

Competition Law and Policy in Chinese Taipei

What is the scope of the competition law?

What institutions enforce the law?

What if other laws restrict competition?

How can competition law and enforcement be improved?

For further information

For further reading

Where to contact us?

Introduction

Competition law in Chinese Taipei has been an important element of the program of economic reforms that moved the economy from centrally directed emphasis on manufacturing and exports to a market-driven emphasis on services and high technology.

An OECD Secretariat report on Competition Law and Policy in Chinese Taipei was presented and peer-reviewed at the OECD's Global Forum on Competition in February 2006. The review found that the competition law follows mainstream practice about restrictive agreements, monopolies and anti-competitive mergers, with a particularly clear statutory basis for concentrating enforcement attention on horizontal collusion. The rules about market deception and unfair practices connect the competition law to consumer interests. The Report cautioned, though, about the risk that rules based on a cultural tradition of fairness might lead to interventions to correct differences in bargaining power, which could dampen competition rather than promote it.

The competition enforcement agency, the Fair Trade Commission (FTC), is now a stable, experienced administrative agency. It followed an appropriate sequence in introducing competition policy, emphasising transparency and guidance to encourage compliance before undertaking stronger enforcement measures. General reforms are in process that would clarify the independence of the FTC. To improve enforcement against hard-core cartels, the Report supported implementing a leniency programme and limiting the special treatment for agreements among small businesses. Some other aspects of the enforcement tool-kit should be revised, such as the cap on fines and the use of market share as a merger notification test.

The most visible regulatory reforms to promote competition have been in telecoms, although an independent regulator for that sector is just now being set up. The government retains holdings in privatised firms that could have implications for market competition, so FTC vigilance about the risk of cross-subsidy or other distortion remains warranted. ■

What is the scope of the competition law?

The economy of Chinese Taipei is now comparatively prosperous, resilient and outward-looking, with development moving toward technology and services. The pre-1990 economy had been characterised by export promotion and domestic protection, in a system of “authoritarian capitalism” that had produced one of the largest government-owned sectors in a market economy.

A draft competition law, part of a general project to liberalise the economy, was sent to the legislature in 1986. After long debate, the Fair Trade Law (FTL) was finally enacted in 1991. Of its multiple goals – to maintain trading order, protect consumers’ interests, ensure fair competition and promote economic stability and prosperity – fair competition appears to be dominant.

Horizontal co-ordination is prohibited unless the FTC grants a specific exemption. A *per se* rule is not applied to horizontal price fixing. Nonetheless, some prominent enforcement actions have been taken against formally organised cartels. The most important cases involved liquefied petroleum gas (LPG), which is the principal household fuel in Chinese Taipei. The FTC’s 2003 decision imposed fines totalling TWD 344 million (USD 10 million) against these cartels. More recently, in December 2005 the FTC fined 21 cement manufacturers and distributors a total of TWD 210 million (USD 6 million), after a 4-year investigation into industry agreements to fix prices, divide markets, limit capacity and discourage imports.

Few FTC actions have challenged construction industry bid-rigging. Bid rigging in government procurement is a crime under other legislation, and the prosecutors have actively pursued collusion that involved government projects.

Resale price maintenance is prohibited *per se*. Other vertical restraints receive rule-of-reason treatment. A market share screen of 10% is used in determining whether they are likely to impede competition.

