



# The Legal 500 Country Comparative Guides

## Taiwan: Cartels

This country-specific Q&A provides an overview to cartels laws and regulations that may occur in Taiwan.

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## 1. What is the relevant legislative framework?

Under Taiwan's antitrust law, the Fair Trade Act (TFTA), a concerted action (cartel) is limited to a horizontal action, which refer to '*competing enterprises at the same production and/or marketing stage, by means of contract, agreement or any other form of mutual understanding, jointly determine the price, technology, products, facilities, trading counterparts, or trading territory with respect to goods or services, or any other behavior that restricts each other's business activities, resulting in an impact on the market function with respect to production, trade in goods or supply and demand of services.*' We hereafter use 'concerted actions' or 'cartels' interchangeably.

A mere information exchange among competitors will not be regarded as a concerted action unless it leads to a subsequent concerted practice between competitors. However, since the TFTA was amended on 4 February 2015, 'the existence of the mutual understanding of the concerted action may be presumed by considerable factors, such as market conditions, characteristics of the goods or services, cost and profit considerations, and economic rationalization of the business conduct. Thus, even if there is no clear mutual understanding of the concerted practice, Taiwan's antitrust regulator, the Fair Trade Commission (TFTC), may presume that any exchange of information is usually related or could lead to concerted actions if there is parallel behavior among the competitors.

Under the TFTA, a concerted action is *per se* illegal. However, in the event that the concerted action is beneficial to the economy as a whole and in the public interest, the parties to be engaged in the concerted action can apply with the TFTC for prior approval of the concerted action. Commonly-seen concerted actions that have obtained the TFTC's approval in the past include the joint transportation of purchased corn and soy beans.

On 1 March 2016, the TFTC published a ruling explaining that if the combined market shares of all participants in a cartel does achieve 10% market share in the relevant market, it can be presumed that the cartel will not result in an impact on the market function with respect to production, trade in goods or supply and demand of services. The same ruling also indicates that the presumption is not applicable to the concerted action the content of which is to restrict price, quantity, trading counterparty or trading areas of the relevant product or service.

There is a leniency program available for enterprises involved in the cartels. The regulation relevant to the leniency program in Taiwan is the 'Regulations on Immunity and Reduction of Fines in Illegal Concerted Action'.

Concerted actions within the same group of companies are exempt from violations of the TFTA because the TFTC is of the view that in the event that the affiliated enterprises follow instructions from the same decision-making body of the group after considering the groups' overall profit maximization and engage in relevant economic activities, it is difficult to regard these affiliated enterprises as having true economic independence and autonomy. There is no

other industry-specific exemptions.

**2. To establish an infringement, does there need to have been an effect on the market?**

No. It would be sufficient to establish an infringement when there is a possibility or potential that the cartels would cause an effect on the market.

**3. Does the law apply to conduct that occurs outside the jurisdiction?**

Yes, as long as such conduct that occurs outside the jurisdiction would possibly cause an effect on the market.

**4. Which authorities can investigate cartels?**

The TFTC.

**5. What are the key steps in a cartel investigation?**

A cartel investigation could be initiated by (i) the TFTC *ex officio* investigation, (ii) a third party complaint, and (iii) the leniency program filed by the enterprise involved in the cartel.

Once the investigation is initiated, the TFTC would notify the parties involved and related third parties to respond to the TFTC's request of information, provide written statement, submit book and records, documents and other necessary materials or exhibits and request to interview the relevant directors/employees or third parties representatives. The TFTC could also dispatch personnel for any necessary onsite inspection of the office, place of business, or other locations of the parties and any related third party. The TFTC may seize articles obtained from the investigation that may serve as evidence and any person subject to an investigation shall not evade, obstruct, or refuse to cooperate without justification.

The statute of limitation for the TFTC to impose administrative penalty is five years after the cartel conduct is complete.

The TFTC will not hold a state of play meeting with the enterprise under investigation; nor will it release a statement of objection. The enterprise under investigation would not be able to know the status of the investigation or the TFTC's preliminary views during the investigation.

