Using Leniency to Fight Hard Core Cartels

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Background

Ever since the Taiwan Fair Trade Commission (hereinafter "the Commission") was established in 1992, it has been the competent authority at the central government level under the Cabinet and transformed itself into an independent agency by executing the Cabinet's project of "Reforming the Central Government Structure" in 2012.

Horizontal co-ordination is prohibited in Article 14 of the Fair Trade Law (hereinafter "the Law") unless the Commission grants a specific exemption. Only for limited purposes shall parties apply to the Commission for approval for horizontal agreements. The term "concerted action," as defined in Article 7 of the Law, which is the statutory basis for the prohibition, is defined as conduct through a 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. 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."

A per se rule is not applied to horizontal co-ordination. Instead, the Commission'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*

[1] The views expressed here are the speaker's alone and not necessarily those of Taiwan Fair Trade Commission

interpretation in Article 7 of the Law, by requiring that it "would affect the market function of production or trade in goods or supply and demand of services."

The top enforcement priority has been concerted action, as measured by the number of cases and magnitude of sanctions. The total sanctions against horizontal agreements have outweighed those against other violations. The major action, clearly dominating the statistics, was the 2003 LPG case resulting in total fines of over TWD 300 million (about USD 10 million).

However, the sanctions provided under the original Law were insignificant. Before 1999, the maximum administrative fine was only TWD 500,000, and the maximum criminal fine only TWD 1 million. Recognizing this deficiency, the 1999 amendments increased the potential fines a hundredfold. Sanctions for violations of Article 14 of the Law were higher than sanctions provided against other kinds of business misconduct. However, fines against hard-core cartels were still low on the basis of international comparisons: the fines issued in December 2005 against the cement cartel amounted to only USD 6 million.

The Commission's sanction regulations called for considering criteria such as the parties' gain from the violation in determining the fine. The general statement was not backed by a more specific measure or target that was clearly related to the economic impact. Its application was limited by the statutory cap, which was set at an absolute level rather than as a proportion of turnover or some other flexible measure.

Links to International Experiences

In referring to the 2006 peer review report by the OECD Competition Committee, the Commission initiated the implementation of a leniency program as well as a set of sanctions as a proportion of turnover or some flexible measure to improve enforcement still further against hard-core cartels and to deter big firms from big violations.

Without a doubt, international organizations, for example, the ICN, have been valuable resources as we have thought thorough the possibilities for implementing a brand new policy. The Commission has dispatched its case handlers to participate in ICN Cartel Workshops since 2007 to enable it to both steadily and increasingly learn from the international community. The funding for such activities has been principally provided by the annual budget of the Commission.

The ICN Cartel Workshops have provided numerous opportunities for participants to fully grasp the importance of incorporating not just the concept of a leniency program but also the importance of all kinds of investigative skills. In addition, these events have greatly facilitated networking among all attendees from all jurisdictions. To be sure, the events have been hugely successful at encouraging attendees to share their experiences in relation to investigative skills, knowledge in enforcing the law, or even daily work procedures. As long as there are more international cartel cases, the friendship and camaraderie born that have resulted from the events have been invaluable. Therefore, the Commission has made and will continue to make every effort to participate in ICN Cartel Workshops.

Moreover, the Commission also has launched an out-sourcing project by referring to the ICN's best practice and to other developing jurisdictions, such as the EU, Germany, Japan, and Korea, which were considering implementing or had implemented their own leniency policy. The Commission mixed the international practice in regard to the following aspects:

1. What are the terms of the leniency program in the jurisdiction?
2. How does the leniency program provide companies with the opportunity to report anti-competitive behavior? Is it immunity or a reduction from fines?
3. Who can be immune from fines? And under what conditions?
4. If the agency is aware of the cartel but it does not have sufficient evidence to proceed with the case, is the immunity still available?
5. Who are the beneficiaries of the leniency program?
6. What are the requirements for applicants to cooperate with the agency? Does the requirement differ between immunity and a reduction in fines?
7. What are the obligations of the beneficiaries?
8. What are the form and the procedure of the application?
9. When will the applicant know the result?
10. What is the legislative basis of the leniency program?
11. Is it necessary to set up a marker system?
12. Is the amnesty plus system helpful?
13. Can the applicant appeal for the rejection of the application?
14. What is the responsibility of information protection?
15. Where can the applicant seek leniency?
16. Can the lenient treatment be revoked?
17. Does the agency provide potential applicants with consultants?

The Commission has researched the above issues of leading jurisdictions, and taken into account other factors of similarities in legal structure, economic development and cultural values, so the Commission has been able to draw upon its own culture, history, and experiences along with its advantageous leniency programs.

Tools for Investigating Hard-Core Cartels

Before the 2011 amendment of the Law introducing the leniency program, the cartel investigations relied heavily on firms' cooperation to provide necessary information demonstrating violations As cartel activities became more devious and covert, the Commission has had great difficulty in obtaining statements from interviewees involved in cartel activities.

The Commission has discussed the idea of introducing a leniency program since its early enforcement, but has not been very optimistic about introducing it. Many said, for example, that the program was undesirable because it encouraged betrayal, or that a leniency program could not be expected to work in the East because society places value on mutual trust among members of a group. However, the Commission has experienced the peer pressure from other jurisdictions with a similar business culture, like JFTC and KFTC, which adopted the leniency policy and used it as the tool to crack down on hard-core cartels successfully. To improve enforcement against hard-core cartels, a leniency program was adopted in the November 2011 amendment of the Law.

In the design of the program, the Commission drew on the lessons learned by leniency programs in other countries. In accordance with Paragraph 2 of Article 35-1 of the Law, the Commission may grant a reduction of or exemption from administrative penalties to be imposed in violation of Article 14, which provides the legal basis of implementing the leniency program.

