COUNTRY STUDIES

Chinese Taipei - Peer Review of Competition Law and Policy

2006

Introduction

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Overview

Related Topics

Competition Law and Policy in Chinese Taipei

2006

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OECD

COMPETITION LAW AND POLICY
IN CHINESE TAIPEI

-- 2006 --

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FOREWORD

This report, prepared by the Secretariat of the OECD was the basis for a peer review examination of Chinese Taipei at the OECD's Global Forum on Competition on 9 February, 2006. 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. 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. There is a risk, though, 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, a leniency programme should be adopted, and the special treatment for agreements among small businesses should be limited. 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.

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COMPETITION LAW AND POLICY IN CHINESE TAIPEI

EXECUTIVE SUMMARY

Competition law in Chinese Taipei was 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. The competition legislation, the Fair Trade Law (FTL), follows mainstream practice to cover the basic competition problems of restrictive agreements, monopolies and anti-competitive mergers. The clear statutory basis for concentrating enforcement attention on horizontal collusion is particularly notable.

Including rules about market deception and unfair practices connects the competition law to consumer interests, while also embodying an approach to competition that acknowledges the importance of fair treatment. Respecting that cultural tradition might facilitate the use of rules that are based on a conception of competition in terms of efficiency. But there is a risk that concern about fairness can lead to interventions to correct differences in bargaining power, which could dampen competition rather than promote it.

The Fair Trade Commission (FTC), although formally a part of the Executive Yuan, operates with substantial independence in fact. Its decisions are not subject to revision or reversal based on effects on other policy interests. Some general reforms are in process that would clarify the independence of the FTC and of some other bodies, such as the new communications regulator and the central bank, that should be clearly outside the government decision process.

Much of the FTC's workload is about deceptive and unfair marketing practices. In overseeing competition, the FTC has concentrated on horizontal restraints. Its strongest enforcement action to date was a 2003 decision against cartels in the LPG industry that resulted in fines of TWD 344 million (about USD 10 million). To improve enforcement still further against hard-core cartels, the FTC should implement a leniency programme. The special treatment for price fixing and other agreements among small and medium sized businesses, which sends a confusing signal about the importance of preventing price-fixing, should be eliminated. Sanctions must be sufficient to deter; the cap on fines is low by international comparison. Some other aspects of the enforcement tool-kit should be revised. Most importantly, the merger notification obligation should depend only on reasonably objective criteria, and not on market share. Rights of private action could be strengthened by employing the competition area some procedural innovations that are already used in Chinese Taipei for dealing with consumer claims.

SUMMARY (cont'd)

The FTC has been cautious in applying the FTL to problems of monopoly, which are most often due to enterprises with some connection to the government. The FTC has typically preferred negotiation over enforcement, although it has taken stronger measures about the former petroleum monopoly, imposing a fine of TWD 5 million for refusing to supply a new distributor of jet fuel. The FTC's effort to fine a patent licensing pool that refused to negotiate lower royalties was reversed on appeal, though, and the case is still pending

The most visible regulatory reforms have been in telecoms, particularly in establishing a competitive market for mobile service; however, an independent regulator is just now being set up. The government retains more of a direct interest in the economy than would be implied by the extent of "privatisation", since that label simply means the government shareholding is below 50 per cent. Government holdings can still be substantial enough to affect strategies and policies in ways that could have implications for market competition. FTC vigilance about the risk of cross-subsidy or other distortion remains warranted

1. Foundations

The institutions that support enterprise-based competition in the economy of Chinese Taipei share values of Confucian traditions of governance. Thus the legal tools and approaches of the competition policy system show some parallels with those of Japan and Korea, as well as the influence of other competition law traditions, especially Germany. And they offer a contrast with others in the region that share these traditions but that have been slower to adopt comprehensive competition laws.

1.1 Context and history

The economy of Chinese Taipei is comparatively prosperous, resilient and outward-looking. Measured in terms of overall GDP on PPP basis, it is smaller than South Korea and Indonesia and somewhat smaller than Australia, but somewhat larger than Thailand and substantially larger than Malaysia. The population of 22.5 million is less than half that of South Korea. Chinese Taipei is now relatively well-off, with GDP per capita in 2004 estimated at USD 25 300 (in PPP terms). Chinese Taipei is a major investor throughout Southeast Asia. Its trade surplus is substantial, and foreign reserves are the world's third largest. Financial conservativism and entrepreneurial strength shielded Chinese Taipei from the Asian financial crisis in 1998. The economy did go into recession in 2001, the first year of negative growth it ever recorded,

due to a combination of global economic downturn, problems in policy coordination and bad debts in the banking system. Unemployment also reached record levels. But output recovered in 2002 and strong growth resumed in 2003-04. The economy is concentrated now in services (66 per cent). Manufacturing (32 per cent) is mostly high-tech computer hardware, where Chinese Taipei ranks third in the world (after the US and Japan). Agriculture accounts for only 2 per cent of GDP, down from 32 per cent in the early 1950s. Manufacturing is stagnating, as production moves elsewhere, including to the mainland. One exception to that trend is the manufacture of machinery and equipment that is destined for those offshore manufacturing facilities. Another exception is TFT/LCD screens, where Chinese Taipei remains the leading producer (followed closely by Korea); this sector gets government technological support.

Development has moved toward technology and services. The pre-1990 economy was characterised by export promotion and domestic protection. Domestic heavy industries were dominated by government enterprises and firms owned by business groups. The system of "authoritarian capitalism" had produced one of the largest government-owned sectors in a market economy. Government-owned enterprises accounted for 57 per cent of industrial production in 1952; in 1986, that was down to 20 per cent. The oil shocks of the 1970s led to some restructuring, while the government retained monopolies in petroleum, electricity, gas, water, steel, railways, shipbuilding, postal service, telecoms, tobacco, liquor and banking. Two investment houses connected to the governing Nationalist (KMT) party controlled some 50 enterprises. About 100 conglomerates, with about 700-800 firms, accounted for 34 per cent of GNP but less than 5 per cent of the workforce, being concentrated in high tech and manufacturing generally. Although Chinese Taipei suppressed domestic competition early in its development history, its market has been more open than many of its neighbours. Chinese Taipei was liberalising trade in goods by the 1980s, and in services by the 1990s.

The economy of Chinese Taipei is increasingly integrating with the mainland. Chinese Taipei has made substantial investments in mainland China, despite the lack of direct trade links. China has overtaken the United States to become Chinese Taipei's largest export market. Chinese Taipei joined the WTO in 2002 as a separate customs territory, shortly after mainland China. With services now dominating its economy, Chinese Taipei has supported WTO moves to liberalise trade in services, principally telecommunications, transport, finance and computer services.

Approaches to law and regulation draw from several sources. In the Chinese tradition, law is understood principally as an instrument for control,

and the courts were part of the bureaucracy. Chinese reformers in the first part of the 20th century drafted a constitution and adopted statutes and codes that borrowed from European models, principally German. The link to German civil code traditions remains strong. Many legal scholars in Chinese Taipei studied in Germany, and the laws tend to follow the German approach. The academics who were commissioned to draft the competition law included some from the Law Faculty of National Taiwan University who followed German legal concepts. By contrast, most academic economists have studied in the United States.

Policy attention to market competition has a long lineage, although the usual tendency was to suppress it. Rules against monopolisation and price-fixing can be found as far back as the code of the Tang dynasty. But central control has also been prominent. Cultural distrust of traders led readily to reliance on price controls and state regulation or ownership of resources and production. The private sector joined in anti-competitive restraints. Guilds were enforcing price fixing agreements at the turn of the 20th century. As late as the mid-1980s, courts in Chinese Taipei were entertaining private competition suits in the form of complaints that competitors were cheating on cartel agreements. Meanwhile the government commonly intervened to protect the interests of enterprises.

Liberalisation was a product of the 1980s, and competition law was part of that project. The president's policy address in 1984 announced a new economic policy approach, of internationalisation, liberalisation and institutionalisation. This came during a period of economic crisis, which included a run on a financial institution and the resignations of the Ministers of Finance and of Economic Affairs. A Committee for Economic Reform, convened by Premier Yu, recommended in 1985 a collection of fundamental changes which would lead to liberalising the domestic economy, privatising many government owned firms, reducing tariffs and non-tariff barriers, permitting foreign banks and liberalising capital flows. One of the changes would be a modern, comprehensive competition to replace the Price Supervisory Board, which had tried to co-ordinate supply and demand by fiat.

A draft Fair Trade Law was sent to the legislature in 1986. The Ministry of Economic Affairs had enlisted a group of academics to prepare it. The government said the law was needed to constrain monopolies and cartels that had been unleashed by liberalisation and to control unfair practices. In addition, there was international pressure about intellectual property issues, particularly from the United States. Trading partners wanted Chinese Taipei to adopt laws about unfair competition problems such as misappropriation or misuse of

trademarks. They were less concerned about whether Chinese Taipei adopted an antitrust law.

The controversial competition law was enacted only after years of debate. One reason for the delay was that momentum for economic reforms stalled in 1985, when attention turned to political reform. Although the competition law was proposed by the government, the new approach would threaten monopolies, public and private, that were connected with patronage. The opposition welcomed the proposal as a tool to break up channels of incumbent power. Issues in the debate were the need for a competition law at all, the effect of merger control on efficiency and the accountability of an independent enforcer. Proponents stressed that enforcement against unfair practices such as misrepresentation and pyramid sales schemes would be much more aggressive than against anticompetitive restraints. To encourage passage, the government agreed to a one-year moratorium on enforcement.

The treatment of the enforcer's independence evolved as the political situation changed. The law was drafted while martial law was still in force. Following the style of legislation from that era, it grants broad discretion to the enforcement body. Originally, that was to have been a unit within the Ministry of Economic Affairs, so application would have been subject to government control. But the law was enacted after the martial law decree was lifted. In the new circumstances, it was necessary to elevate the enforcer to an independent status. The enforcer would report to the Executive Yuan directly, not to the Ministry of Economic Affairs that had sponsored it. The Fair Trade Law (FTL) was finally enacted in 1991. The Organic Statute providing for the organisation of the Fair Trade Commission (FTC) to administer the law was passed 13 January 1992, and the FTL became effective a month later, 4 February 1992.

The FTL has been amended several times since then, to improve efficiency and strengthen enforcement. Amendments in 1999 replaced criminal penalties for monopolisation and concerted action with administrative fines, and eliminated the register of dominant enterprises. Amendments in 2000 dealt with administrative practices. Amendments in 2002 revised the merger notification system and improved procedural transparency. Further changes are likely, as the FTC is developing a leniency program, which will require a legislative basis. The FTC is also preparing a clarification of the law about horizontal agreements to remove restrictions that might reduce the incentive for innovation of research and development joint ventures.

1.2 Policy goals

The law prescribes multiple goals for competition policy. These are to maintain trading order, protect consumers' interests, ensure fair competition and promote economic stability and prosperity. (Article 1)[1] Unusually, the term "competition" is specifically defined, in terms of rivalry for transaction opportunities by enterprises offering better prices or superior quantities, quality, service and other conditions. (Article 5) Official statements about enforcement policies and legislative objectives generally repeat these same elements, without further explanation of their relationship or priority. For example, the objectives given for revising the merger control regime do not indicate a policy direction, other than enabling firms to remain competitive and efficient while preserving market competition.

Fair competition appears to be the dominant objective. The definition of competition implies that the law is more concerned about process and fairness than about welfare effects. The prominence of process issues, of order and stability, in the statement of goals reinforces that impression. Emphasis on fairness would be consistent with tradition. In the trade-off between efficiency and fairness, Chinese culture has favoured fairness. A century ago, the reforming vision of Sun Yat-sen was a fair and affluent society based on moderate socialism. General policy goals in basic law, which were drafted in the 1940s, sound sceptical of the benefits of economic competition, calling for "equalisation of land ownership and restriction of private capital in order to attain well-balanced efficiency in national wealth and people's livelihood."[2] In modern practice, the FTC's decisions and its attention to guidelines about the conduct of large distributors show a concern about fairness in bargaining relationships.

The law's reference to protecting consumers' interests was added in the legislature. In explaining what this is taken to mean, the FTC again emphasises process over welfare measures. It is not understood in terms of the personal interests of individual consumers. Rather, consumers' interests are protected to the extent that consumers have an opportunity to deal in open and free markets, benefiting from increased efficiency and innovation.

Economic stability and prosperity are seen as the ultimate objectives of competition policy. This suggests that considerations of overall economic performance would be unlikely to determine a decision in a particular case, but that in setting overall priorities and assessing the impact of applying the law, these would be the most important criteria.

2. Substantive issues: content of the competition law

The law's different tools represent several jurisprudential approaches. Some practices are prohibited, subject to defined exemptions. Other practices are prohibited only when they are "improper," implying that the law is concerned about controlling abuse. Criminal prosecution is still possible, although this is now a backup rather than the primary means of redressing infringements. And the FTC has issued extensive guidelines, which resemble regulatory codes of practice.