**6. What are the key investigative powers that are available to the relevant authorities?**

The TFTC have the following investigative powers:

- request the parties involved and related third parties to respond to the TFTC's request of

information, provide written statement, submit book and records, documents and other necessary materials or exhibits;

- request to interview the directors/employees or third parties representatives;
- dispatch personnel for any necessary onsite inspection of the office, place of business, or other locations of the parties and any related third party;
- seize articles obtained from the investigation that may serve as evidence

The TFTC is entitled to impose an administrative fine from NTD 50,000 to NTD 500,000 on enterprises refusing to cooperate with the above investigation without justification.

Kindly note that unlike other jurisdictions, there is no dawn raid in the traditional sense under the TFTA so the TFTC cannot search the enterprise's premises to obtain the requested documents and information. However, the TFTC can conduct administrative on-site investigations and the investigators have limited seize powers if the enterprises provide the documents or any articles with the TFTC officer voluntarily. A TFTC official carrying out an on-site investigation must present the documents supporting such duties; the person to be investigated may refuse the investigation where the investigator fails to present such documents. If the enterprise is regarded by the TFTC as evading, interfering or refusing the on-site investigation without justification, the above administrative penalties would apply.

However, the TFTC cannot compel those enterprises to submit documents and information to the TFTC.

**7. On what grounds can legal privilege be invoked to withhold the production of certain documents in the context of a request by the relevant authorities?**

The concept of attorney-client privilege is neither well developed nor widely recognised in Taiwan. The laws and court opinions are silent on the existence or application of attorney-client privilege. Because the concept of attorney-client privilege does not exist, there is no basis for the enterprise to claim that the production of certain documents requested by the TFTC could be withheld.

**8. What are the conditions for a granting of full immunity? What evidence does the applicant need to provide? Is a formal admission required?**

Under the TFTA and the 'Regulations on Immunity and Reduction of Fines in Illegal Concerted Action Cases', the TFTC will grant full immunity from the administrative fines for the concerted action under the following circumstances:

1. The first whistle-blower that reports the concerted action before the TFTC is aware of it or initiates an investigation: (a) submits the concrete illegal conduct of the concerted action in which it has taken, (b) submits the evidence and assists the investigation, and (c) fulfils the conditions set by the TFTC.

The evidence submitted must be able to assist the TFTC to initiate an investigation. More

specifically, the applicant must provide concrete details of the concerted action in which they have been involved, along with related evidence, which the TFTC does not possess or is unaware of, to give an outline of the concerted action in question as well as the time and location where the mutual understanding has been established and the content of the mutual understanding or other related matters for the TFTC to initiate an investigation.

2. In the event that no one reports the concerted action before the TFTC is aware of its or initiates an investigation, the first whistle-blower that, during the TFTC's investigation, (a) submits the concrete illegal conduct of the concerted action in which it has taken, (b) submits the evidence and assists the investigation, and (c) fulfils the conditions set by the TFTC.

The evidence submitted must be able to help the TFTC establish the infringement. This includes the situations where the applicant provides a statement of concrete details of the concerted action in question, along with evidence that the applicant has already obtained at the time of application and is capable of proving the violation of the said concerted action.

**9. What level of leniency, if any, is available to subsequent applicants and what are the eligibility conditions?**

Reductions in cartel administrative fines for up to four additional leniency applicants coming forward once the TFTC is aware of the cartel. The first will have its fine reduced by 30% to 50%; the second by 20% to 30%; the third by 10% to 20% and the fourth by up to 10%.

**10. Are markers available and, if so, in what circumstances?**

Markers are available to the applicant for the full immunity if it currently does not have all the information and evidence qualified for to file the application for full immunity. The applicant may submit the statement (either a written statement or oral statement) to the TFTC requesting to preserve the priority status for the full immunity and provide the following information:

1. The name of the enterprise, the uniform invoice number, the paid-in capital, the annual revenue, the name of the representative or person in charge, the company address, and the date of company registration;
2. The product or service involved, the form of the concerted action, the geographical areas affected, and the duration of the action;
3. The names, company addresses, representatives or persons in charge of the other involved enterprises.