Box 1. THE CD-R PATENT- LICENSING CASE

In 2002, the FTC imposed fines totalling TWD 14 million on a patent-licensing pool set up by Philips, Sony and Taiyo Yuden, covering over 100 patents for making CD-R products. Chinese Taipei was the major manufacturer of CD-R products, with a 70% world market share. As demand for the product multiplied and prices dropped, local makers were losing profit because the minimum per-unit license fee remained fixed. In 1996, the effective license rate was 3% of net sales, but as the price of the product dropped by more than 90%, the alternative fixed minimum (of JPY .10) meant that the effective rate was about 18%. The manufacturers refused to pay the licence fee, the licensor took them to court to collect and the manufacturers then approached the FTC to investigate. The FTC found that the pool amounted to a restrictive agreement that should have been notified and approved, thus violating Article 14, that the refusal to reconsider the royalty rate was abuse of a joint monopolistic position and that including non-essential, invalid and substitute patents in the licence constituted tying. The crux of the FTC concern appears to be licensor’s refusal to renegotiate a lower royalty rate, despite its greatly increased total licensing revenues due to growth in demand for the discs. In August 2005 the High Administrative Court reversed the FTC decision, finding that the pool was not a horizontal agreement because its members’ technology contributions did not compete with each other; the FTC has appealed further.

“Monopolistic enterprises” may not abuse their market power. An enterprise is not considered monopolistic if its market share is below 50%, the top two firms together have a share below 67%, and the top three firms, below 75%. No firm with a share under 10% or annual sales below TWD 1 billion (USD 30 million) is considered a monopolistic enterprise. Particularly when the law was relatively new, the FTC often resorted to negotiation rather than confrontation concerning dominant firm conduct. Exploitative high prices have not yet been found to violate the law. Nonetheless, concern about high prices motivated two controversial FTC actions involving intellectual property. The 2003 administrative settlement with Microsoft implies that the basis for the FTC action was prices, and the FTC’s decision about CD-R patents also reacted to high prices.

Merger control, which has rarely been applied, relies on a public interest standard: whether overall economic benefit of the merger outweighs the disadvantages resulted from competition restraint. The amendments in 2002 established a pre-notification regime. Both market share and turnover are criteria in the notification thresholds, and the FTC has fined companies for not filing because they had mistaken their market shares.

Unfair competition claims, particularly about false advertising, are a major part of the FTC workload. The section of the FTL about unfair competition, bargaining power and economic dependence also includes antitrust subjects such as resale price maintenance, boycotts and discrimination. The borderline area between concepts of competition and fairness remains controversial, in Chinese Taipei as elsewhere. FTC guidelines on large scale distribution businesses and department store-supplier relations are about economic dependence, not market power, and set out rules about fair treatment within a contract relationship.

The FTL includes a general catch-all provision, which prohibits “any deceptive or obviously unfair conduct” that could “affect trading order”. This has been used extensively, often with a consumer-protection emphasis. Courts are challenging excessive reliance on this provision, on the grounds that it is too vague. The FTC has said that this provision could prohibit conduct that is “contrary to business ethics or public order and good morals” when “market supply and demand are not in equilibrium” because “market mechanisms failed.” Although this language may be intended to describe taking advantage of consumer vulnerability in *force majeure* shortages, it can be read to support intervention against any alleged market failure. ■

What institutions enforce the law?

The FTC is a ministerial level agency, responsible for policy and legislation as well as enforcement. The nine full-time Commissioners are nominated by the premier and appointed by the president for 3 year, renewable terms. Whether the competition agency should be an organic part of the Ministry of Economic Affairs or an independent body was a key issue in the original debate. Ultimately, the legislature decided to create an independent body of experts.

The FTC's independent status may be clarified under a new organic law providing for the possibility that agencies could be outside the Executive Yuan reporting structure. In addition to the FTC, bodies that might become more independent could include the new communications regulator, the central bank, the central elections committee and the Financial Supervisory Commission. Legislation has not yet been adopted that would implement these principles for the FTC, though.

Public explanation of the FTL and the FTC's decisions is a high priority. Announcements of case decisions in Chinese are posted on the FTC website, and some significant case decisions are posted in English as well. The FTC relies heavily on "soft law" instruments such as statements about its methods and guidance to particular industries. Not only does the FTC use "administrative guidance", it even has a Guideline about it. This Guideline is principally intended as an instruction to the FTC staff, but it suggests best practices about informal guidance that other agencies might consider.