"Enterprise" is a defined term that determines the scope of the law's application. It refers to a company, partnership, sole proprietor, trade association, or in general "any other person or organisation engaging in transactions through the provision of goods or services." (Article 2) The first part of the definition, based on form, sweeps in conventional forms of commercial business operation. The specific mention of "trade associations" ensures that these common occasions for misconduct do not escape coverage because of technicalities. The second part of the definition, based more on function, could extend coverage to some government commercial operations if they can be treated as an organisation or a legal person. This coverage would only apply to their activity as providers of goods and services, most likely in competition with non-government entities.

Separate parts of the law address monopolistic practices, merger control, horizontal agreements and unfair competition. The substantive sections conclude with a general catch-all provision, which prohibits "any deceptive or obviously unfair conduct" that could "affect trading order". (Article 24) The structural distinction between the treatment of horizontal and vertical practices is not perfect, because some of the rules appearing under the heading of unfair competition, which are mostly about vertical restraints, also cover conduct with horizontal effects.

2.1 Horizontal agreements

Horizontal co-ordination is prohibited unless the FTC grants a specific exemption. (Article 14) The term "concerted action", which is the statutory basis for the prohibition, is defined as conduct through contract, agreement or any other form of mutual understanding to jointly determine the price of goods or services or to limit the terms of quantity, technology, products, facilities, trading counterparts or trading and thereby restrict each other's business activities. (Article 7) Amendments to the law in 2002 made it clear that the ban

applies only to horizontal arrangements, "at the same production and/or marketing stage," and they formalised the criteria and process for exemption.

A *per se* rule is not applied to horizontal price fixing.[3] Instead, the FTC's decisions accept some burden of showing that the prohibited conduct had, or could have had, a market effect. The definition of concerted action supports a *de minimis* interpretation, by requiring that it "would affect the market function of production or trade in goods or supply and demand of services".[4] (Article 7) This characterisation in terms of the scale of the impact does not necessarily imply a requirement that the FTC show an effect that was anti-competitive, although in practice that appears to be what the FTC's decisions try to do.

The definition's reference to "any other form of mutual understanding" is intended to be sure that the prohibition is not limited by contract law technicalities. It means a meeting of minds, whether legally binding or not, which would in effect lead to joint actions. Typical examples include resolutions of trade associations and so-called gentlemen's agreements, to the extent that they have only have moral, economic or societal binding force. It could also cover tacit understandings reached by conscious communication and expression of intent. Inconsistency between this characterisation and the civil code's understandings about the formalities of contract, as well as the economic ambiguity of tacit collusion, make this difficult to apply. It is not supposed to cover pure oligopoly interdependence or conscious parallelism. The FTC is usually cautious here, proceeding under Article 19 or Article 24 where the evidence about the strength and nature of the agreement is unclear. But the FTC fined the two petroleum firms under Article 14 for co-ordinating price changes through public announcements about their intentions, in what looks like oligopoly price leadership.

CONCERTED ACTION OR CONSCIOUS PARALLELISM?

The FTC opened an investigation against the only two gasoline suppliers in Chinese Taipei, to examine their pattern of simultaneously adjusting their wholesale prices of 92 and 95 unleaded gas and premium diesel oil. Chinese Petroleum Corp. ("CPC") had long been the monopoly provider. Formosa Petrochemical Corp. ("FPCC") entered the market in September 2000. (Esso tried to enter, but exited after less than two years.) CPC and FPCC account for about 70 per cent and 30 per cent, respectively, of the market for gasoline and diesel fuels.

CONCERTED ACTION OR CONSCIOUS PARALLELISM? (cont'd)

CPC and FPCC simultaneously adjusted the wholesale price within the same range at least 20 times. Typically, the initiating party would announce in the media a decision to change prices. If the rival announced it would follow, then the two competitors would make the same changes, at the same time. If the rival announced it would not, then the initiating party would withdraw or amend its earlier announcement.

The FTC contended (among other things) that this public exchange of views and intentions was more than parallel action, but instead constituted a "meeting of minds" and thus a prohibited "concerted action." The FTC argues that disclosing sensitive market information, exchanging business strategies or directly communicating business intelligence can be construed as reaching a "meeting of minds." Here, this was inferred from indirect evidence, which the FTC describes as inducement, economic benefits, the timing or the degree of price increase, the possibility of substituting different actions, the frequency, duration and concentration of the actions and unanimity. The FTC admits that simple uniform pricing would not necessarily be unlawful. But it contends that here the two enterprises did not just reach the same price levels, but they communicated their intent in advance and their actions led to simultaneous moves, which retail operators typically followed too.

The FTC had sent a letter to the two firms warning them not to use advance announcements to change wholesale prices jointly, but instead to make price decisions in accordance with their own operating conditions. For disregarding the warning and for concerted action in violation of Article 14(1), the FTC in October 2004 imposed an administrative fine of TWD 6.5 million on each firm. The parties appealed, and the matter was returned to the FTC for a justification of the fine. In July 2005, the FTC imposed the identical fines again, reciting the considerations that are set out in its sentencing guides, of motive, objective, expected improper benefits, degree of damage to trading order, duration, benefits obtained, scale of business, business operations, revenue and market position, previously correction of or warning against the conduct, type and number of previous violations, interval of violations, punishments incurred, conduct after the violation, cooperation during the investigation and other factors. The decision is again on appeal.

Source : FTC

Trade associations are defined as "enterprises" and thus they are fully subject to the FTL. (Article 2(3)) The FTC Policy Statement about trade associations identifies conduct that is likely to violate the law and lists several specific infractions, most of them taken from rules about unfair competition. Trade associations are warned against restricting firms from entry or exit, encouraging discrimination or other unfair acts and international agreements or contracts including improper or unfair terms or restrictions, as well as imposing excessive standardisation, dividing markets, denying needed approvals, limiting

capacity, setting quotas, co-ordinating down-time, joint purchasing, setting common terms, and outright price fixing. The Policy Statement notes that associations may collect and disseminate information and support their members' capacity building. But for self-regulatory codes about standards or unfair competition and certainly for anything listed in the prohibited practices, they should apply first to the FTC for approval.

The FTL lists exceptions that can be permitted, by the FTC after prior application, if they are found in the particular case to be beneficial to the economy as a whole and are in the interests of the public at large. These seven categories of exemption include uniform specifications (to reduce costs, improve quality or increase efficiency), joint research and development, specialisation and rationalisation of operations, export cartels, import agreements, crisis cartels and agreements among SMEs to improve efficiency and strengthen competitiveness. (Article 14) The FTC can impose conditions and time limits when it approves an exemption, and it can revoke or amend its approval if conditions change or the parties violate the conditions of the approval. Exemptions are generally limited to 3 years. The FTC does not issue negative clearances, and the FTL does not authorise block exemption regulations.

The FTC spends comparatively little time or resources processing applications for exemption, which only involve horizontal co-operation. There have only been about 10 applications per year on average, and only 2 in 2004. Most applications have been approved. In October 2005, there were only 11 approved agreements in effect. The largest single category of approved agreements is for importation. Others involve credit card processing and airline ticket voucher exchange. In total, about 10 applications have been rejected and 11 were partially approved. The FTC has revoked approval where the parties to a permitted import agreement had also agreed on limiting domestic competition. Decisions about applications for exemption must be reached within three months; this deadline can be extended once. (Article 14) The FTC is considering how to define a clearer safe harbour for joint ventures for research and development.

Crisis cartel applications are rare. Joint action to limit output or stem price cuts in an economic downturn would be permitted only if conditions in the market have driven the market price below "average production cost" and firms are threatened with exit or overproduction. It is not clear whether "production cost" means variable cost or total cost. In any event, there have been few requests for exemption on this basis. The FTC rejected an application for a capacity-reduction agreement among fibre manufacturers in 1998, on the

grounds that conditions were not irretrievable and the market was likely to recover.

Some prominent enforcement actions have been taken against formally organised cartels. The most important cases involved market division and price fixing for liquefied petroleum gas (LPG), which is the principal household fuel in Chinese Taipei. Production and wholesale distribution had been separate legal monopolies until the 1990s, and retail distribution and pricing were also tightly controlled. When the market was liberalised and new producers and importers entered, some levels of the industry evidently tried to maintain old habits. The FTC investigated retailer complaints about refusals to supply and found two cartels at work, in the historically separate northern and southern markets. The cartels met occasionally to reach agreements to control competition between regions, assign bottlers to distributors, set retail prices, manage "stabilisation" funds to pay off potential defectors and implement price-cutting or refusal-to-deal punishment against those who violated the assignments. The FTC estimates the cartel's overcharges in the northern market to have totalled over TWD 1 billion. The FTC's 2003 decision imposed fines totalling TWD 344 million. In December 2005, the FTC fined 21 cement manufacturers and distributors a total of TWD 210 million, after a four-year investigation into industry agreements to fix prices, divide markets, limit capacity and discourage imports. The industry had adopted these strategies to counter the threat that new suppliers would enter the region after the 1997 Asian financial crisis.

The FTC has uncovered and sanctioned other, smaller-scale agreements about price and market division. Enforcement against classic price fixing cartels had been limited at first. Early cases involved the price of eggs and interest rates among credit co-operatives. A study of the early experience by FTC staff found that sanctions had been imposed more frequently than expected in seemingly competitive markets, and that SMEs and less sophisticated businesses were more likely to draw sanctions. There is more pressure on profits in such markets, so the participants have a greater incentive to limit competition. In addition, where there are many participants there is a greater need for a formal structure to reach and police an agreement. Smaller and less sophisticated businesses are less likely to get legal advice about compliance with the FTL, and thus they reach explicit agreements which make is easier for the FTC to prove the violations. Regional markets and those with oligopoly features were also more likely to draw enforcement attention.

Few FTC actions have challenged construction industry bid-rigging, although this is a common setting for competition law enforcement elsewhere.

Bid rigging in government procurement is a crime under other legislation, and the prosecutors have actively pursued collusion that involved government projects.

Sanctions against horizontal collusion are modest by international comparison. They are nonetheless the highest provided by any administratively-enforced law in Chinese Taipei. Fines under the FTL are subject to a statutory ceiling, of TWD 25 million (which can be doubled for repeat offences). Below that ceiling, the FTC has some discretion to make the fine proportionate to the magnitude of the violation and other factors. The FTC has not used all of the discretion the law makes available to it. The total fines in the LPG cartel case, by far the highest that the FTC had ever imposed, were below the maximum that the statute would have authorised.

2.2 Vertical agreements

Rules about vertical restraints are in the section of the FTL dealing with unfair competition. Resale price maintenance, whether of maximum or minimum levels, is prohibited *per se*. (Article 18) The ban applies only to setting resale prices of goods, not of services. An explicit agreement or order setting the resale price would obviously violate the law. In addition, FTC decisions show that resale price maintenance can be inferred from a practice of penalising discounters.[5]

Other vertical restraints, which receive rule-of-reason treatment, are catalogued separately. (Article 19) The practices listed there are prohibited where they lessen competition or impede fair competition. The sub-parts use different terms to describe the "rule of reason" showing. Inducing a refusal to deal depends on a "purpose" to injure the firm that is cut off (Article 19(1)), discrimination is prohibited where it is "without justification" (Article 19(2)) and other conduct is forbidden when done "improperly" or through "improper means". Showing a net anti-competitive effect is a prerequisite to finding liability for tying, exclusive dealing, territory and customer restraints, discrimination and refusal to deal. The FTC considers intent, purpose, the parties' position in the market, market structure, product characteristics and the impact on competition. A market power screen of 10 per cent is used as an internal rule of thumb in determining whether a vertical restraint is likely to impede competition. The 10 per cent test is neither a safe harbour nor a positive presumption. The FTC will also consider whether competition is actually reduced, whether inter-brand competition is sufficient, and whether there are barriers to entry and hence potential competition.

The FTC has issued only a few decisions about vertical restraints. The FTC has struck down protection clauses that barred vendors to a major department store, which had a market share of just under 30 per cent in the greater Taipei area, from selling the same products to other stores within 2 kilometres. In 2004, it applied similar reasoning against a department store with a local market share of about 33 per cent that threatened to cut off boutique tenants if they also set up in a competitor 600 meters away. An exclusive dealing case about licensing *karaoke* tunes apparently turned on the fact that the outlets involved accounted for about 60 per cent of the licensing in the market – and that the respondent had been warned after a previous similar violation. Guidelines are used heavily to explain the legal treatment of vertical relationships and thus to encourage compliance without formal enforcement action. There are general guidelines about the "likelihood of impeding fair competition" under Article 19 and about trade associations and distribution, as well as specific guidelines about trade practices between department stores and suppliers of branded products, among other topics.