However, the applicant that has been granted a marker should furnish the TFTC with the said information and evidence within the specified period set by the TFTC or it would lose the priority status preserved.

**11. What is required of immunity/leniency applicants in terms of ongoing cooperation with the relevant authorities?**

This requirement for ongoing cooperation will be specified in the TFTC's conditions to both the full immunity applicant and the leniency applicant, which includes the following:

1. The applicant shall withdraw from the concerted action in question immediately upon filing the application or at the time specified by the TFTC.
2. From the time the application is filed until the case is concluded, the applicant shall follow the instructions of the TFTC and provide honest, full and continuous assistance during the investigation, which shall include the following:
  1. The enterprise shall provide the TFTC at the earliest time with all the information and evidence regarding the concerted action in question that it currently possesses or may obtain in the future. For those applying for leniency (i.e. fine reduction), the information and evidence provided must be of significant help on the TFTC's investigation on the concerted action in question or able to enhance the probative value of the evidence the TFTC has already obtained.
  2. The enterprise shall follow the instructions of the TFTC and provide prompt explanation or cooperation to help the investigation on related facts capable of proving the existence of the concerted action in question.
  3. If necessary, the enterprise must allow its staff members or representatives having participated in activities related to the concerted action in question to be interviewed by the TFTC.
  4. The content of the statement, information or evidence provided may not contain any untruthfulness and no destruction, forgery, alteration or concealment of any information or evidence related to the concerted action in question shall be tolerated.
  5. Without the consent of the TFTC, the applicant may not disclose to any other parties about filing the application or any content of the application before the case is concluded.

**12. Does the grant of immunity/leniency extend to immunity from criminal prosecution (if any) for current/former employees and directors?**

No. It applies to the administrative fines only. Note that the criminal liability from the concerted action only arises when the enterprise subject to the administrative sanctions fail to follow the TFTC's order. See below 6.1.

**13. Is there an 'amnesty plus' programme?**

No.

**14. Does the investigating authority have the ability to enter into a settlement agreement or plea bargain and, if so, what is the process for doing so?**

The TFTC has the ability to enter into a settlement agreement, which is an administrative contractual arrangement between the TFTC and the enterprise. However, pursuant to the TFTC Guidelines for Handling Administrative Settlement Cases, it only applies to a situation where the TFTC is not able to ascertain relevant facts or legal relationship on which the TFTC decision is based to establish the infringement after its investigation. In the event that the TFTC is able to verify the facts or legal relationship to conclude its investigation, the TFTC is not allowed to enter into a settlement agreement with the enterprise.

The TFTC will have to consider the legality and appropriateness of the settlement, the possible impact on the public interest and the possible detriment to the interested parties to determine whether to enter into a negotiation procedure with the enterprise. The TFTC official in charge shall, before commencing the negotiation procedure, submit for the commissioners' meeting's deliberation on whether the TFTC should enter into a settlement agreement and the key issues and scope of the negotiations for the agreement.

Any offer or commitment by the TFTC in respect of a settlement agreement should be proposed by a commissioner or the TFTC official in charge and is subject to the resolution at a commissioners' meeting.

The counterparty shall submit its offer or commitment by stating details and reason in writing to the TFTC. The TFTC shall reject the counterparty's offer if the offer is deemed unreasonable, provided the TFTC may make a separate offer if it deems it necessary to enter into a compromise agreement.

Rejection of an offer or expression of intent to make a separate offer shall be made in writing to the counterparty. The TFTC may, in the course of negotiation of a settlement agreement, seek the advice or opinion of stakeholders on the content of the settlement contemplated or request the counterparty to enter into a civil settlement or agreement with it, provided the TFTC is not bound by such advice or opinion, the content of settlement or the content of the agreement.