The FTC can initiate investigations in response to complaints, and it can open an investigation *ex officio* for a matter that involves the "public interest". The hearing and decision process is changing to conform to the Administrative Procedure Act, which now provides for formal public hearings at administrative bodies. The FTC was the first agency to use the new formal hearing process, in an October 2005 cement cartel proceeding. The FTC has the option of entering an administrative settlement rather than imposing sanctions. This procedure too is novel and somewhat controversial. The FTC's settlement with Microsoft in 2003 was a precedent-setting action. Enforcement resources have been stable, with staff levels averaging about 217 for the last five years. The composition of the FTC caseload has shifted as its role evolved from education to enforcement. The top enforcement priority has been horizontal agreements, as measured by number of cases and magnitude of sanctions.

Sanctions for violations are modest by international comparison, although they are the highest provided by any administratively-enforced law in Chinese Taipei. The basic administrative fine ranges from TWD 50 000 up to TWD 25 million (USD 15 000 to USD 750 000), and can be doubled against repeat offences. Subject to the ceiling, the FTC has discretion to make the fine proportionate to the magnitude of the violation and other factors. The total fines in the LPG cartel case, the highest that the FTC ever imposed, were below the maximum that the statute would have authorised. Criminal prosecution is possible, but only for failure to comply with FTC orders. Criminal enforcement has been used mostly against misrepresentations.

The FTL provides several kinds of privately-initiated relief. Depending on the nature of the violation, the court may award multiple damages for intentional violations, up to treble damages. Over 100 private suits have been filed since 1999, including over 50 seeking multiple damages. None have led to a major success, though. ■

What if other laws restrict competition?

Where the FTL conflicts with another law, the competition law will apply where other laws “conflict with the legislative purposes” of the FTL. This phrase, added in 1999 to confer a stronger priority to the FTL, has not made a substantial difference in practice. Conflicts with other laws are most often resolved through consultation between the FTC and other authorities, a process that the FTC treats as advocacy.

Concerted actions by small businesses, even agreements about price, may be exempted where the intent is to improve their operational efficiency or strengthen their competitiveness. These actions must be shown to be beneficial to the economy as a whole and in the public interest, and they must receive prior approval from the FTC. Criteria for FTC approval include whether the agreed prices are “reasonable”.

Sector-specific rules govern acquisitions in cable TV and broadcasting. The FTC has long disagreed with the regulator, the Government Information Office (GIO), about how to deal with this industry. FTC guidelines for this sector deal with joint procurement and sale of programming and with vertical mergers. Virtually the only mergers that the FTC has rejected have been among cable TV systems and program providers.

Mergers of financial institutions may be accelerated for prudential reasons, subject to a competition proviso that is applied by the financial regulator. The banking market is fragmented, and the government is promoting consolidation among existing banks and facilities. This policy has stirred some controversy, although in the market conditions of Chinese Taipei combinations to reach that result would not necessarily impede effective competition.

In other areas of sectoral regulation, a ten-year effort has liberalised telecom markets. Regulatory functions will move from a Ministry to the newly-created National Communications Commission (NCC), which will be clearly outside the government, with a broader jurisdiction that is intended to accommodate better the convergence of technologies and services. Reform in electric power has been under discussion for 10 years, so far without results. Regulation of ocean shipping conferences leads to a *de facto* exemption from the FTL ban on restrictive agreements.

Government ownership still has some market-distorting effects, as government influence or preference is more likely to affect the decisions and strategies of enterprises in which the government is a major shareholder. For example, one of the two petroleum refining companies remains government controlled, and the government reportedly instructed it not to increase prices following increases in international crude oil prices. A firm is classified as “privatised” when the government’s shareholding is below 50%, regardless of the actual composition of the board, the presence of other substantial shareholders or the firm’s responsiveness to government interests in its operation.

Laws for several professions have required fee standards for practicing, to be set through the charter of the professional association. In some cases, the association must submit its proposal for fee standards for a regulator's approval. Since professionals cannot practice without being members of the association, the fee standards reduce or eliminate price competition. The FTC has been working to reform these constraints.