2.3 Dominance-monopolisation

Entities that are "monopolistic enterprises" may not prevent others from competing "by unfair means," may not set, maintain or change prices "improperly," may not demand preferential treatment "without justification" and may not otherwise abuse their market power. (Article 10) A "monopolistic enterprise" is defined as one that faces no competition or that has a dominant position to enable it to exclude competition in a relevant market. (Article 5). The market share criteria defining a safe harbour are now in the statute. An enterprise is not considered "monopolistic" if its market share is below 50 per cent, the top two firms together have a share below 67 per cent, and the top three firms, below 75 per cent. No firm with a share under 10 per cent or annual sales below TWD 1 billion is considered a monopolistic enterprise. But these thresholds might not apply if there are legal or other constraints on establishing such enterprises or on trade in their products such that the ability of others to compete is impeded. (Article 5-1) That is, in the presence of regulatory entry barriers, the FTC can ignore these statutory safe-harbours. These thresholds, which had been in the FTC's enforcement regulation, were put into the statute because the Administrative Procedure Act required that important, legally binding standards should be in statutes rather than enforcement rules. In form, the criteria are negative presumptions, but in practice they are also applied as positive presumptions, so a firm with a share over 50 per cent would have the burden of showing that because of market factors such as lack of entry barriers it nonetheless did not enjoy a dominant position.[6]

Two or more firms can be monopolistic enterprises if they do not compete on price and otherwise meet the definition's terms. (Article 5) The statute appears to permit this finding to be based simply on the fact that firms are not competing, that is, in situations of oligopoly co-ordination and interdependence. The FTC has not applied this part of the law to such a situation. Decisions applying Article 10 have generally involved situations of single-firm dominance.

There are no provisions for exemption to defer to other policies or to balance anti-competitive effects against claims of efficiency. Industrial policies could not justify infringing conduct, since statutory monopolies are no longer considered an appropriate vehicle for promoting development. Actual or likely market effect determines liability, not formal classification, and assessing effects necessarily requires making judgments. Some balancing of restrictive effects against ordinary commercial considerations is implied by the qualifiers that appear in each of the defined items in Article 10, that the allegedly abusive conduct be "improper," "without justification" or "unfair".

The FTC has rarely applied the general prohibition against abuse. In enforcement, it more often uses the specific prohibitions in Article 10 and the rules about unfair conduct from Article 19. Particularly when the law was relatively new, the FTC often resorted to negotiation rather than confrontation. The FTC relied on negotiation to get the water company to change its rules about liability of new customers for old customers' unpaid bills and to stop monopolising meter installation, to get the stock exchange to open up its contract for data transmission and to get the telecoms directorate to improve its billing and call verification. The first enforcement actions against dominant firm abuse came after the change of administration in 2000. The FTC imposed a fine of TWD 5 million on the historic monopoly petroleum company for refusing to supply a new distributor of jet fuel. The FTC had also warned against trying to enter long-term contracts to supply retail service stations just before the import market was opened to competition.

Claims of predatory exclusion are treated cautiously. The FTC describes this as a sacrifice of short-term profit to drive equally efficient competitors from the market or block their entry into it, protected by an entry barrier that would enable the predator to gain excessive profits in the long term. Setting price below average variable cost is normally taken to show predatory intent, since that is the point at which a rational profit-maximising firm without predatory designs would shut down. But when fixed or common costs are major portion of the total cost, another reference might be used, such as long run incremental cost. It is necessary to show both the intent to impede or exclude competitors

and the capacity to recover losses by raising prices after that effort succeeds. Several different markets might be relevant, because cross-subsidy among operations could support a predatory strategy. The FTC does not treat limit pricing or loss-leader strategies as predatory. The FTC has not yet found liability for predatory exclusion under Article 10. A claim of predatory pricing in mobile telecoms was rejected because the dominant firm's prices were above fully allocated costs and hence above long run incremental cost; moreover, the pricing strategy did not incur a profit sacrifice in the short run. The FTC has invoked other parts of the FTL in analogous situations, though. For example, it treated a bid of virtually 0 for a contract to supply vaccine to the Department of Health as an "improper incentive" prohibited by Article 19(3).

Abuse of a monopolist's control over an essential facility can violate Article 10. The FTC endorses and explains the elements of this doctrine in its guidelines about business practices for the "4C" industries (telecommunications, cable TV, computer networks and e-commerce). The "facility" must be controlled by a monopolist, so there is no alternative provider. Actual or would-be competitors in the markets that depend on it must be unable to duplicate it in an "economically reasonable way" in a "short period of time", yet they must have access to it in order to compete with the monopoly that controls it. In some aspects of telecommunications, sector regulation assures access to such bottlenecks. The FTL has been applied to claims in industries where there is no such sector regulation in place. An example is electronic data interchange about cargo clearance, which was originally set up as a government monopoly and later corporatised. The historic monopolist refused to share its standard with a new entrant, refused to interconnect with it, set its fees too high, interrupted service and used deterrents such as loyalty discounts. The FTC levied a fine of TWD 1.5 million against the loyalty discount scheme.

Exploitative high prices have not yet been found to violate Article 10. But when the FTC sanctioned the gas company for using a meter that produced excessive minimum-usage fees, this was in effect a finding that the monopoly was charging excessive prices. Moreover, 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. The settlement agreement simply commits Microsoft to comply with the FTL, to provide that its licence contracts will be subject to the law of Chinese Taipei, to withdraw corporate guidelines about exclusive distribution outlets, to engage in steps to promote customer relations and to discuss and consider sharing source code. There was no complaint and there is little indication in the settlement itself of a particular theory of liability. But the

FTC's announcement highlights the side agreement, that Microsoft would reduce its prices by an average of 27 per cent.

The FTC's important decision about CD-R patents also reacted to high prices. In 2002, the FTC imposed fines totalling TWD 14 million on a patent-licensing pool set up by Philips, Sony and Taiyo Yunden, covering over 100 patents for making CD-R products. Chinese Taipei was the major manufacturer of CD-R products, with a 70 per cent 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 per cent of net sales, but as the price of the product dropped by more than 90 per cent, the alternative fixed minimum (of JPY .10) meant that the effective rate was about 18 per cent. 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.[7] 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.[8]

2.4 Mergers

Merger control has rarely been applied. The substantive criterion is in effect a public interest standard: whether overall economic benefit of the merger outweighs the disadvantages resulted from competition restraint. (Article 12) Setting a notification requirement based on market share implies that merger control is concerned with dominance, although the generality of the language would also support a "substantial lessening of competition" standard. In assessing the overall economic benefit, the FTC considers scale economies of production, management or finance, technological improvements and other factors such as reduced prices, benefits from integration and failing-firm issues. Effect on competition is an important element in the balance. In determining whether there is a restraint on competition, the FTC is concerned about creation of a monopoly, imposition of entry barriers, change in concentration, decrease in the number of competitors, similarities in the products and degree of market openness.

The technical definition of “merger” is based on function as well as legal formality. It includes a true merger-combination and a partial holding (or acquiring) of more than one-third of the shares or capital of another firm. But the definition and thus the law’s control and notification requirements also apply to joint operation, assignment or lease and even to direct or indirect control or appointment or discharge of personnel.[9] (Article 6) Establishing a new joint venture is also covered now by merger control, since the FTC in August 2002 revoked an explanation letter that had evidently tried to correct for the over-breadth of the pre-2002 reporting burden.

The amendments in 2002 changed merger control to a pre-notification regime, eliminating the need to await formal FTC approval. If the FTC takes no action within 30 days after notification, the parties can proceed. The FTC can extend that period for 30 days, by written decision. If parties merge without notifying or fail to comply with conditions, the FTC can impose a number of sanctions, from removing individuals to divestiture or dissolution. Revising the thresholds in 2002 sharply reduced the number of notifications. Between 2002 and 2005, 177 transactions were notified, and only one received a further investigation. The 2002 amendments also extended the merger control system to the Financial Holding Company Act, which was administered then by the Bureau of Monetary Affairs and is now enforced by the independent Financial Supervisory Commission. If the establishment of a financial holding company meets the definition of a merger under the FTL, then a notification for a merger of enterprises is to be made with the FTC.

Both market share and turnover are criteria in the notification thresholds. The FTC sets the turnover thresholds. The threshold that generally applies now is annual sales over TWD 10 billion for one party and over TWD 1 billion for the other party; for financial enterprises, those figures are TWD 20 billion and TWD 1 billion.[10] Regardless of these turnover thresholds, a transaction must be notified if it will lead to a post-merger share over 33 per cent or if one of the parties already has a share over 25 per cent. The FTC has fined companies for not filing because they had mistaken their market shares. The FTC considers the market share threshold to be useful, despite its admitted conceptual and practical difficulties, because it enables the FTC to prevent formation of monopolies in the cable TV market.

With the FTC taking very few decisions against mergers, the costs of its merger control regime appeared disproportionate. The original system requiring review and approval of thousands of transactions created a serious resource drain as well as a burden on reporting businesses. After the shift in 2002 to a notification regime with higher thresholds, the resource commitment is now

low. The FTC receives and reviews about 25 filings per year. Of the 6 135 merger notifications to the FTC from 1992 to 2004, the FTC only rejected 4, each involving proposed combinations that would have threatened dominance in local markets on Chinese Taipei. Three of them were in the cable TV industry. In addition, the FTC advised the monopoly petroleum supplier during the run-up to liberalisation in 1997 that it would reject any effort to acquire retail facilities or sites or any enter any joint ventures or new companies to set up gas stations. The firm wanted to anticipate the imminent loss of its supply monopoly by expanding its 50 per cent retail market share. The FTC announced draft Merger Guidelines in December 2005, planning to hold hearings on them in April 2006 and to issue them in final form by the end of the year.

2.5 Unfair competition

Unfair competition claims, particularly about false advertising, are a major part of the FTC workload. The section of the FTL about unfair competition also includes antitrust subjects such as resale price maintenance, boycotts and discrimination, as well as prohibitions against coercion, inducement or other means of forcing others to do business or refrain from price competition, acquiring confidential information about production or sales or other trade secrets and limiting counterparts' trading activities. Separate sections deal with passing-off and related trademark issues, such as counterfeiting distinctive characteristics, false advertising, harming reputation, multi-level sales schemes and other deceptive or obviously unfair conduct. The FTC separates responsibilities for the subjects by assigning cases about trademark, misrepresentation and multi-level sales to the "unfair competition" Department 3, while most other issues under this part of the law are dealt with by the antitrust sections.

The FTC shares jurisdiction over aspects of advertising and labelling with other laws and agencies. The Trademark Act also deals with passing off; however, because it is not clear how the Trademark Act covers product appearance, the FTC often handles this issue. Other authorities that also regulate advertising include the Ministry of Education for supplementary education, the Council of Labour Affairs for employment, the Financial Supervisory Commission for securities firms and insurance, the Ministry of Finance for wine and spirits, the Council of Agriculture for pesticides and the Department of Health for food and dairy, pharmaceutical, cosmetic and health food products. An upcoming change would require applying the strongest administrative sanction where more than one was potentially available.[11] Because the FTL contains the strongest sanction, this change could increase the FTC's workload.

Injured competitors can bring civil suits about unfair competitive practices. The FTC encourages resort to other avenues for resolving disputes. These methods include industry-sponsored mediation through trade associations. Where the FTC detects widespread abuse in an industry, its first step is often to contact the relevant trade association with a "disposition letter", requesting it to notify its members about the problem and admonish them to self-discipline. On some occasions, the associations have adopted the FTC's position in their own rules (which may in turn be approved by their regulatory overseers). Consumer protection complaints go to local officers, while advertising issues come to the FTC.

Other aspects of unfair competition deal with bargaining power and economic dependence. This borderline area between concepts of competition and fairness remains controversial, in Chinese Taipei as elsewhere. The FTC guideline on large scale distribution businesses demonstrates this concern. This guideline applies to hypermarkets, convenience stores, department stores, supermarkets and consumer cooperatives. It calls on them to "correct" such actions as taking advantage of their superior market positions, collecting improper surcharges from suppliers and requiring suppliers to offer them their most favourable prices. Other issues in this guideline are transparent terms for removing products from display, methods for determining responsibility for warehouse out-of-stock, calculation of penalties for shortage of supply and verification of "membership" for large-volume retailers with "defined customers." The FTC's department store-supplier guides are another example of attention to economic dependence. They neither require nor even mention any showing of market power. Rather, these are rules about fair treatment within a contract relationship, in which the outlet store or supplier evidently has developed a relationship of reliance on the department store's policies.

The catch-all general provision, Article 24, has been used extensively, often with a consumer-protection emphasis. The FTC relies upon this Article where the evidence is not sufficient to demonstrate a violation of more specific statutory prohibitions. It has been applied to conduct that appears to fit within more specific prohibitions, such as demands for shelf-space payments and most-favoured customer treatment and refusal to deal. Applications to unfair competition include passing off, plagiarism, intimidation over IP rights, free riding and operating without necessary licences. Information asymmetry is the basis for its applications to sales promotions, consumer contracts, real estate commissions and financial contracts. The FTC has used Article 24 in nearly 800 cases. The only provision that has been used more often is Article 21, about misleading advertising, with over 900. Courts are challenging excessive reliance

on Article 24 on the grounds that it is too vague and thus leaves too much to FTC discretion.