The performance of a settlement agreement that will infringe upon the rights of a third party will not take effect absent the written consent of the third party.

The TFTC may, where necessary, withdraw or modify its offer, or discontinue the settlement procedure and proceed with investigation, in the course of entering a settlement agreement.

The settlement does not require the approval from the court. As of today, none of the settlements entered by the TFTC with the enterprises is related to the cartel violation.

**15. What are the key pros and cons for a party that is considering entering into settlement?**

As specified previously, the settlement agreement is only available under certain circumstances and has never been proposed or used in a cartel investigation. This approach might not be a commonly used approach for the cartel investigation.

**16. What is the nature and extent of any cooperation with other investigating authorities, including from other jurisdictions?**

The TFTC during the investigation would consult with other governmental agencies, such as the Ministry of the Economic Affairs, if necessary. For international cartels, the TFTC previously have worked with other antitrust regulators, including regulators in the EU, the US and Singapore, to clarify the facts and exchanges opinions. The information obtained from the cooperation will be for the TFTC's reference only and the TFTC will not be bound by the information or opinions received.

**17. What are the potential civil and criminal sanctions if cartel activity is established?**

**1. Administrative sanctions:**

The nature of the sanctions imposed by the TFTC is administrative sanctions instead of civil or criminal sanctions.

When the cartel activity is established, the TFTC may order the enterprise involved in the cartel activity to cease or cure its violation or take other necessary corrective measures within a prescribed period. The TFTC may also impose an administrative fine on the enterprise up to NTD 50 million. If the enterprise does not follow such an order, it may be additionally fined up to NTD 100 million.

The TFTC may impose an administrative fine of up to 10% of the total sales revenue of the violating enterprise in the previous fiscal year, without being subject to the limit of an administrative fine as set forth above, if the TFTC finds that the enterprise to be in serious violation of the prohibition against the cartel activity.

**2. Criminal sanctions**

The enterprise involved in the cartel activity will be subject to criminal sanctions only when it fails to follow the TFTC's order to cease or cure its violation or take other necessary corrective measures within a prescribed period, or after its ceasing therefrom, shall such enterprise have the same or similar violation again. The actor would be punished by imprisonment for not more than three years or detention, or by a



fine of not more than NTD 100 million, or by both.

**18. What factors are taken into account when the fine is set? In practice, what is the maximum level of fines that has been imposed in the case of recent domestic and international cartels?**

1. General cartel violation For general cartel violations, the TFTC could take into consideration the following factors to determine the fine: (i) motivation, purpose, and expected improper benefit of the acts; (2) the degree of the act's harm to market order; (3) the duration of the act's harm to market order; (4) benefits derived on account of the unlawful act; (5) scale, operating condition, and market position of the enterprise; (6) types of, number of, and intervening time between past violations, and the punishment for such violations; and (7) remorse shown for the act and attitude of cooperation in the investigation.

For the most recent five years, the maximum level of fines in the case of recent domestic and international cartels is NTD 20 million.

2. Serious cartel violations

For serious cartel violations, in addition to the above factors, the TFTC would take into consideration the following factors to determine if there is a serious cartel violation: (1) scope and degree of harm to competition on the market; (2) duration of harm caused to competition on the market; (3) market position and market structure; (4) total sales income and benefit derived from the violation; and (5) type of cartel involved, for example, horizontal price fixing of goods or services, total industry output, allocation of customers or allocation of territories.

The fine formula is detailed in the Regulations for Calculation of Administrative fines for Serious Violation of Article 9 (abuse of dominance) and Article 15 (cartel) of the TFTA set forth by the TFTC.

For the most recent years, the maximum level of fines in the case of recent domestic and international cartels for serious violation is around 6% of the turnover.

**19. Are parent companies presumed to be jointly and severally liable with an infringing subsidiary?**

No.

**20. Are private actions and/or class actions available for infringement of the cartel rules?**

Private actions are available for the infringement of the cartel rules. No class action is available.

