to evaluate whether non-economic justifications are compatible with the legislative purposes of the TFTA.

\[\text{¶6-060} \quad \text{A Suggested Path for Legal and Policy Reforms}\]

To address the problems described in the previous section, we propose the following path for legal and policy reforms.

First, the resolution of the problems associated with the determination of collusive agreement and market impacts from concerted actions all require the TFTC to adopt a more effects-based enforcement approach. This would entail the TFTC further cultivating its skill in applying economic theories to connect suspicious circumstantial evidence with a joint intent to collude, to define the relevant markets and market power more precisely, and to evaluate the market impact from the cartel under its review more accurately. In implementing such a reform, however, it may not be desirable for the TFTC or the government to follow wholesale the US or EU model. For example, in comparison with those jurisdictions, Taiwan comprises a small and stable economy that demonstrates less frequent market entry by potential competitors compared with that in larger economies. That could in turn make parallel behavior more plausible as an indication of collusive agreement.

Regarding the issue of determining whether market function has been affected, the TFTC might attempt to justify its interpretation of this requirement by resorting to the EU experience of enforcing Art 101 of The Treaty on the Function of European Union, which prohibits concerted practices that may affect trade between Member States and which have as their object the prevention, restriction or distortion of competition within the internal market. Violations could be presumptively established if the “object” to restrict competition was proved. However, the requirement of demonstrating the negative impacts on “market function” from concerted practices may place the TFTC on a higher burden of proof than that for showing the practices would “affect trade.” Trade could be affected in the form of changed patterns of product inflow or outflow in a relevant market without necessarily indicating the distortion of the demand and supply functions in that market. In reality, the changes might very well signal market re-adjustments towards new equilibrium and were indeed a phenomenon we would observe in a properly functioning market. To make

\(^{47}\) See supra note 30, 31 and the accompanying texts.
sound distinctions, it is necessary for the TFTC to undertake, in each case, an effects-based investigation into the market structures and conditions in which cartel members compete, including an inquiry into the number of firms that have joined the cartel and their total market shares. Given the current wording of Art 7 of the TFTA, the TFTC should avoid over-deterring collective actions that are competition-neutral or competition-enhancing by adopting a conduct-based *per se* rule against cartels.

Secondly, limiting cartel defendants to horizontal competitors is not sustainable by economic theories. In addition to the reasons mentioned previously, narrowly defining “competitor” also generates unnecessary legal disputes that would inefficiently distract the TFTC’s enforcement efforts away from the evaluation of market effects caused by cartels. The *IPP Cartel* case provides an example. The wholesale market of electricity in Taiwan is still highly regulated by the government. Not only are the wholesale prices fixed by regulation, the nine IPPs are also limited to selling electricity only to Taipower. These regulations had induced the IPPs to argue that it is unlikely under current legal restrictions for them to engage in any meaningful competition, and should not be treated as competitors under Art 14.48

In accordance with the previous arguments regarding including potential competitors as competitors in the TFTA, we believe that the IPPs have adopted too static a view in their counterargument. A more appropriate understanding of competition and “competitor” should hinge on an antitrust “but for” test. Namely, in the context of the *IPP Cartel*, the preliminary issue for the TFTC remains whether the nine IPPs would compete with each other in a timely and sufficient fashion if the alleged regulatory constraints were lessened or eliminated.

Thirdly, we also suggest maintaining the rule of “administrative action takes precedence over criminal liability”, at least in the short run. Commentators who hold contrary views in Taiwan often presuppose criminal liability to be the most effective deterrent mechanism. Hence, they would deem placing criminal liability behind administrative penalties a misguided policy for prosecuting cartels. As we previously argued, whether criminal liability deters cartels more effectively compared with administrative penalties or civil damages is a hypothesis that must be empirically tested. Although the “criminalisation” of cartel has recently emerged as a global trend, its efficacy in achieving optimal deterrence may not be universal. Differences in enforcement experience, legal and prosecutorial systems, or the level of awareness in business community of the consequences of violations could cause various enforcement results.49 Given the costs of administering criminal anti-cartel systems and agencies that have yet to develop strong public profiles, “softer” forms of enforcement such as advocacy, business education, or dialogues, should precede the application of criminal systems.50 Consequently, until the Department of Justice builds up the capacity to handle complicated market and industrial issues in cartel cases, it might be more appropriate to let the TFTC have preemptory jurisdiction over cartel cases. This diminishes the possibility of conflicting decisions between the

48 See Chen, supra note 40.


50 Ibid at 216.
two enforcement agencies. The results from investigations by the TFTC could also assist the DOJ in subsequent investigations into repeated violations and expedite their discovery proceedings.