The FTC's 2002 *Principles Governing the Application of Article 24* do not limit FTC discretion very much. They try to emphasise the separate significance of the requirement in Article 24 that a practice be sufficient to "affect trading order". The *Principles* imply that this requirement could mean that the practice must "affect competition". The requirement is evidently intended to limit the application of this catch-all provision so that it does not duplicate other laws. It serves as a kind of "public interest" or *de minimis* test, to steer private disputes toward resolution by other means such as contract law or consumer protection rules. Separate sections of the *Principles* explain how Article 24 would apply to some conduct that other laws or other parts of the FTL itself would not control or prohibit. The FTC would invoke Article 24 against an enterprise whose "relatively advantageous market position *vis-à-vis* its consumers is so endemic to the industry that consumers' interest is harmed due to over-reliance or the lack of alternatives". The FTC would apply it to abuses of claims about intellectual property rights that amount to unfair competition but not abuse of monopoly power. According to the *Principles*, the term "trading order" has moral as well as economic dimensions, referring to market conditions that conform with "social ethics" of society as well as with efficient "business competition ethics" and the "spirit of free and fair competition." Although "sufficient to affect" implies a *de minimis* limit based on the number of victims and the magnitude of the threatened or actual harm, it appears to set a sliding scale. The FTC would apply Article 24 to conduct aimed at a single organisation or group if it is sufficiently deceptive or patently unfair. Examples given to suggest what would be unfair include free riding on others' work or reputation, comparative advertising intended to create an unfair overall impression, claims of intellectual property infringement made without sufficient confirmation and notification and coercion of trading counterparts. Taking advantage of information asymmetry or relative "trading advantage" can also violate Article 24. A notable example given is 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." This may be intended to describe taking advantage of consumer vulnerability in *force majeure* shortages, but the language can be read to support intervention against any alleged market failure.

2.6 Consumer protection

A separate law and agency are responsible for consumer protection. The Consumer Protection Law, adopted in 1994, was promoted by the legislature

and the Consumer Protection Foundation, an NGO. It was not an initiative of the Executive Yuan. The law provides for strict liability for defective goods and services, regulates unconscionable contract terms and provides for punitive damages and class action procedures. The principal remedy for individual complaints is through a civil lawsuit. The Consumer Protection Commission can intervene and make collective or class litigation processes available where the parties are on an unequal footing.

The Consumer Protection Commission is responsible for policy co-ordination, not enforcement. It thus has a small staff. It is chaired by the vice premier, and the FTC Chair is a member. There has been discussion since the late 1990s about combining the Consumer Protection Commission with the FTC, an idea that the ruling party, the Democratic Progressive Party (DPP) revived in 2002. But combining the two bodies is no longer under consideration. The FTC believes that their enforcement methods and policy goals are too dissimilar, and it evidently does not want to take on responsibility for small-scale complaints. There is no formal co-operation procedure between the FTC and consumer NGOs, although the FTC may be in contact with them about particular issues.

Nonetheless, the FTC applies the FTL with a consumer-policy purpose to provide general solutions to market situations of asymmetric information. Examples are the FTC guidelines about terms in consumer bank loan contracts and its "policy requirements" for the banking industry specifying consumer disclosures about minimum balance rules. These guidelines are motivated by Article 24 and a principle of transparency.

3. Institutional issues: enforcement structure and practices

Competition law is applied though an administrative process. The FTC relies upon guidance and education as much as on formal litigation. Indeed, the intensity of formal enforcement action appears to be declining in recent years. The FTC is formally within the executive, although it is considered independent. Pending reforms would make its independence clearer.

3.1 Competition policy institutions

The FTC is a ministerial level agency, responsible for policy and legislation as well as enforcement. (Article 9) There are nine full-time Commissioners, including the chair and vice-chair. They are nominated by the premier and appointed by the president for 3 year, renewable terms. The terms of the Commissioners are simultaneous. Thus, the literature refers to the "first"

and "second" Commissions and so on; the current Commission is the fifth. Reappointments are not uncommon.

The FTC staff is organised both by sector and by function. The separate departments deal with trade, services and agriculture, manufacturing and network industries, unfair competition, planning, legal affairs and administrative support. Nearly all of the staff is in Taipei, but some are stationed in the Cabinet Southern Region Associated Services Centre, to deal with regional competition matters. The Commissioners may also have responsibilities and assignments about topics such as international affairs and legal issues.

Commissioners are assigned to supervise cases by random selection. The staff takes the initiative, though, in responding to complaints and developing investigations. The Commissioners' involvement in developing cases varies. The assigned Commissioner will review the staff report before it goes to the Commission for decision. The Commissioner may in effect exercise a veto by declining to move the staff recommendation. For a big case, more than one Commissioner may be assigned to prepare it and present it to the Commissioners' meeting. Commissioners meet weekly to decide matters. Action is by majority vote of a quorum of the membership, which in turn is one more than half of the total. Thus in theory a decision could be reached by the vote of 3 Commissioners. But Commission meetings and decisions involve the whole membership, and Commission does not reach decisions in panels or committees.

Whether the competition agency should be 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, although the Ministry's Price Supervisory Board supplied the first FTC staff. By law, Commissioners must be well experienced in law, economics, finance, tax, accounting or management. Most of the appointees in the FTC's first decade had doctorates in law, economics or management and academic or professional experience. Professors who move to the FTC do not change their status very much, because the national universities are close to being civil service units. Staying away too long, however, may force a career choice, because faculty slots may not be held open. The FTC may not be partisan. The Commissioners "shall be beyond party affiliations", and no more than half of them may be members of the same political party. (Organic Statute, Article 11, 13) Still, when the former opposition took control of the government, changes in the appointment pattern were noted.

The FTL and the Organic Statute contain recitals supporting the FTC's independence. FTC actions are not to be scrutinised by the Executive Yuan or other agencies. The FTC chair and other officials appear before the legislators to explain their programs and proposals, and the FTC budget is reviewed and approved by Parliament. The FTC has no fee income and does not retain fines. Providing for the FTC to act as a body reduces pressure on any individual Commissioner. But to recognise the value of independent consideration, the FTC has kept track of dissents. Since 2002, dissenting opinions have been published, at first in the official gazette and now posted on the FTC's website.[12]

The FTC has direct access to policy-making, since it is part of the Executive Yuan, which is the highest administrative organisation provided by the constitution. Constitutionally, all agencies are subordinate to the Executive Yuan. The Executive Yuan is headed by the Premier, who is the chairman of the Ministers' meeting. The FTC chairman, who has ministerial status, attends that meeting to present the FTC's views on matters affecting competition and regulation. The position does not compromise the FTC's decision independence, because the Executive Yuan does not vote.

The FTC's independent status may be clarified by a pending reform, which would also affect other agencies. The Legislative Yuan has passed 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. In this new status, appeals from FTC decisions would be taken directly to the Administrative Court, rather than an appeals committee responsible to the Executive Yuan. The FTC chairman would no longer participate in Executive Yuan meetings. Commissioner appointments would be subject to consent by the legislature. The Commission would probably shrink, to 5-7 members, and terms would be staggered rather than consecutive. The proposed changes would probably not significantly affect the FTC's budget process.

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. Decisions are also published in English in the FTC's *Cases and Materials* series; however, these volumes appear with a 2-year delay. At the outset, the FTC made it a priority to educate the business community and the public about the new competition regime. By 2001, it had convened over 1000 workshops with trade

associations and other groups. A series of 36- or 72-hour lecture programs graduated 38 "classes" totalling over 2 033 managerial-level employees by November 2005.

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. It provides that "guidance shall be conducted only within the statutory powers" of the FTC and that "the power to conduct administrative guidance may not be abused". Where conduct is likely to violate the FTL, or "may affect the trading order" even though it is not in violation of the law, the FTC may issue a warning to the industry or the firm involved. The purpose of that guidance is to assist and admonish, in order to encourage correct conduct or discourage misconduct. Guidance has no compulsory legal effect, and thus guidance should avoid using the kind of compulsory or restrictive language that is typically used in laws or orders. Instead, guidance should use phrases such as "it is suggested", "please note", "please be sure to" and "it is advisable". It must be written and specific, giving reasons. A warning to an industry is to be sent to the relevant trade association and posted on the FTC's website. The FTC will not undertake enforcement action based solely on a party's rejection of administrative guidance.

GUIDELINES AND GUIDANCE FROM THE FAIR TRADE COMMISSION

FTC guidance often takes the form of a bulletin aimed at a particular industry, collecting the parts of the law that are likely to come up there and pointing out how they apply to situations or practices in that industry. The principal examples of guidance targeted to industries involve large-scale distribution, banking, computer training programs, gas safety equipment and construction. Such guidance does not by itself have mandatory force. Guidelines, by contrast, may establish rules and procedures that are binding on the FTC itself.

The scope of the FTC's use of such instruments is suggested by subjects of the items posted on the FTC's website:

Additional Fees Charged by Distribution Business
Application of Article 24 of the Fair Trade Act [deceptive or unfair conduct in general]

GUIDELINES AND GUIDANCE FROM THE FAIR TRADE COMMISSION (cont'd)

Business Practices of Financial Industry
Business Practices, Cross-Ownership and Joint Provision among 4C Enterprises [cable TV, communications, computers and e-commerce]
Cable Television-Related Industry
Cases Governed by Article 20 of the Fair Trade Act [trademark misuse]
Cases Governed by Article 21 of the Fair Trade Act [misrepresentation]
Cases Handled by Administrative Guidance
Cases Involving Foreign Elements
Consideration of the Likelihood of Impeding Fair Competition
Criteria for Applying the Fair Trade Act to Private Law Acts by the Executive Government Entities
Directions for Enterprises Filing for Approval of Concerted Action
Directions for Enterprises Filing for Merger
Disclosure of Information by Franchisers
Distribution Industry
Extraterritorial Mergers
Foreign Resort Membership Card Sales Practices
Guidelines for Oral Arguments Before the Fair Trade Commission
Illegal Commissioning of Household Production
Information Transparency and Improper Marketing Practices by Weight Loss and Body Care Businesses
Multi-level Sales
Penalty fees for Prepayment of Housing Loans
Principles for Approving Exemptions for Concerted Pricing by Small or Medium-sized Enterprises
Promotion by Means of Gifts and Prices
Public Hearings
Real Estate Sales Practices Regulations - Regulations Governing Housing Advertisements
Technology Licensing Arrangements
Trade Associations
Trade Practices Between Department Stores and Branded Products Suppliers
Warning Letters for Infringement on Copyright, Trademark and Patent Rights

Source: FTC website

3.2 Enforcement processes and powers

The FTC can initiate investigations in response to complaints from enterprises, customers or consumers about alleged violations of the FTL. It can open an investigation *ex officio* for a matter that involves the “public interest”.

In addition, the FTC decides about some restrictive agreements in response to applications by the parties for approval of exemptions. Although the FTC has the authority to look into competitive conditions in an industry, it cannot use compulsory process to get information in such investigations, and thus the FTC has not yet used this power. A complaint must be accompanied by a detailed explanation and supporting evidence.

The FTC's principal tool to investigate and obtain further information is requiring submission of documents and information by the parties, third parties and other individuals and agencies. The FTC also has powers to perform on-site inspections of respondent enterprises and to obtain statements from respondents and related third parties. The sanction for refusal to comply with the FTC's investigative processes is an administrative fine of between TWD 20 000 and TWD 250 000. Repeated refusal or failure is subject to further fines, double those amounts, for each refusal. (Article 43) Only the prosecutor has truly coercive powers of investigation, though, and those powers are available only in criminal cases against repeat offenders.

Parties and related persons have the right to review and copy the FTC's files and materials in order to make claims and defences. (Article 27-1) An FTC regulation governs access to materials and files, setting out qualifications and rules about time, method, fees and scope. The law and the regulation do not permit access to the FTC's internal working drafts and documents. Access is also denied to material that is protected by law and material for which the provider has justifiably claimed confidentiality, or where access is likely to infringe third-party rights or seriously obstruct performance of official duties.

The FTC meetings at which matters are decided have not usually been fully public. Attendees could include industry experts, competitors, consumer groups, government agencies with related jurisdiction and academics. The Commissioner in charge of the matter chaired what amounted to a roundtable discussion. Complainants and respondents would not necessarily be present, although they might be invited in order to provide further explanations. In this setting, enterprises may not have felt the opportunity for defence was adequate.

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 issued its guidelines for implementing the Administrative Procedure Act in 2002 and amended them in 2005. The FTC used the new formal hearing process for the first time in an October 2005 cement cartel proceeding. No other agency has used this formal process yet. If the FTC holds such a public hearing, disappointed parties do not need to

petition the Appeal and Petition Committee of the Executive Yuan, but may appeal against the FTC action directly in the administrative court.

The FTC may enter an administrative settlement, rather than impose sanctions, in the event that the administrative authority is unable to ascertain complete factual or legal information during an investigation, and in order to achieve its administrative objectives and resolve a dispute. This procedure too is novel and somewhat controversial. The FTC's settlement with Microsoft in 2003 was a precedent-setting action.