If the event that a cartel activity leads to the infringement of the rights and interests of another, the injured may request to remove such infringement; the injured could also request the damages arising therefrom. The court may, taking into consideration of the nature of the infringement, award compensation more than the actual damages if the violation is intentional; provided that no award shall exceed three times of the amount of damages that is proven. Where the infringing person gains from its act of infringement, the injured may request to assess the damages exclusively based on the monetary gain to such infringing person.

**21. What type of damages can be recovered by claimants and how are they quantified?**

The damages that can be recovered include the damages that the injury actually suffered and the interests which have been lost.

Interests which could have been normally expected are regarded as the interests which have been lost, such as the decided projects, equipment, or other particular circumstances.

**22. On what grounds can a decision of the relevant authority be appealed?**

The enterprise subject to the TFTC decision could object and challenge the TFTC's decision by appealing to the Taipei High Administrative Court (THAC) and claim that the TFTC decision is illegal and infringe the rights or interest of such enterprise. The party subject to the judgment not in its factor could further appeal to the Supreme Administrative Court (SAC).

**23. What is the process for filing an appeal?**

The enterprise subject to the TFTC decision against the cartel activity needs to appeal to the THAC within two months after receipt of the TFTC decision to request to revoke the TFTC decision. The THAC will review the case and determine if it should (i) revoke the TFTC decision or (ii) dismiss the claim. The judgement rendered by the THAC could be further appealed to the SAC within 20 days upon receiving the THAC's written judgment.

**24. What are some recent notable cartel cases (limited to one or two key examples, with a very short summary of the facts, decision and sanctions/level of fine)?**

1. The ODD case: In September 2012, the TFTC found four optical disk drive (ODD) manufacturers had conspired before the bidding process or during the bidding process held by Hewlett-Packard Company (HP) and Dell Inc. (Dell) from September 2006 to September 2009 by contacting among each other via emails, phone calls and meeting and exchanging the quotes and expected ranking of the bids as well as sensitive

information such as capacity and amount of production among themselves. The TFTC held the view that these manufacturers' bid rigging had certainly affected the supply and demand in the domestic ODD market and constituted a concerted action under the TFTA. The TFTA fined the enterprises involved NTD 25 million, 16 million, 8 million and 5 million respectively.

This is the first case that the enterprise has applied a leniency program and was granted full immunity. One manufacturer made an appeal to the court and the THAC rescinded the TFTA decision due to the expiration of the status of limitation. The THAC's judgment was upheld by the SAC.

2. The capacitor case: In December 2015, the TFTA found 7 aluminium capacitor manufacturers and 3 tantalum capacitor manufacturers participated in meetings or bilateral communications to exchange sensitive business information such as prices, quantity, capacity, and terms of trade to reach agreements, the conducts were sufficient to affect the market function of capacitor in Taiwan. The practice constituted the concerted action and the TFTA therefore imposed administrative fines totalled NTD 5.8 billion on these capacitor makers. Two makers appealed the TFTA decision and the SAC has confirmed the concerted action violation but revoked the fines imposed on these companies.

This is the decision that the TFTA has imposed the highest fines on the foreign enterprises.

**25. What are the key recent trends (e.g. in terms of fines, sectors under investigation, applications for leniency, approach to settlement, number of appeals, etc.)?**

No official information is available for the sectors under investigation and applications for leniency. According to the statistics released by the TFTA, from 1992 to the end of June 2019, there were 186 cases involving the illegal concerted action with the total fines of NTD13,142,210,000. Most of the cartel cases relate to manufacturing industries and energy sectors.

**26. What are the key expected developments over the next 12 months (e.g. imminent statutory changes, procedural changes, upcoming decisions, etc.)?**

There are no imminent statutory changes or procedural changes. The term of four commissioners will expire on 31 January 2021 so the Premier will nominate four new commissioners before 31 October of 2020 for seeking the consent from the Congress.