

Dominance

Contributing editors

Patrick Bock, Kenneth Reinker and David R Little



2018

GETTING THE
DEAL THROUGH

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Patrick Bock, Kenneth Reinker and David R Little
Cleary Gottlieb Steen & Hamilton LLP

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This article was first published in April 2018
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Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 3780 4147
Fax: +44 20 7229 6910

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No photocopying without a CLA licence.
First published 2005
Fourteenth edition
ISBN 978-1-78915-016-2

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Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112



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Preface

Dominance 2018

Fourteenth edition

Getting the Deal Through is delighted to publish the fourteenth edition of *Dominance*, which is available in print, as an e-book and online at www.gettingthedealthrough.com.

Getting the Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

Throughout this edition, and following the unique **Getting the Deal Through** format, the same key questions are answered by leading practitioners in each of the jurisdictions featured. Our coverage this year includes new chapters on Austria, Belgium, Saudi Arabia, Sweden and Taiwan.

Getting the Deal Through titles are published annually in print. Please ensure you are referring to the latest edition or to the online version at www.gettingthedealthrough.com.

Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

Getting the Deal Through gratefully acknowledges the efforts of all the contributors to this volume, who were chosen for their recognised expertise. We also extend special thanks to the contributing editors, Patrick Bock, Kenneth Reinker and David R Little of Cleary Gottlieb, for their continued assistance with this volume.

GETTING THE
DEAL THROUGH 

London
March 2018

Taiwan

Aaron Chen and Emily Chueh

Lee, Tsai & Partners

General questions

1 Legal framework

What is the legal framework in your jurisdiction covering the behaviour of dominant firms?

The main source of law regulating dominant enterprises is the Fair Trade Act (FTA), under which articles 7 and 9 define 'monopolistic enterprises' and prohibit such monopolistic enterprises from abusing their market position. Others include the Enforcement Rules of Fair Trade Act and the Principles of the Fair Trade Commission Regarding the Definition of Relevant Markets established by the Taiwan Fair Trade Commission (TFTC), as well as the TFTC's interpretations and explanations on specific industries or type of conduct. Please refer to question 4 for more details. While the above laws use the concept of monopolistic enterprise instead of dominant firm, they could generally be deemed interchangeable under the above law and the practice in Taiwan. As such, the analysis below uses the two terms interchangeably unless otherwise specified therein.

2 Definition of dominance

How is dominance defined in the legislation and case law? What elements are taken into account when assessing dominance?

There are two types of dominance defined in the FTA: (i) any enterprise that faces no competition or has a dominant position to enable it to exclude competition in the relevant market; and (ii) two or more enterprises that do not substantively engage in price competition with each other and have, as a whole, the same status as the enterprise in (i) (article 7 of the FTA).

The standard for determining dominance as applied by the courts and the TFTC is based on the FTA and other relevant regulations promulgated by the TFTC. The main factors as specified under the FTA are market share, sales amount, and any other circumstance under which the supply and demand of the market can be affected or otherwise impede the ability of others to compete, which includes the possibility of substitution of the goods or services, the ability to influence prices, the barrier of entry, etc (article 3 of the Enforcement Rules of the Fair Trade Act).

According to paragraphs 1 and 2 of article 8 of the FTA, if one enterprise owns a half market share in the relevant market, two enterprises as a whole own two-thirds market share, or three enterprises as a whole own three-quarters market share in the relevant market, the enterprise or the enterprises as a whole, respectively, may be presumed to be dominant. However, if the market share of an individual enterprise is less than 10 per cent, or if the total sales turnover of the enterprise during the previous fiscal year is less than NT\$2 billion, it will not be presumed as dominant.

With that said, in practice, the aforementioned sales turnover safe harbour exception is merely an instructive guideline, which means other factors, such as market share, may still be taken into consideration when the TFTC determines an enterprise monopolistic or not. As an example, there was a case in which even though the sales amount of the enterprise did not exceed the above statutory threshold for a monopolistic enterprise, the enterprise was still penalised

as a monopoly owing to its high market share (TFTC Decision Gong-Chu-Zi No. 094017).

While the concept of relative dominance is not present in the law itself, if the enterprise is not monopolistic, it may still be found to have violated the FTA (article 20) owing to leveraging its relatively stronger market position to its trading counterpart to limit competition (TFTC Decision Gong-Chu-Zi No. 094053).