Remedies for substantive infringement include fines and orders to cease and correct conduct. The basic administrative fine ranges from a minimum of TWD 50 000 up to TWD 25 million. The fine can be doubled against repeat offences. (Article 41) The same remedies and fines could apply to all kinds of substantive violations. Notably, the statute makes no distinction between the treatment of hard-core cartels and other violations of specific prohibitions or "deceptive or obviously unfair conduct" under Article 24. The FTC enforcement regulation specifies factors to be considered in assessing the fine. These include the violator's motive, purpose and expected gain from the violation, the harm to market order, the duration of the harm, the violator's actual benefit from the violation, the size and market position of the violator, any previous enforcement or warnings about the type of violation, the violator's previous record of compliance with the law, and the violator's "remorse" and co-operation with the FTC investigation. (Enforcement Rules, Article 36)

Implementing a leniency program will require amending the FTL. The FTC has prepared amendments that would establish the basic legal authority for the FTC to negotiate with parties about fines and to reduce a fine to 0 in exchange for providing sufficiently useful information. The details of a leniency program would be contained in FTC regulations after that legislation is adopted. There is precedent for leniency in the criminal law of Chinese Taipei, which provides for clemency in exchange for co-operation with the prosecution. The issue is still under discussion in the FTC, and the proposed amendments have not yet been forwarded for consideration.

3.3 Appeal and judicial review

FTC decisions can be appealed on the merits to the Appeal and Petition Committee of the Executive Yuan. This body is the usual avenue of appeal from administrative decisions. Its chair is the general counsel of the Executive Yuan, but most of its members are outside experts and academics in administrative and constitutional law. Its role is not to provide a means for overriding agency

decisions on policy grounds, but to assure compliance with administrative standards. Its decisions can be appealed further to the Administrative Court. The Appeal and Petition Committee has tended to support the FTC more than the courts have. Since 2000, the FTC lost only 32 out of 785 appeals to the Committee, about 4 per cent, while in the Administrative Court and Higher Administrative Court, the FTC lost 23 out of 251, about 9 per cent. Most appeals are by respondents seeking reversal of the FTC's decision finding liability, but about one-fourth are objections to the FTC's decision not to take action.

Recent legislation about administrative processes created new appeal possibilities. Under the Administrative Procedure Act, an appeal from an agency adjudication following a formal public hearing may not be taken to the Appeal and Petition Committee. Instead, the appeal must be taken to the Superior Administrative Court, a new first-instance court that was created by the Administrative Litigation Law of 2000 as an avenue for judicial review. This court, which began with about 19 judges and now has 28, has gone through a challenging adjustment phase, receiving about 20 000 filings in its first year of operation. Adding this new level and the opportunity for review led to substantial delays just in getting a judge assigned to a matter. That time required to get a case started is down now to about a month. Administrative courts have the power to enter judgments, but they rarely do so. Instead, if they disagree with the administrative agency's decision they remand for further proceedings. The greater prospect of sceptical judicial review has reportedly made a difference to agency practices, encouraging agencies to produce more detailed reasoning to support their findings and decisions.

3.4 Other means of applying competition law

Criminal prosecution is possible, but only for failure to comply with FTC cease and desist orders. (Articles 35, 36) Potential sanctions are imprisonment for up to 3 years and a fine of up to TWD 100 million for violating orders about monopolisation, concerted action or trademark violations, and up to 2 years and TWD 50 million for violating orders about unfair practices.[13] The 1999 amendments to the FTL relegated the criminal sanction to this back-up role, in order to make enforcement more credible. The threat of criminal penalties against a wide range of violations of the FTL was obviously overbroad. The previous two-track enforcement system exposed some differences in approach and evidentiary standards among the FTC, the prosecutors and the courts. Courts would sometimes impose a 6 month sentence, but this could be commuted by paying a fine. The threat nonetheless had some deterrent effect; at least, the FTC reports that early prosecutions taught trade associations to

eliminate the post of "president," who would be the obvious target of criminal prosecution. Limiting criminal actions to violations of FTC orders also responded to business concerns about abuse of private individuals' right to bring criminal prosecutions, which are possible under Chinese Taipei's criminal procedures.

Criminal enforcement power has been used often, despite the complications, but mostly against misrepresentations. Early on, the FTC recommended some prosecutions against egregious price fixing and bid rigging. There were several criminal cases before 2000, many resulting in convictions (about 20 out of 25). Even after the law was revised in 1999, there have been 170 cases. This total covers includes enforcement of FTL orders of all kinds.[14] In the most recent reporting periods, imprisonment and criminal fines have been imposed only against multi-level sales frauds. Since 1999, there have been no FTL prosecutions against cartel recidivists.

Prosecutors often target bid rigging with another law, the Government Procurement Act. A contract, agreement or other meeting of the minds that causes a supplier not to tender or compete over price, with the intent to adversely affect the price of an award or gain illegal benefits, can be punished by imprisonment from 6 months up to 5 years and a fine of up to TWD 1 million.[15] Since 1999, the public prosecutors have brought 89 cases against anti-competitive bid rigging for public projects, or nearly 15 cases per year.[16]

The FTL provides several kinds of privately-initiated relief. Private litigants can sue in court to obtain a cease and desist order or preventive injunction against the threat of a violation (Article 30) and to recover damages (Article 31). Depending on the nature of the violation, the court may award multiple damages for intentional violations, up to treble damages. Where the violator profits from the violation, the damages can be assessed based on that gain. Private actions are said to be less attractive than complaints to the FTC, because of costs. But the statute of limitations for private suits is generous. Suit must be filed within 2 years after the plaintiff learns of the claim, but no more than 10 years after the infringing conduct. Despite the costs, and the fact that the FTC generally will respond to all complaints (even though it claims to have discretion not to pursue claims that raise no public interest issues), over 100 private suits have been filed since 1999, including over 50 seeking multiple damages. Because all parts of the FTL can be the subject of a private suit, these cases are at least as likely to deal with unfair competition claims, such as passing off or counterfeiting, as with restrictive agreements or monopoly abuses. None have led to a major success; at least, no important cases seeking or

awarding either injunctive relief or damages, single or multiple, have been reported.

Other laws in Chinese Taipei include innovative processes to encourage private recoveries. Consumer protection law provides for *parens patriae* and class-recovery actions by recognised consumer groups, including treble damages in the case of wilful violations, with reduction or waiver of some of the costs of suit.[17] There have been about a half dozen consumer class actions for damages. The most notorious suit resulted in an award of TWD 200 million against a builder for defective construction that was unable to withstand an earthquake. Three consumer NGOs have been approved by the Consumer Protection Commission to bring these representative actions. Each action must be approved by the consumer ombudsman, who is a local government official. These approved consumer protection groups or the ombudsman can also sue to obtain injunctions. In addition, the securities regulator has encouraged recoveries through private-party litigation. It supported a non-profit foundation, that was set up in the 1990s to protect investors, soliciting claims to “opt in” to its cases, piggybacking on public prosecutions with private claims for damages in a process that waives filing fees.

Metropolitan, country and city governments have a limited role, although most of their responsibilities were eliminated in the 2000 amendments. They are defined in the FTL as “competent authorities” (Article 9); however, the most important powers are reserved to the “Central Competent Authority,” which is the FTC. There is a system of regular contacts and semi-annual reporting among the FTC and these levels of government, which support the FTC with advocacy and public relations. The FTC can call on local governments for assistance, but it does so only for regular inspections of the operations of multi-level sales businesses.

3.5 International issues

The FTL applies to foreign enterprises to the extent that their conduct affects market competition in Chinese Taipei, irrespective of whether those foreign enterprises have representatives, subsidiaries or branches there or of the status of the relationship between Chinese Taipei and their home governments. A foreign juristic person or organisation may file a complaint with the FTC, provided that the country from which this foreign person or organisation comes authorises similar actions there by individuals or enterprises from Chinese Taipei.

A high proportion of the FTC's cases involving foreign firms are international mergers. The FTC has adopted guidelines about its treatment of these transactions. To reduce the burden of requiring insignificant filings, jurisdiction is based on whether it could be reasonably predicted that the merger would directly and substantially have an impact on Chinese Taipei. It is not clear that the FTC has considered international markets in its analysis, but it has noted the effect of foreign trade on the definition of domestic markets. For example, when the elimination of tariffs made imported cement competitive and it was imported to the point that had traditionally marked the boundary between northern and southern markets, the FTC decided the whole island was one market.

The FTC has no role in application of anti-dumping laws. In theory, the FTC can envision taking action against abuses of that process, to raise prices, restrict imports or intimidate competitors. In 1997, the FTC requested as a condition for a merger that the parties refrain from anti-dumping claims that would have kept out cyclical imports from Korea and Japan. The parties have in fact refrained from such actions.

The FTC has only a limited ability to undertake enforcement against international cartels. The FTC has gotten some evidence in several cases about international collusion. But the FTC concentrates on finding better proof of agreement about domestic sales, in the absence of realistic prospects of applying its law to non-resident international or foreign firms.

The FTC has signed a trilateral anti-trust cooperation agreement with the enforcement bodies of Australia and New Zealand as well as a cooperation agreement with France's *Conseil de la concurrence*. It has had a co-operation arrangement with the ACCC since 1996. The co-operation arrangement with the ACCC was invoked in a 1998 investigation, when the ACCC queried the FTC about possible enforcement actions a multi-level sales operation. To help facilitate regional collaboration, the FTC also maintains the APEC Competition Law and Policy Database. In announcing its recent decision imposing fines on a cartel in the cement industry, the FTC called attention to the international scope of this cartel and emphasised its willingness to share information and work co-operatively with other enforcers.

3.6 Resources and priorities

Resources, in staff and budget, have been stable for some time. Staff levels have averaged about 217 for the last five years. The budget level declined slightly, from about TWD 370 million in 2001 to about TWD 355 million in

2004, as the FTC has borne its share of general fiscal tightening. About a quarter of the FTC staff have an academic background in law, about one-sixth in economics, and another one-sixth in business administration or accounting. Most of the staff (85 per cent) have at least a bachelor's degree.

Table 1. Trends in Competition Policy Resources

	Person-years[1]	Budget (TWD MM)
2004	211	355.1
2003	223	353.7
2002	221	361.0
2001	219	370.0
2000	210	570.0[2]

1. As of the end of the year; the budget is the amount set at the beginning of the year.
2. The fiscal year changed in 2001; budget expenditure for 2000 includes the second half of 1999.
Source : Annual Performance Report of the FTC, 2000-2004; Budget Report of the FTC

The composition of the FTC caseload has shifted as its role evolved from education to enforcement. Successful early publicity about the law attracted a huge number of complaints, which overloaded resources at first. For its first ten years, the FTC averaged well over 2 000 matters per year, or one for every 10 000 inhabitants. The total number of cases dropped sharply in 2002 because of the change in the merger notification threshold, reducing the number of merger filings by 97 per cent (from 1 089 to only 33). Responsibilities for administering rules about multi-level sales are not reflected in the table about trends in competition policy actions. These multi-level sales cases occupy a significant share of the FTC's attention, accounting for 19 per cent of dispositions. Over these 5 years, the issue has declined in importance, probably because the public is more aware of the nature of these Ponzi schemes.

The top enforcement priority has been horizontal agreements, as measured by number of cases and magnitude of sanctions. Most fines have been imposed in Article 14 cases about concerted actions. The major action, clearly dominating the statistics, was the 2003 LPG case resulting in total fines over TWD 300 million. In most other years too, the total sanctions against horizontal agreements has outweighed those against other violations. Overall, the trend in enforcement intensity has been downward since 2000. For every basic substantive category, in 2004 the number of matters in which the FTC sought or obtained sanctions and the total sanctions imposed were at or near their lowest points of the period.

Table 2. Trends in Competition Policy Actions

		horizontal agreements	vertical agreements[3]	abuse of dominance	mergers	unfair competition[5]
2004: matters opened[1]	1 194					
sanctions or orders sought[2]		16	16	5	24	227
orders or sanctions imposed[2]		6	4		21	82
total sanctions imposed[4]		19.5	4.8		2.9	15.2
2003: matters opened[1]	1 156					
sanctions or orders sought[2]		38	25	8	33	273
orders or sanctions imposed[2]		24	12		32	133
total sanctions imposed[4]		352.6	10.5		3.5	20.7
2002: matters opened[1]	1 367					
sanctions or orders sought[2]		30	17	13	120	318
orders or sanctions imposed[2]		15	4	4	119	145
total sanctions imposed[4]		10.4	3.3	22.0	3.0	33.7
2001: matters opened[1]	2 511					
sanctions or orders sought[2]		38	18	15	1 090	323
orders or sanctions imposed[2]		17	3	1	1 088	155
total sanctions imposed[4]		155.3	.9	14.0	.4	74.4

		horizontal agreements	vertical agreements[3]	abuse of dominance	mergers	unfair competition[5]
2000: matters opened[1]	2 609					
sanctions or orders sought[2]		47	48	15	1 184	395
orders or sanctions imposed[2]		30	9	2	1 182	170
total sanctions imposed[4]		87.7	7.9	10.0	5.2	35.9

1. Includes cases upon complaint, FTC self-initiated investigations, applications for concerted actions and merger applications and notifications.
2. Includes approvals of applications for concerted actions, approvals of merger applications, non-prohibited merger notifications and prohibited merger notifications.
3. Cases involving Articles 18 and 19 of the Fair Trade Law.
4. TWD 1 000 000.
5. Cases involving Articles 20, 21, 22 and 24 of the Fair Trade Law.

Source : 2004 Statistical Yearbook of the Fair Trade Commission.