Review, analysis and reform advocacy have been among the FTC's most important functions. The statutory foundation for the FTC to advise about the impact of other policies is a provision that calls on the FTC to co-operate with other government bodies. There has been a sequence of regulatory review and reform programs. In April 2005 the Council on Economic Planning and Development endorsed in principle the establishment of a regular RIA system, which is under development within the government. ■

How can competition law and enforcement be improved?

- **Implement a leniency programme.**

Putting a sound leniency program in place should be a high priority. Experience elsewhere has shown that leniency tools are invaluable to penetrate clandestine cartels. The FTC has been working on legislation to authorise leniency. When that is adopted, it will design the details of the program. The FTC is also planning to propose clearer rules about joint ventures for research and development. These two aspects of enforcement concerning horizontal combinations might be planned as a legislative package, joining a measure to make enforcement tougher with another to reassure industry that the FTC will not attack efficient joint ventures.

- **Sanctions must be sufficient to deter.**

Substantial sanctions against cartels are closely related to leniency, which does not work unless the benefit of avoiding punishment is great enough. Even though the 1999 amendments increased the potential fines a hundredfold, fines against hard-core conduct are still low by international comparison. The statutory cap is an absolute level rather than a proportion of turnover or some other flexible measure, and thus the cap may prevent the FTC from imposing fines high enough to deter big firms from big violations.

- **Limit special treatment for SME price fixing.**

The provision for the FTC to approve price-fixing agreements among small businesses sends a confusing signal. The prohibition of hard-core horizontal cartels should be a bright-line rule. The exemption has only been granted once, so perhaps the provision is thought to be insignificant as a practical matter. The provision responds to a general policy goal of supporting small business, and having it on the books, subject to close FTC oversight, might reduce the temptation to seek broader statutory exclusions for the same kind of conduct.

- **Eliminate market share as a criterion for merger notification.**

A market share test is uncertain in administration, because market definition is sometimes unclear and often contested. Basing the reporting obligation on market share is not consistent with best practices. It would be better to base it solely on a less contested measure, such as assets or turnover.

- **Clarify the FTC's independence from political oversight.**

Each of the proposed changes in the structure of independent agencies like the FTC would be sound. The FTC chairman would no longer participate in Executive Yuan meetings, but being more independent would not prevent the FTC from expressing views about anticompetitive impacts of other government actions. Appeals from FTC decisions would be taken directly to the Administrative Court rather than to an appeals committee that is responsible to the Executive Yuan, underscoring that application of competition law is not a matter for political balancing of interests and policies. Commissioner appointments would be subject to consent by the legislature, which would broaden the base of support and “ownership” of competition policy, although the effects on institutional independence might be mixed. Terms would be staggered rather than consecutive, which would promote continuity.

- **Consider strengthening rights of private action further.**

The FTC could concentrate its resources more efficiently if it did not feel obliged to respond to every complaint. Private litigation appears more frequent in Chinese Taipei than in many other places, but still there are some measures that might make it even more attractive as an alternative to a no-cost complaint to the FTC. Chinese Taipei has already put in place some procedural innovations to aggregate consumer-level claims for consumer claims and securities cases. It would be straightforward to extend them to actions for similar kinds of claims under the FTL. Another measure that would tend to facilitate private litigation would be to increase the number of lawyers available to represent smaller parties by eliminating the quota on new lawyers. ■

**For further
information**

For further information about the OECD's work on competition law and policy, please visit our website at www.oecd.org/competition or contact us at dafcomp.contact@oecd.org.



For further reading

Country specific publications on Competition Law and Policy can be found on the Publications and Documentation page of our Web site
www.oecd.org/competition.

Annual Report on Competition Policy Developments in Chinese Taipei, 2003,
www.oecd.org/dataoecd/36/13/34720299.pdf.

OECD publications can be purchased from our online bookshop:
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