3 Purpose of the legislation

Is the purpose of the legislation and the underlying dominance standard strictly economic, or does it protect other interests?

The legislative reasoning for the FTA provides for four purposes: maintaining trading order; protecting consumers' interests; ensuring free and fair competition; and promoting economic stability and prosperity. As such, the purpose of the legislation is more economic oriented. Industrial policy and protection of other interests are generally covered by industry-specific regulations (such as the Electricity Act) or other laws (such as Consumer Protection Act and environmental protection laws), which the TFTC does not take into consideration in practice despite some of the recent academic opinions on the contrary.

4 Sector-specific dominance rules

Are there sector-specific dominance rules, distinct from the generally applicable dominance provisions?

The TFTC has established several sets of administrative handling principles for specific sectors such as in elevator enterprise sales and maintenance, digital convergence related enterprises, cable television related enterprises and telecommunication enterprises. Although the rules regarding market dominance do not vary from those in the FTA, those sector-specific rules often contain more detailed and concrete guidelines on determining the relevant market, calculation of market share and abuse of dominant position. For example, market share is generally calculated based on the ratio of the sales volume or turnover of an individual enterprise in the relevant market over a certain period of time, but in article 4 of the Regulations of the Fair Trade Commission regarding the Cross-Industry Operation of Digital Convergence Related Enterprises, market share is calculated by the number of users or subscribers for enterprises with fixed customers, or by service usage or data volume for those without fixed customers.

In addition to specific industrial sectors, the TFTC has further specified the following types of illegal conducts that may constitute the abuse of dominance in technology licensing: (article 6 and article 7 of the Fair Trade Commission Disposal Directions (Guidelines) on Technology Licensing Arrangements):

- restrictions on the use of the licensed technology or the trading counterparts of a licensee in order to achieve market segmentation, or if such restrictions are irrelevant to the scope of the licence;
- mandatory requirement for the licensee to purchase, accept, or use patents or know-how not needed by the licensee; and
- mandatory requirement for the licensee to assign back exclusively to the licensor any improvements to the licensed patent or know-how.

5 Exemptions from the dominance rules

To whom do the dominance rules apply? Are any entities exempt?

In principle, all enterprises are subject to the FTA. The TFTC had also penalised a state-funded enterprise, which may be deemed as a public entity, for abuse of dominance (TFTC Decision Gong-Chu-Zi No. 103043).

6 Transition from non-dominant to dominant

Does the legislation only provide for the behaviour of firms that are already dominant?

The FTA only prohibits the abusive conduct of enterprises that are already monopolistic; there is no specific provision on enterprises attempting to attain dominance.

7 Collective dominance

Is collective dominance covered by the legislation? How is it defined in the legislation and case law?

Yes. According to paragraph 2, article 7 of the FTA, two or more enterprises shall be deemed as a single monopolistic enterprise as a whole if they do not substantively engage in price competition with each other. For example, there was a case where multiple enterprises set their royalties through the use of patent pooling that was deemed as monopolistic (by collective dominance) by the TFTC and the courts (Supreme Administrative Court 2012 Decision Pan-Zi No. 1001).

8 Dominant purchasers

Does the legislation apply to dominant purchasers? Are there any differences compared with the application of the law to dominant suppliers?

The FTA does not preclude the application of the statute to dominant purchasers. In particular, the language of paragraph 3, article 9, 'make a trading counterpart give preferential treatment without justification' has generally been considered to regulate dominant purchasers.

9 Market definition and share-based dominance thresholds

How are relevant product and geographic markets defined? Are there market-share thresholds at which a company will be presumed to be dominant or not dominant?

The term 'relevant market' as used in the FTA is generally defined by both the product market and geographic market. The product market refers to a set of goods or services that are considered to be substitutable in terms of functionality, features, uses or prices. The geographic market refers to a specific region where the counterparty of a transaction may easily choose or switch to other trading partners for relevant goods or services (Principles of the Fair Trade Commission Regarding the Definition of Relevant Markets). The courts have generally followed the same above principles set out by the TFTC, but from time to time and depending on the case, they may come to a different market definition result from that asserted by the TFTC.

Refer to question 2 for details regarding market share thresholds and the single or collective dominance.

Abuse of dominance

10 Definition of abuse of dominance

How is abuse of dominance defined and identified? What conduct is subject to a per se prohibition?