4. Limits of competition policy: exclusions and sectoral regimes

Where the FTL conflicts with another law, the FTC claims a strong presumption in favour of the competition law. The competition law will apply where other laws "conflict with the legislative purposes" of the FTL. (Article 46) This phrase was added in 1999 at the initiative of the legislature. Before that change, the presumption went the other way, that the FTL "shall not apply to any act performed by an enterprise in accordance with other laws." The FTC asserts that the change now gives the FTL the status of a "fundamental economic law." That is, actions of enterprises that are subject to competition law but that are in response to or affected by other economic policies should still comply with the FTL. According to the FTC, other applicable laws can have precedence only if the basis of the other laws is both set out expressly and also does not conflict with the legislative purposes of the Fair Trade Act. The previous FTL language had simply stated the common principle that general laws such as the FTL would defer to specific ones in the event of inconsistency. The amendment was thought to confer a stronger priority to the FTL.

But the change has not made a substantial difference in practice. Conflicts are most often resolved through consultation between the FTC and other authorities, a process that the FTC treats as advocacy. (Article 9(2)) A big early project was identifying and correcting a host of arrangements that excluded particular industries from FTL coverage. After the 1999 amendment tried to

strengthen Article 46, the FTC in 2001 launched another round of reviewing laws and regulations on the books, followed by working with the other ministries to correct them. The first and only time the FTC tried to take advantage of the strengthened Article 46, however, through an enforcement action against anti-competitive conduct that was authorised by another part of the government, the Appeal and Petition Committee ruled that the FTL was inapplicable because the conduct was authorised by other law. Thus despite the ostensibly stronger presumption in favour of the FTL, the FTC is considering reverting to advocacy rather than enforcement confrontation where laws conflict with the purposes of the FTL.

Controversy over whether the FTL would cover government-related enterprises was resolved by a compromise transition period, during which conduct could continue if it was specifically authorised at an appropriately high level. Examples include supply of diesel fuel to the railroad and supply of sugar to the military and to honeybee farmers. The transition period ended in 1996. Pressure from consumers, media and the private sector helped keep special deals for government-related enterprises under control. Still, due in part to the four-year transition period and lingering consideration of public service obligations at stake, the FTC took few enforcement actions against such firms during its first decade. Any competition issues arising from conduct of government-owned enterprises are now fully subject to the FTL, but controversies are still typically resolved by consultation rather than enforcement. In telecoms, the FTC deferred to the Ministry about how the government-owned incumbent priced innovative services when the market was opened up. In LPG, the FTC consulted with the two government-related authorities that had jointly monopolised the market to develop administrative guidelines that would avoid violations in the future. When petroleum product markets were liberalised, the FTC tried to set up a "fair competition mechanism and standards" in response to complaints that China Petroleum Corporation was discriminating in selling aviation fuel and otherwise abusing its dominant position, although in that situation the FTC also imposed a fine.

Government ownership 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 per cent, 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. Firms that are not

yet privatised even by that definition include China Petroleum Corporation, Aerospace Industrial Development Corporation, China Shipbuilding Corporation, Tang Zong Iron Works Company, Taiwan Power Company, Taiwan Sugar Company, Taiwan Water Supply Corporation, Taiwan Tobacco and Liquor Company, Bank of Taiwan, Land Bank of Taiwan, Central Trust of China, Taiwan Railway Administration (which is not yet corporatised), Chunghwa Post Company, Veterans Pharmaceutical Plant, Lung-Chi Chemical Plant, and RSEA Engineering Corporation. The government holds significant, although less than majority, shares in other firms. The government's shareholding in Chungwha Telecom Company, for example, is still substantial, although it fell below 50 per cent after an auction of shares and issuance of ADRs in August 2005.

Commercial activities by entities that are part of the government may not be covered if those entities are not "enterprises". On the one hand, the FTC has asserted that the FTL applies to government agencies that engage in business, such as the Directorate-General of Telecommunications when the predecessor of Chung Hua Telecom was the Ministry's business arm. On the other hand, the FTC has been cautious, finding some monopoly operations by government offices to be beyond its reach, but not others. Printing schoolbooks was exempt, but reselling books printed by others was not. The emerging legal test for the application of the FTL is functional: whether the government entity is performing a government function or is engaged in a market transaction. The tests are not completely coherent. If an entity is not an enterprise because of its structure, even if it engages in a commercial act, it is difficult to see how it could become one based on its function. The FTC is evidently more comfortable applying the FTL where competition is distorted in a situation in which the government agency is a purchaser. In that situation, the object of FTC action may be the seller, even though it was the agency's conduct that led to the competition problem, for example by writing a bid specification that eliminated competition.

Conduct in connection with the exercise of intellectual property rights under the Copyright Act, Trademark Act, or Patent Act is not covered by the FTL, unless it is "improper". (Article 45) The FTC has explained the relationships in its 2001 *Rules for Review of Technology Licensing Cases*. The rules explicitly do not presume that patents or know-how confer market power, and they acknowledge the formal exemption from the FTL for proper conduct in connection with the exercise of intellectual property rights. But an arrangement that oversteps the scope of proper exercise of those rights, even if formally proper, will be reviewed to determine whether it restrains competition. The Rules call for examining effects not only in the market for goods and services

directly subject to the intellectual property, but also in markets for technology that is substitutable for that technology and in innovation markets related to the goods or services. The Rules describe the kinds of stipulations in licences that would not typically amount to restraints or unfair competition, those that normally would violate the law and those that are more indeterminate. In addition, FTC *Guidelines for the Reviewing of Cases Involving Enterprises Issuing Warning Letters for Infringement on Copyright, Trademark, and Patent Rights* advise against abusive claims to competitors about alleged infringements of copyrights, trademarks, or patents. Complaints of discrimination and monopolisation against a copyright royalty association were rejected in a 2004 decision, because the Copyright Act provided for other means of resolving disputes, such as mediation (and demands for fees within the regulated range, or an appeal for criminal enforcement against infringement, could not be regarded as abuse of the rights).

Concerted actions by small businesses, even agreements about price, may be exempted from the Article 14 prohibition, 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. The FTC guideline about these SME price agreements sets out two reasons for finding them to be beneficial to the public interest and the economy, despite dampening price competition. The first is transaction stability. The guideline contends that resources might be wasted on inquiries and shopping for small-scale but sporadically purchased goods or services, that consumers who cannot inquire might be taken advantage of and that coordination will make suppliers more efficient. The second is information transparency, which can lessen the social costs of transactions and help create trading opportunities. The guidelines recommend that firms work through their trade associations, to negotiate with the trade associations of their trading counterparts a consensus on reasonable concerted prices, and propose a self-disciplinary code and procedures that are consistent with the spirit of the FTL. Criteria for FTC approval include whether the agreed prices are "reasonable." The FTC's process may include public hearings or seminars with academics, specialists, organisations representing the trading counterparts, other relevant organisations, trade associations, target industries, and social and administrative authorities. The FTC may require conditions, restrictions or undertakings. Approved prices would generally be ceilings, not mandatory uniform prices; however, for "special transactions" where fixed prices involve both buying and selling prices, or where the principal concern is information transparency, the FTC could approve setting both the maximum and minimum prices and valuation methods.[18]

The potential scope of the small-business price-fixing exemption is determined by criteria in the general statute about development of small and medium sized enterprises. An enterprise qualifies for that status if its paid-in capital is below NTD 80 million for manufacturers, or its sales revenues are below NTD 100 million in the previous year for services providers. Alternative criteria that agencies may apply, depending on the nature of the business for which they provide guidance, are having fewer than 200 regular employees for manufacturers and fewer than 50 for services providers. The exemption has only been applied once. In 1997, the FTC permitted tire repair shops to agree on a maximum price to charge commercial vehicles for highway emergency service, on the grounds that it would reduce search costs, prevent opportunistic exploitation and provide an impetus for product or service providers to compete.

4.1 Ocean shipping

Regulation of ocean shipping conferences leads to a *de facto* exemption from the FTL ban on restrictive agreements. The FTC investigated complaints it received after the Pan-Pacific Stability Association and the Canadian Pan-Pacific Stability Association raised rates in 2003. These rate hikes had been duly filed with the regulatory authority, the Ministry of Transportation and Communications, pursuant to Articles 39, 40 and 25 of the Shipping Law. The FTC considered the legislative purposes of the Shipping Law, the characteristics of the shipping industry, the effects of concerted operation on efficiency, past policies of the FTC towards these organisations and the fact that exemptions for similar agreements were common internationally. Applying the rule in Article 46, the FTC gave precedence to the Shipping Law, while urging the Ministry to strengthen its supervision.

4.2 Telecoms

A ten-year effort has liberalised telecom markets. The Telecommunications Act of 1996, amended in 2005, has further promoted liberalisation while trying to curb abuse of dominance. The law has been administered by the Directorate General of Telecommunications (DGT) under the Ministry of Transportation and Communications, which was the historic monopoly. The first steps were tentative, keeping the successor to the historic monopoly, Chunghwa Telecom Co. (CHT), a government-owned enterprise and limiting competitive investment in facilities-based providers. A second phase began in 1998 with tendering for the fixed network and fair competition rules for telecoms. The evolution of the ensuing legislation and regulations has been complex. In general, the telecoms law now permits more foreign direct ownership of fixed line businesses, provides for incentive price regulation

through flexible price caps, requires accounting separation and bans cross-subsidies and anticompetitive conduct. The legislative barrier to privatisation of CHT has been removed, and the government no longer holds a majority; however, the government is still the largest shareholder, and it also retains a golden share to control or prevent CHT from taking some actions.

DGT, through a staff of about 90 in its General Planning and Public Telecommunications departments, has been in charge of liberalising the market and establishing an environment for fair competition. Its *ex ante* rules and powers address accounting separation for facilities-based systems, designation and funding of a facilities-based universal service provider, number portability and equal access, price-cap tariffs for facilities-based services, co-location for facilities-based carriers and operator choice. DGT rules about fair competition set a presumption for finding significant market power at a market share of 25 per cent.[19] Its *ex post* oversight powers define prohibited dominant-firm conduct, setting out a list of nine industry-specific infractions such as obstructing an interconnection request, refusing to explain fee calculation and rejecting without due cause requests to lease components or circuits or to negotiate co-location. There is also a general catch-all prohibition of abusing dominant status or engaging in other acts of unfair competition. The FTC retains jurisdiction in this sector, but will typically defer to DGT as long as its actions support competition and are consistent with the purposes of the FTL. DGT and the FTC have on occasion dealt with the same case, and they reached consistent results.

Despite the cautious approach of the original legislation, mobile operation became competitive. CHT remains the leader in this sector, but it is now only one among three nearly equal-sized national providers. Disputes about interconnection costs slowed down the process. These were reported resolved more effectively by the Telecommunication Tariff Schedule Advisory Council, rather than through DGT's Dispute Resolution Committee.

There are plans to move DGT's functions to the new National Communications Commission (NCC). New entrants have not always been confident that DGT is sufficiently independent, since the government still holds nearly half of the shares of CHT. NCC will be clearly outside the government. Its broader jurisdiction is intended to accommodate better the convergence of technologies and services. Under discussion since 1998, the legislation creating the NCC finally became effective in November 2005. The NCC will be an independent agency with 13 full-time Commissioners, serving three-year terms. The NCC is expected to be in operation in early 2006, once the nominees have been confirmed. In the meantime, DGT has been proceeding with changes in the

telecoms statute or regulations, including number portability to mobile phones and fixed lines, requiring CHT to adopt a wholesale tariff for resellers of its services and ruling about voice-over-internet service. One key change would be to raise the threshold for asymmetric regulation to a higher market share level (or control over essential facilities). This would eliminate the anomaly that the three national mobile groups, each with a market share of about 30 per cent, could be subject to regulation because they exceed the "market power" threshold.

4.3 Cable television

The 1999 Cable TV and Broadcast Act set sector-specific rules that govern acquisitions in the industry. The aim is to curb concentration and to prevent the mutual boycotts of programming that the big operators had used as negotiating tactics against each other. In 1994, the regulator, the Government Information Office (GIO), set up 51 service areas or zones.[20] A horizontal merger among operators or systems may not combine more than one-third of subscribers nationwide, one-half of operators in a zone (unless there is only one operator in the zone), or one-third of operators nationwide. For vertical mergers, an operator and related enterprises may use only one-fourth of the available channels. These and other GIO responsibilities are to be transferred to the new NCC.[21]

The FTC has long disagreed with the GIO about how to deal with this industry. The GIO considers cable TV service to be a natural monopoly suitable for direct regulation, and so it permits and even encourages mergers to monopoly within geographic zones. When the GIO could not stop the pattern of mutual boycotts, the FTC stepped in. FTC guidelines about joint procurement and joint sale of programming deemed transactions outside of the defined structural limits to be violations of Article 24. The FTC also issued a guideline about vertical mergers. The vertical merger guidelines acknowledge that conditions in each zone are likely to be at best duopoly, and often monopoly; thus, the guidelines demand that parties "externalise the internal benefits and propose positive measures … to prevent competition-restraining results". They include a rebuttable presumption that transactions over the structural thresholds fail the merger law's public-interest balancing test. The FTC advised that there should be at least two providers in each zone, except in extremely isolated regions, and that the disposition of the areas and the rules about cross-ownership ought to be reviewed to remove entry barriers. The law was amended to remove the cap and permit more cross-ownership and foreign investment. But most of the areas are served by a monopoly provider with a nine year licence. Virtually the only mergers that the FTC has rejected have been among cable TV

systems and program providers (including both horizontal and vertical combinations), although some of those transactions were later approved after the parties divested some of their positions and gave undertakings not to discriminate or refuse to deal.