Finally, the harmonisation of competition and non-competition policies requires a certain degree of “paradigm shift” of the TFTC’s enforcement approaches towards Art 46. Facing the “market uniqueness” justifications, the TFTC first needs to learn how to factor those characteristics into the framework of competition-law analysis, rather than uncritically recognising the need for more market-intrusive self-regulations. More importantly, the TFTC should adhere to a review standard under which cartels organised to facilitate optimal market performance may still be disfavored if there exist less restrictive alternatives to fulfill the same goal. In this context, the Lifelaw Online Legal Services case should be reviewed by first ascertaining that the information-asymmetry problem between the professionals and the public is the central issue that needs to be addressed. The next step then is to compare and evaluate the effectiveness and competition-restraining potential of the various remedial mechanisms, including the market’s self-correcting functions, in resolving the problem. By following this suggested reviewing process, the enforcement agency and the courts would gain a clearer picture on whether the TBA’s ban on online advertisements of legal services would be the most ideal method of controlling lawyers’ incentives to misuse their informational advantages.

Although “public interest” is a wide concept subject to multifaceted legal interpretation, we believe that our suggestion is equally applicable to review the reasonableness of public-interest defense. In economic parlance, public interest is a “positive externality”, an unintended benefit generated by an economic action that spills over to parties other than the actor himself. The conventional concern of positive externality is that it generates the incentive on the side of the beneficiary to “free-ride” on others’ investments in economic activities. Left unconstrained, this feature in turn diminishes the actors’ willingness to engage in socially beneficial activities, causing welfare losses to the society as a whole. Along this line, the TBA argued that devoted lawyers’ services create significant positive externality in the form of a more just society and stronger confidence on the legal profession, which benefits all lawyers. Unregulated online advertising allows unethical lawyers to increase their profits by misleading their clients with lower fees while providing compromised and hard-to-verify service quality. Part of the costs from diminishing confidence in lawyers and less frequent use of legal services will be shouldered by devoted lawyers. From the perspective of competition law, however, the more important question is still which available rectifying mechanisms for this problem would be the most effective and competitively the least restrictive. Full-scale prohibition of online advertising might prevent unethical lawyers from benefitting from the contribution made by devoted lawyers; but at the same time legal-service users would be deprived of the opportunity to become more informed regarding the content of the services they purchase. This could leave the information-asymmetry problem unimproved or even

exacerbated. The customers’ ability to distinguish devoted from unethical lawyers could remain the same or become more disadvantaged.

\[\text{¶6-070 Conclusion}\]

This chapter provides an evolutionary perspective on the regulation of cartels by the TFTA. We began with a brief introduction of the legislative history and regulatory framework of the TFTA. Based on this background information, we then divided the enforcement experience of the TFTC into three phases. Representative cases in each phase were discussed to illustrate the characteristics of each individual enforcement period. Problems revealed by the decisions of those cases and their likely solutions were summarised and discussed in the ensuing sections. Specifically, we proposed that the TFTC should continue to follow a path of reform, building on a more effect-based analytical approach towards cartels. On this premise, we propose that the “horizontal competitor” requirement should be abolished. Under the effects-based approach, the TFTC also needs to more clearly articulate its views on how to apply economic theories which establish collusive agreements from circumstantial evidence and demonstrate the adverse impacts of cartels on market functions. Thus, we suggest that empirical studies regarding the effectiveness of criminal anti-cartel programs be undertaken before changes are implemented to the current rule that prioritises administrative penalties over criminal investigation. At the end of the chapter, we provided suggestions on how Art 46 of the TFTA should be interpreted and applied to cartel exemption applications. After reflecting on, and learning from, past events, this chapter should assist the TFTC in making informed and persuasive decisions in the future. And judging from the commonality of the issues presented in this book, our study should also be useful to the development of competition laws and policies in other Asian countries.