Abuse of dominance as provided in article 9 of the FTA includes:

- directly or indirectly preventing by unfair means other enterprises from competing;
- improperly setting, maintaining or changing the price for goods or the remuneration for services;
- making a trading counterpart give preferential treatment without justification; and
- other abusive conduct (all-inclusive provision).

The above-mentioned 'unfair means', 'improperly', 'without justification' and the all-inclusive provision itself are not strictly defined legal concepts, so Taiwan's approach may be better characterised as effects-based. The TFTC usually makes its findings based on whether the enterprise leveraged its dominance to prevent, obstruct or block competitors, or otherwise affected market competition. However, a refusal to deal by a dominant enterprise appeared to have more easily led to a conclusion of abuse of dominance (TFTC Decision Gong-Chu-Zi No. 089170). The recent TFTC decision against Qualcomm (TFTC Gong-Chu-Zi No. 106094) also appeared to have concluded that a standard-essential patent (SEP) holder's refusal to licence its SEPs under fair, reasonable and non-discriminatory commitments constitutes abuse of dominance.

11 Exploitative and exclusionary practices

Does the concept of abuse cover both exploitative and exclusionary practices?

Yes, both exploitative and exclusionary practices are contemplated by the TFTC as abuse of dominance under the FTA.

12 Link between dominance and abuse

What link must be shown between dominance and abuse? May conduct by a dominant company also be abusive if it occurs on an adjacent market to the dominated market?

According to the FTA, the abusive conducts of monopolistic enterprises must be directly or indirectly related to its market dominance. However, it is possible for conduct of a dominant enterprise to be deemed as abusive if the enterprise improperly extends its market power into other product or service markets by tie-in, package deals or other means.

13 Defences

What defences may be raised to allegations of abuse of dominance? When exclusionary intent is shown, are defences an option?

As mentioned above, the monopolistic enterprise may justify the economic rationalisation and legitimacy of its behaviour. For example, the TFTC presently has determined that different or preferential pricing with justification implemented by telecommunications and digital convergence enterprises shall not be deemed as an abuse of dominance. Theoretically, efficiency gains may be used to justify the alleged abusive conduct; however, in practice, it would be weighted, along with all other factors such as intent, to determine the legality of the alleged abusive conduct.

It is worth noting that a monopolistic enterprise's intent and justification for its conduct are already part of the criteria for determining whether there is abuse of dominance and thus, the legitimacy of the conduct at issue will be determined on a case-by-case basis. In practice, it may be more difficult to defend the conduct if exclusionary intent is demonstrated. For example, in the aforementioned *Qualcomm* decision, the TFTC held that Qualcomm acted to exclude its competitors despite Qualcomm presumably presenting evidence justifying its actions. In contrast, when a monopolistic enterprise was able to substantiate that its refusal to deal has nothing to do with exclusionary intent but was merely the result of the other party's failure to abide by the long-standing practices to process the deal, it may successfully be found to have not engaged in abusive conduct (Supreme Court 2015 Decision Pan-Zi No. 53).

Specific forms of abuse

14 Rebate schemes

As described earlier, paragraph 3, article 9 of the FTA forbids a monopolistic enterprise from 'Making a trading counterpart give preferential treatment without justification'.

The TFTC has found that the practice of 'offering loyalty rebates (accompanied with an agreement prohibiting users from changing trading counterparties)' or 'giving bulk discounts to a party who may be changing trading counterparties' by a monopolistic enterprise shall be deemed as conduct that directly or indirectly prevents any other

enterprise from competing by unfair means in violation of paragraph 1, article 9 of the FTA (TFTC Decision Gong-Chu-Zi No. 094017). The aforementioned *Qualcomm* decision also found Qualcomm's rebate provisions to exclusive customer as in violation of paragraph 1, article 9 of the FTA (TFTC Decision Gong-Chu-Zi No. 106094).

15 Tying and bundling

There are two factors that may be taken into consideration when the TFTC determines what constitutes tie-in sales. The first is whether there are two distinguishable products or services; and the other is whether there exists an explicit or implied agreement that the buyer cannot freely choose whether to purchase the product and the tie-in product simultaneously from the seller. After the above conditions are met, it is necessary to further determine whether a tie-in sale is actually in violation of the law. There are three factors to consider for this part of the determination (TFTC Interpretation Gong-Can-Zi No. 09144):

- the seller should have a certain degree of market power in the tie-in products;
- whether there is a concern of obstructing market competition of the tie-in products; and
- whether there is proper justification: even when the above two factors are present, the tie-in may still be deemed as legal if there is proper justification.