4.4 Financial sector mergers

Mergers of financial institutions may be accelerated for prudential reasons, subject to a competition proviso that is applied by the financial regulator. The precise legislative authority varies slightly for different kinds of institutions. Under the Banking Act, the FTL merger review process and FTC approval do not apply where a bank is in difficulty and the regulator determines that it is necessary to proceed with a transfer immediately and that there will be no serious and adverse effect on competition. Under the Financial Holding Company Act, similar emergency moves for a financial holding company, bank subsidiary, insurance subsidiary or a securities subsidiary of a financial holding company are similarly exempted from merger review authority, if immediate measures are necessary and such measures will not result in unfair competition. The Financial Institutions Mergers Act affords similar treatment to bank takeovers of the credit departments of farmers' and fishers' associations, where such measures would not have any material adverse effect on competition. And the Insurance Act affords similar treatment to takeovers in that sector, where the competent authority deems that there is a need for urgent measures and there will be no material adverse impact on competition. In all these cases, the relevant authority is the Financial Supervisory Commission, which was established in 2004 to develop, improve and oversee integrated financial supervision, consolidating supervision over the banking, securities and insurance sectors and assuming the role of single regulator for all of these industries. A failing firm defence would probably excuse the transactions covered by these special provisions. The FTC does not see risks in this assignment of responsibility.

The banking market is fragmented. There are 47 local banks, with the top five holding only 38 per cent of the local market, plus 31 credit-cooperatives. The FSC is concerned about an excess of competition in the financial sector, as institutions are too small to achieve economies of scale or afford innovation. The government holds about 50 per cent of financial assets, while the private banks are family-controlled. Because the industry is so fragmented, most bank mergers would not raise competition issues and indeed many would not even require pre-notification. Merger filing thresholds are set separately for financial institutions. For financial holding company transactions, one party must have revenues over TWD 20 billion. Notification would be required only for

combinations involving a firm with a substantial share of the economy's banking revenues. The government is promoting consolidation among existing banks and facilities, rather than formation of new banks or opening new branches, aiming to reduce the number of financial holding companies to seven by the end of 2006. 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.

4.5 Electric power

Reform in electric power has been under discussion for 10 years, so far without results. Publicly-owned Taiwan Power Company (Taipower) had a 30 year monopoly concession covering generation, transmission and distribution sales, which expired in 1998. Reform would involve both liberalisation and privatisation. The FTC produced two reports in 1999, recommending vertical separation of Taipower as the first-best solution, and other steps as complements if that were not feasible. The FTC recommended that the FTL apply to mergers and abuse of dominance in the sector. The Cabinet approved amendments to the Electricity Act in 1999, limited to setting up an ISO, an independent regulator and a universal service fund, but Parliament did not pass them. Draft legislation providing for phased liberalisation is still officially on the agenda. But legislation to permit larger customers to buy power directly has not gotten through the legislature, because of concerns about effects on labour of privatisation, more than of liberalisation, and about supply security.

There are few competitive forces in this industry to date. The Electricity Act permits self-generation and encourages efficient co-generation. But independent producers have no market impact, since all power must to be sold to Taipower, who sells it back to the customers. Independent producers might profit from a production cost advantage or serve demands for service quality.

4.6 Professional services

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 a member of the association, the fee standards reduce or eliminate price competition.

The FTC has been working to reform these constraints. In 1999, the FTC met with the Ministry of the Interior, the Ministry of Finance, the Ministry of Justice and the Public Construction Commission to discuss whether the price

standards in the trade association charters for architects, accountants, lawyers and technicians were in violation of the FTL.[22] The FTC decided that they were violations and so advised the agencies and the professions affected, giving them one year to delete the association rules setting fee standards. Responses have been mixed. For engineering, there has been no change in the law yet, but the public construction commission informed the engineers that they should not send a proposed fee agreement for approval.

In the legal profession, the fee standards are no longer enforceable in practical fact. The Ministry of Justice held a conference on the issue, reaching a consensus to abolish the fee standards. That has not yet been done officially, but the standards are reportedly no longer applied. Entry controls limit competition, though. Because there is a limited quota of passes for the annual examination (now about 8 per cent), there is only a limited number of lawyers. Of the total of 5000 lawyers, 3000 are in Taipei. Many people with legal education work in organisations, though, and they can represent their organisations in court. Thus the constraint on entry principally inhibits competition for legal services to individuals and to smaller businesses that cannot employ their own legal staff.

Although some associations thus moved to drop fee regulations, the architects resisted. Their system involved a schedule of service charges and a threat to expel from the association any providers that undercut them. Compliance is monitored and enforced through centralised fee collection by consignment to the association. The FTC in 2003 ordered the three major associations to stop using their fee rules and to repeal them. The associations appealed, and the Appeal and Petition Committee reversed the FTC's decision. The ruling doubted that the standards affected the market, thus confirming that the FTL does not prohibit agreements about price *per se*. Moreover, the Committee found that the fee schedule was exempt from the FTL, because the requirement of regulator approval meant the agreed fees were attributable to an official order. The Committee's decision did not appear to apply the FTC's construction of Article 46, which would require a finding that the purpose of the legislation authorising collective fee setting conflicted explicitly with the purposes of the FTL.

5. Competition advocacy and policy studies

Review, analysis and reform advocacy have been among the FTC's most important functions, particularly during its 10 years of operation. 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. (Article 9) Among its many interventions, the FTC has advised the Department

of Health about regulation of beauty and fitness salons, the Government Information Office about the competition framework for cable television, the Ministry of Finance about retailer hoarding of rice wine and the Ministry of Economic Affairs about liberalising the petroleum products and electricity markets.

About a dozen FTC staff are involved primarily in advocacy, out of a total of about 215. The share of budget is about the same, about TWD 21 million out of a total of about TWD 355 million. There was a peak in advocacy activity in 2003, when it accounted for about TWD 27 million. Others assist with industry-specific issues, and a large number of local government officials have responsibilities that include some advocacy.

The FTC organises and participates in meetings and seminars with other parts of the government about matters affecting competition. Often, the occasion for these efforts appears to be a concern to manage markets, or at least to listen sympathetically to the participants' complaints about conditions. For example, for 2004 the FTC has noted work with the Council of Agriculture, the Market Management Offices of local governments, the major wholesalers and the police departments to "establish an alarm system to ease the disorder in the demand for and supply of vegetables", a meeting about the "resolution of seasonal demand and supply disorder in the fresh milk market" and one about "stabilising the steel-related market trading order and producer's self-discipline", to which the FTC invited the Industrial Development Bureau and the International Trade Bureau of the Ministry of Economic Affairs, the China Steel Corporation and 67 other firms in the iron and steel industry. Ten years ago, the FTC and the Council of Agriculture held meetings to air complaints when the price of garlic swung 90 per cent from one season to the next.

Worries about unstable market conditions often afflict farmers. The Agricultural Products Market Trading Act encourages farmers to form and join co-operatives. The first sale of farm products at wholesale must go through local markets, although farmers also have the option of selling direct to processors, exporters or consumers. The FTC has expressed concern to the Council of Agriculture about requiring the local wholesale markets to give priority to the products of farmers' associations.

There has been a sequence of regulatory review and reform programs over the years. Their titles include the "Project for the Promotion of Regulation Liberalisation", "Project for the Termination of Anti-competitive Actions of Publicly-owned Enterprises", "Project for Deregulation and Promotion of Market Competition" and the "Project for Review of the Enforcement of the

'Green Silicon Island Vision and Promotion Strategy' Regulations." The government supports developing the APEC-OECD Integrated Checklist for self-assessment about policies on competition, regulation and market openness. There is no formal government-wide program of regulatory review and analysis in place yet. In April 2005 the Council on Economic Planning and Development endorsed in principle the establishment of a regular RIA system, and it is commissioning studies about implementation. The system is still under development within the government.

In 1994, the FTC set up its own project of review and advice, the "461 Review and Consultation Plan" and the "461 Project Task Force". (The titles refer to the relevant part of the FTL, Article 46, paragraph 1.) They reviewed all regulations which could have been inconsistent with the FTL. The projects were organised around seven sets of regulations, those of Ministry of Finance and Central Bank of China (Taiwan), the Ministry of Economic Affairs and Council for Economic Planning and Development, the Ministry of Transportation and Communications and Public Construction Working Group, the Ministry of the Interior and Veteran Affairs Commission, the Government Information Office, Council for Cultural Affairs and Ministry of Education, the Department of Health and Environmental Protection Administration and the Council of Agriculture. Each of these seven groups did a search and review of the regulations under their oversight, listing regulations that might be inconsistent with the FTL because of their impact on "trading order" and on consumers' interests. Thirteen consultation meetings were held and over two hundred regulations were reviewed.

In 1996 the FTC set up a "Deregulation Task Force", to come up with reform plans for presentation to and execution by the Executive Yuan. In manufacturing, the Task Force identified five markets for reform and opening to imports: sugar, petroleum products, telecoms, liquefied petroleum gas and gravel. In services, the Task Force identified eight markets for reform to remove entry barriers or improve regulation: consumers cooperatives, telecommunications, cable television, customs clearance information, courier services, warehouses of export processing zones, government procurement of freight services and electronic information related to securities trading.

During the FTC's second term, the Executive Yuan launched the "APROC" initiative (for "Asia-Pacific Regional Operations Center"), another regulatory reform program to remove barriers and create a stronger regional role based on Chinese Taipei's comparative advantages. One goal was to rely less on industrial policy and more on competition. The FTC took advantage of this with its concurrent "Article 46(2) special project", to review government regulations

that displaced the market. The 1999 amendment to the FTL to strengthen Article 46 responded in part to the resistance the FTC encountered in this project.

An occasion for systematic participation in larger policy initiative was the 2001 Green Silicon Island Vision and Promotion Strategy. The project reported to the Cabinet in August 2003. Consultation in connection with that project led to reforms about insurance, attorney's fees and movie theatres. The Ministry of Finance agreed to permit firms to set their own supplementary premiums for fire and car insurance, to eliminate minimum fire insurance premiums and to admonish the industry to obtain FTC approval for concerted action about premiums for joint insurance. The Ministry of Justice reached a consensus with the FTC that bar associations should not set fee standards. And the Government Information Office eliminated the rule that had limited the number of screens showing foreign films (in part because it conflicted with WTO commitments). The Public Construction Commission agreed to remove fee-setting provisions from the relevant legislation, although it has not yet done so, nor has the association amended its own rules.

The FTC combined advocacy with enforcement to reform the market for liquefied petroleum gas. In 1998, the FTC recommended breaking up the distribution monopoly of the Department of LPG Supply of the Veterans Affairs Commission. The monopoly supplier responded with new rules for selecting qualified distributors, and that number increased from one to nine. In 1999, the Bureau of Energy issued new rules about permits for import, export and sale of petroleum products, in effect lifting import regulations. This broke the production and supply monopoly of China Petroleum Corporation through the entry of a competitor, Formosa Petrochemical Corporation. The industry did not find this new competition comfortable, and thus the FTC's biggest enforcement action to date was needed to break up their post-liberalisation cartels.

6. Conclusions and policy options

By including a general competition law in the program of market-opening reforms, policy makers recognised that the economy of Chinese Taipei would need to apply a comprehensive approach to overseeing the competitive process. The substantive law generally follows mainstream practice to cover the basic competition problems of restrictive agreements, monopolies and anti-competitive mergers. The clear statutory basis for concentrating enforcement attention on horizontal collusion is particularly notable.

Including control of unfair competition and deceptive practices highlights a consumer dimension. These powers give the FTC many opportunities to demonstrate to the public that marketplace abuses will not go unchecked, especially in the absence of a central consumer protection enforcement authority. Most of the FTC's workload, measured in terms of numbers of decisions if not in terms of resources deployed, has been in this area. Treating objectionable practices as unfair is an obvious, natural and appropriate strategy in a cultural tradition that values fairness and harmony. Acknowledging that tradition might also facilitate the use of rules that are based on a conception of competition in terms of efficiency. But a focus on fairness can encourage interventions to correct differences in bargaining power. Where these do not also remedy market power that harms consumers, such interventions on behalf of particular competitors could dampen competition rather than promote it.

The ready appeal to fairness is consistent with the frequent resort to the general prohibition against "any deceptive or obviously unfair conduct" that could "affect trading order" in Article 24. The FTC admits that it uses this part of the law in circumstances where it cannot demonstrate a violation of other, more specific provisions of the law. But as long as it rests decisions on the assertion that practices are "obviously" unfair or deceptive, the FTC postpones developing experience and economically-informed doctrines for applying more specific provisions. The courts have been challenging the FTC to be more precise, and the FTC is invoking Article 24 less often. For the 10 years 1994-2003, the FTC relied on Article 24 for more than 75 decisions per year; in 2004, though, there were only 32 decisions based on Article 24, the lowest number since the first full year of FTC operation in 1993, and the number for 2005 may be even lower yet. Thus, the over-use of this general "catch-all" provision may be a transition phenomenon.