The lenient treatment that provides amnesty to cartel members can be applied under one of the following conditions:

1. A requirement for the cartel member to self-report by submitting written leniency applications with sufficient evidence before an investigation;

2. After an investigation has commenced, a requirement for the cartel member to provide evidence with added value to proceed and complete the investigation

during the period of investigation.

To ensure consistent, predictable and transparent implementation of the leniency policy, the Commission has enacted the settlement procedure referred to as the "Regulations on the Immunity and Reduction of Fines in Illegal Concerted Action Cases" to deal with the substantive interplay between leniency and settlement. It includes the following regulations:

1. Requirements for applicants to cooperate with the Commission：
   (1) The qualification of the applicant: The applicant shall not have coerced others, instigated the cartel, or acted as the ringleader.
   (2) Other obligations of the applicant in exchange for leniency:
      - The report or materials related to the concerted action in which the applicant has been involved shall not contain false information.
      - The applicant shall not directly or indirectly disclose to other parties information about the leniency application or any content of the information it intends to provide to the agency.
   (3) The evidence provided by the applicant should enable the Commission to initiate or complete its investigation and is capable of proving the violation of the concerted action. Failure to complete the tasks may have implications for the status of the leniency program.

2. Responsibility for the leniency program within the Commission:
   (1) The Commission may grant an approval with conditions to require the applicant to provide more detailed information or evidence to initiate or complete the investigation of a cartel.
   (2) The Commission may reject the lenient treatment when the applicant fails to genuinely and continuously provide necessary information, which can prove the case or is capable of proving the existence of evidence in the case.

3. Immunity or reduction of the administration fines:
   (1) For cases initiated by evidences provided by the applicant, only the first applicant may obtain 100% immunity from the fines.
   (2) For cases in the period under investigation, the first applicant may obtain 100% immunity with regard to the fines, the second applicant may obtain a 30% to 50% reduction in fines, the third applicant may obtain a 20% to 30% reduction, and the fourth applicant may obtain a 10% reduction.

4. Marker system

   When an applicant makes an initial application, the applicant is given a tentative place in line. Even though the applicant cannot submit a detailed report at that time, a marker is given. The position is then formally determined once the applicant submits a detailed report by a certain deadline.

Sanctions vis-à-vis Hard-Core Cartels

While Article 41 of the Law prescribes administrative penalties, it is also a catchall punishment for all violations of the Law. Under Article 41 of the Law, the Commission may order any enterprise that violates any of the provisions of this Law to cease and rectify its conduct, or the Commission may take necessary corrective action within the time prescribed in the order; in addition, it may impose upon such an enterprise an administrative penalty of not less than TWD50,000 and not more than TWD25,000,000. For a repeated offence against a prior order related to a concerted action, a punishment of imprisonment for not more than three years or detention, or a criminal fine of not more than TWD100,000,000, or both, may be imposed.

However, a leniency program and the meting out of severe punishment to hard-core cartels are just like a carrot and stick. In cartel cases, the profits that enterprises obtained in the past usually far exceeded the upper cap for administrative fines set forth in Paragraph 1, Article 41 of the Law. In considering the recommendation by the OECD Competition Committee, the 2011 amendment of the Law has added Paragraphs 2 and 3 to Article 41 to deter future violation. The Commission may impose an administrative fine of up to 10 percent of the total sales of the violators involved in any forms of horizontal agreement.

While the legislators ratified the Commission's proposed amendment to raise the maximum possible fines for hard-core cartels to 10 percent of the turnover, and to introduce the leniency program into the Law, at almost the same time, the Commission decided to fine four major convenience chain stores TWD20 million in total for colluding to increase the prices of milk coffee, such as lattes, cappuccinos and caramel macchiatos, by TWD5. Although the 4 convenience chain stores sold a total of 72 different tastes and flavors of coffee, and the recipes were not identical, the 4 chains were unable to provide the Commission with sound reasoning behind their identical TWD5 price hikes, which occurred within the same week of October, leading the Commission to reach the conclusion that price fixing did in fact take place. However, the public still complained that the existing regulations and fines were not

adequate to prohibit suppliers from engaging in price fixing. The 4 chains fined were always able to cover the fines with other gains on the basis of the amount of coffee sold which was roughly 530,000 cups per day.
Therefore, as the amendment to impose significantly more serious punishments for cartel behavior was passed, the revised article of the Law was named the "Coffee Clause" by the media to indicate that the severe punishment can provide cartel members with the incentives to apply the leniency treatment and can deter such violations.

Conclusion

Since the 2011 amendment of the Law has been promulgated for only 10 months, the Commission still needs more practical experience in handling cases that are applicable for leniency. To build the capacity of cartel investigations with lenient treatment, the Commission has held several internal training courses to educate all investigators who will be in contact with the leniency applicant. The Commission would like to learn more practical skills, for example, how to verify the materials provided by the applicant, and what questions should be required when interviewing the applicant to gather the necessary evidence.

Adopting a leniency program, as well as changing the sanctions imposed on cartel members to be based on sales, marks a significant milestone in the history of the Commission, However, due to lacking other tools such as dawn-raids, and search and seizure, the Commission can hardly gather the facts-related materials aggressively. For the information provided by the applicant, the Commission can only request that the applicant cooperate honestly, fully and on an ongoing basis. The Commission is still not able to conduct a thorough investigation and is considering amending the Law in the future to enlarge its powers of investigation by introducing additional investigative tools.

The Commission has benefited enormously from the international competition community. With respect to executing a leniency policy, the Commission continues to reap valuable rewards from the products of the ICN, and there is no doubt that this has made it better equipped to enforce the Law more effectively.

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