Merger control is up to the FTC alone. Its merger decisions are not subject to revision or reversal by the government or a political official based on effects on other policy interests such as employment or competitiveness. This underscores the independence of competition analysis in this sometimes sensitive area. The FTC uses a general "public interest" standard, though, which might invite the FTC itself to consider the effects of proposed mergers on other policies; however, the FTC explains its merger analysis only in terms of market effects. Still, the FTC has rarely found a threat of market power that required preventing or controlling merger plans. The only merger control applications have been to support the liberalisation of the petroleum market and to preserve some competitive confrontations in the usually-monopolised markets for cable TV service. Retaining merger control authority is worth the resource commitment despite its rare application, especially since the 2002 changes have

greatly reduced the burdens of filing and reviewing applications. As FTC enforcement against horizontal combinations becomes more vigorous, there may be more attempted mergers among firms operating in domestic markets, some of which would justify FTC intervention. Indeed, that may be happening already, as the rate of merger filings has accelerated in 2005. The FTC guidance that limits the prospect of intervention in mergers outside of Chinese Taipei is straightforward and in principle neutral: a merger must be notified if the statutory turnover thresholds are met in Chinese Taipei. Some potential complications remain, though. The guideline implies that the threshold might be met if the firms' products end up in Chinese Taipei even if the merging parties do not sell them there directly, so firms might not be able to determine whether they meet the threshold without knowing more about the downstream distribution and use of their products. The alternative threshold based on market share also raises problems, and not just for foreign firms, as basing notification on market share introduces elements of uncertainty and subjectivity.

The FTC is now a stable, experienced administrative agency. It followed an appropriate sequence in introducing competition policy to Chinese Taipei, emphasising transparency and guidance to encourage compliance before undertaking stronger enforcement measures. To further improve transparency and accountability, the FTC has implemented the new general law about administrative processes, by ensuring that governing legal criteria are set out explicit in the statute and using the new provision for formal public hearing that will emphasise the importance of principled legal justifications. The FTC has enough resources to do the job. Its budget and personnel complement have been stable while the workload has shifted. As the number of merger filings dropped sharply in 2002, the FTC could pay more attention to other complex competition issues. The overall activity level declined for a while but rebounded in 2005. The total number of cases undertaken through November 2005 (1 698) exceeded the total for the full year 2002 (1 387).

Whether the FTC has the discretion to concentrate its resources on higher-priority cases remains in doubt. The FTL provides that the FTC may investigate, on complaint or *ex officio*, any violation that "harms the public interest." The FTC's rules do not include the "public interest" criterion, however, but instead provide only that the FTC may reject complaints that "lack substantive content" or proper identification of the complainant. The FTC contends that it can dismiss complaints that lack the public interest element, but in practice the FTC does not do so. This should be clarified, particularly since the law's provision for rights of private suit in court are comparatively generous. Disappointed complainants have a credible alternative outlet for their complaints. It is not clear from the FTC's enforcement statistics how it is using

its *ex officio* powers to target high-priority problems. The number of *ex officio* matters has increased greatly, with 104 in 2004 compared to a long-term annual average of about 50. The FTC's decisions are still heavily concentrated on unfair practice issues, of multi-level sales and deception. Of 34 decisions finding violations in 2004, only 3 were about anti-competitive practices (and 2 more fell under the catch-all of Article 24). The absence of FTC cases about bid rigging is explained only in part by the alternative enforcement route of criminal prosecution, because that route would only apply to collusion about public projects. The same firms might also be colluding about private projects. The FTC may need the additional enforcement lever of a leniency program to uproot this kind of conduct.

The public profile of the FTC is lower now than when the law was new and the government was promoting liberalising reforms. To be sure, competition policy is important enough that a change in the party in power is leading to changes in the composition of the FTC, to include people with political backgrounds. Legislators expressed interest in the constituents' complaints that led to recent cases involving intellectual property licensing and pricing. Ultimately, agencies in a politically open society must be responsive to public concerns. But sound competition policy requires that the enforcer be able to resist pressure, and even the appearance of pressure, to use the law to favour the interests of some competitors or customers over others. The proposed reforms to underscore the independence of the FTC, as well as the independence of other bodies that should be removed from the apparent influence of short-term political calculation, are thus welcome.

Competition policy issues still require attention in other areas. The record of regulatory reform in Chinese Taipei since the mid-1990s follows experience in many other jurisdictions. Progress has been slow in sectors where change has come slowly in other jurisdictions too, such as electric power, postal services and some aspects of professional services. The most visible reforms have been in telecoms, particularly in establishing a competitive market for mobile service; however, an independent regulator is just now being set up, and this will be particularly important as long as the government still has a substantial interest in the historic incumbent. The extent of the government's direct interest in the economy is obscured by terminology, as firms are described as privatised if the government shareholding falls below 50 per cent. Under that definition, government holdings in nominally privatised firms can still be substantial enough to affect the firms' strategies and government policies about their industries in ways that could have implications for market competition. FTC vigilance about the risk of cross-subsidy or other distortion remains warranted. Considerations of industrial policy and targeting are prominent in policy

debates, although government interventions tend to be aimed at helping firms participate in international markets that are usually competitive. The government is now paying some attention to the structure of the financial sector, evidently motivated by policy considerations other than competition. In the fragmented market conditions of Chinese Taipei, to reduce the number of financial holding companies to seven or to support the creation of three locally-based financial firms with market shares over 10 per cent would not on its face threaten adverse effects on market competition. The FTC may be an awkward position, though, if FTC acquiescence in a combination because it does not threaten competition is understood by the public as FTC approval of other aspects. The FTC may need to explain that the basis for its non-action is limited to the absence of adverse effect on market competition.

6.1 Policy options for consideration

6.1.1 Implement a leniency programme.

Putting a sound leniency program in place should be a high priority. This is the principal gap in the FTC's toolkit. An effective leniency program could invigorate the FTC's enforcement against cartels and bid rigging, where the FTC seems to defer to the prosecutor about public projects while taking few cases itself about matters that are outside the prosecutors' jurisdiction. As businesses become more familiar with the FTL, "on the record" formal cartels will go underground. 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.

6.1.2 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. The sanctions provided under the original FTL were insignificant. Before 1999, the maximum administrative fine was only TWD 500 000, and the maximum criminal fine only TWD 1 million. Recognising this deficiency, the 1999 amendments increased the potential fines a hundredfold. Sanctions for violations of the FTL are now higher than sanctions provided against other kinds of business misconduct. But fines against hard-core conduct are still low

by international comparison: the fines issued in December 2005 against the cement cartel amounted to only USD 6 million. The FTC's regulations call for considering criteria such as the parties' gain from the violation in determining the fine. The general statement is not backed by a more specific measure or target that is clearly related to economic impact. Its application is limited by the statutory cap. Set at an absolute level rather than as a proportion of turnover or some other flexible measure, the cap may prevent the FTC from imposing fines that are high enough to deter big firms from big violations, although fines under the cap may be adequate to deter smaller firms from smaller violations.

6.1.3 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. By contrast, the exemption from Article 14 looks like price regulation through FTC ratification of privately-reached agreements, as long as the agreed prices are "reasonable". The FTC tries to justify the provision for these exemptions in terms of information transparency and costs and what it calls "transaction stability". Permitting price fixing so consumers will not have to waste resources on inquiry and shopping displays a paternalistic distrust of consumer choice in the market. Information transparency can indeed reduce costs of transactions and create trading opportunities, but overt price fixing is not typically needed to support it. Of greater concern, perhaps, is the unusual "hold-up" situation in which consumers who cannot take the time to inquire might be taken advantage of. A better approach in these situations could be to encourage price transparency, rather than countenance actual price fixing. 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.

6.1.4 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. Making the reporting obligation depend on market share tends to confuse the administrative obligation with the substantive rule. Basing the reporting obligation on market share is not consistent with best practices.[23] It would be better to base it solely on a less contested measure, such as assets or turnover. The FTC acknowledges that this kind of test leads to uncertainty on both sides, noting that it has had

disputes with firms about market definitions and shares and thus about the obligation to notify. Rather than keep it just to control consolidation in the cable TV sector, it would be better to adopt a specific merger enforcement policy for that sector, perhaps in collaboration with the NCC.

6.1.5 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. This would move the FTC away from policy-making discussions and require changes in the FTC's approach to advocacy. There are advantages to being at the table when other policy issues are discussed, but being more independent would not necessarily prevent the FTC from expressing views and even objections concerning 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. This is already possible for decisions that have been taken after a formal hearing at the FTC. This change would underscore 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. This change would broaden the base of support and "ownership" of competition policy, although the effects on institutional independence might be mixed. Legislative confirmation provides some check on possible arbitrariness, but also another avenue for expression of political interest. Terms would be staggered rather than consecutive, which would promote continuity.

6.1.6 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.

NOTES

1. Parenthetical citations are to the Fair Trade Law as amended, unless otherwise indicated.
2. Constitution, Article 142; see Williams, 2005.
3. There was at one time some authority for reading Article 14 as a *per se* prohibition. (Chao, 1998)
4. An early, unpublished decision had implied a de minimis interpretation: no action was taken against two transport firms for fixing freight rates, because each had less than 1 per cent of the market. (L.S. Liu, 2002)
5. Originally, the law included a “fair trade” rule, regulating how firms could set retail prices for consumer goods for which there was adequate inter-brand competition. This rule was never applied, and it was removed in 1999.
6. The FTC no longer has any responsibility to compile and publish a roster of “monopolies”. It built on this to publish a roster of concentrated industries as well. That function, which occupied substantial resources, was eliminated in the 1999 amendments. In addition to the monopolies in energy and petroleum products, the most concentrated non-service sectors had been in polyester, cement, steel, paper and some chemical products, while the 1993 list of monopolistic enterprises included railroad passenger service, fixed line telecoms, ports, airport ground services, long-haul buses, life insurance, commercial paper trading, the stock exchange and trading financing, and TV broadcasting. (K-C. Liu, 2002)
7. The case is reported on the English part of the FTC’s website under “mergers.”
8. In the similar case pending in the United States, the CAFC ruled in September 2005 that packaging essential and non-essential CD patents together for licensing was not *per se* patent misuse.
9. This legalism may be a carryover from debates over the original construction of the competition law, which included concern about unfair and irregular corporate activities and related-party transactions as well as market competition. The definition of “merger” was also affected by 1997 legislation amending the Company Law to protect creditors and minority shareholders. (L.S. Liu, 2002, pp. 43-44)

10. The 2002 amendments raised the thresholds substantially. Before the amendments, the law required notification and approval of minor and competitively insignificant transactions such as as parent-subsidiary share transfers and franchise contracts.

11. The Ministry of Justice would limit this treatment to items that are not clearly covered by a specific law.

12. In this practice, the FTC followed the example of the Council of Grand Justices, which publishes dissents (unlike the regular courts, which do not). (L.S. Liu, 2002)

13. The FTL also has an obscure provision for individual fine and imprisonment where an enterprise is found to have made false statements that damage business reputation. (Article 22, Article 37)

14. It does not, however, include criminal enforcement against multi-level sales schemes under Article 23.

15. Government Procurement Act, Article 87(4). This Article also prohibits several other forms of coercion and interference with the procurement process.

16. This total represents about 4 per cent of all of the criminal cases under the Government Procurement Act. Most prosecutions evidently involve fraud or coercion.

17. Consumer Protection Law, Articles 49-55.

18. Fair Trade Commission Guidelines on the Approval of Concerted Pricing among Small or Medium sized Enterprises, 13 January 2005.

19. The provision of the telecoms law about anticompetitive conduct was taken from the part of the original FTL, which has since been repealed, that required the FTC to maintain a roster identifying firms with market power, based on market share. (L. S. Liu, 2001)

20. The Cable Television Law in place at that time limited the number of providers in each of these zones to a maximum of five.

21. The GIO also applies rules under the Broadcasting Law requiring prior approval of transfers of shares in over-the-air broadcasters. These rules set maximum holding limits, to discourage excessive concentration of media ownership. The GIO will not permit a transfer to a natural person if the transferee (together with related parties) holds more than 50 per cent of the shares or more than 10 per cent of the shares of a newspaper or broadcast business, or a transfer to a legal person that holds more than 50 per cent of the shares of a newspaper, broadcast or related business.

22. At first, the FTC did not treat self-employed professionals and other individuals in trade as enterprises covered by the law's prohibitions, and thus the FTC did not comment on their price control arrangements in its first round of reviews in the mid-1990s. (L.S. Liu, 2002)

23. The OECD Council Recommendation on Merger Review (section I.A.1.2.2) calls for notification requirements that are based on clear and objective criteria., Similarly, the International Competition Network, in its Recommended Practices for Merger Notification and Review Procedures (II.B), calls for notification criteria that are objectively quantifiable, and it considers market share to be inappropriate.

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