For the digital convergence and telecommunications sector, the TFTC has expressly stated that according to section 5 of the Directions on the Cross-Industry Business Practices of Enterprises Engaging in Digital Convergence and Related Businesses, the use of tie-in or bundling sales to expand market share in new services constitutes an improper expansion of market power and shall be deemed as an abuse of dominance.

16 Exclusive dealing

Exclusive dealing is not explicitly regarded as an abuse of dominance in the FTA and the Enforcement Rules. However, if a dominant company that engages in exclusive dealing that limits competition, it may be found as engaging in abuse of dominance. For example, in the *Qualcomm* case, TFTC mentioned in its decision that Qualcomm precluded competition by offering discounts and exclusive deals, which may constitute abuse of dominance (TFTC Decision Gong-Chu-Zi No. 106094).

Past interpretations made by the TFTC, the presence of an exclusive gasoline supply provision in a long-term gasoline purchase agreement between a petroleum company and gas station owner has been found to have directly hindered new enterprises from entering the market and thus constitute abusive conduct for 'directly or indirectly preventing by unfair means other enterprises from competing' (Letter 1998 Gong-Er-Zi No. 8511058-004).

17 Predatory pricing

There is no express definition of 'predatory pricing' under the FTA; however, the concept has long been adopted in practice.

Both the Directions on the Telecommunications Industry and Directions on the Cross-Industry Business Practices of Enterprises Engaging in Digital Convergence and Related Businesses as drafted by the TFTC state that the predatory pricing includes the ability to recover all losses and gain extra profits in the long-run after all competition has been excluded.

The Taipei High Administrative Court decided in the 1998 Su-Geng-Yi-Zi No.107 case that when determining whether price-setting is predatory, the TFTC shall take into account the following four factors, including whether the enterprise is capable of recovering its losses:

- whether the actor is monopolistic in the relevant market;
- whether the price is below the long-run incremental cost;
- whether competitors operating at similar efficiencies are being impeded or excluded from the market; and
- whether there is a significant barrier of entry that allows the actor to recover its previous losses and raise its prices to those of a monopoly after all competitors have been excluded.

18 Price or margin squeezes

The TFTC has made the following interpretations with respect to 'vertical price or margin squeezes' in the digital convergence industry and in the telecommunications industry.

Digital convergence industry

If a monopolistic enterprise has control over the key factors of production, and it has set the price on those key factors higher than 'the individual cost to that enterprise in providing such key factors of production', thereby increasing the operating costs of the downstream competitors and forcing them to withdraw from the market, such conduct may constitute an abuse of dominance (section 5 of the Directions on the Cross-Industry Business Practices of Enterprises Engaging in Digital Convergence and Related Businesses).

Telecommunications industry

In the case of a vertically integrated telecommunications enterprise with operations in both upstream and downstream markets, and the upstream market is a monopoly with products that are essential for downstream competitors, if, in seeking to impede or eliminate downstream competitors, the enterprise increases the price of the upstream market product and lowers the price of the downstream market product, this will be found to be a vertical price squeeze (section 5 of the Directions on the Telecommunications Industry).

The TFTC further explained in an official interpretation letter for a particular case that if the upstream agent or distributor is a monopolistic enterprise and 'makes improper price decisions or reduces supply of parts to competing distributors in the same area' for no reason other than to eliminate those distributors from competition in the market, that type of conduct would be deemed as a price squeeze or supply squeeze and is likely to constitute 'directly or indirectly preventing by unfair means other enterprises from competing'.

19 Refusals to deal and denied access to essential facilities

In a previous case where a fuel supplier, who is also a downstream gasoline provider, refused to provide fuel to another downstream gasoline provider so as to prevent airline companies from working with the other gasoline provider, such refusal to deal was held to be abusive conduct. The supplier's unfair prevention of other gasoline providers from entering the market to maintain its dominant position constituted an abuse of dominance that was 'clearly without a legitimate commercial reason' (TFTC Decision Gong-Chu-Zi No. 170).

In the aforementioned recent *Qualcomm* decision, the TFTC also deemed Qualcomm's refusal to licence to other chip makers as an abuse of its dominance in the baseband chipset market (TFTC Decision Gong-Chu-Zi No. 106094).

The TFTC has also determined in the past that denial of access to essential facilities is a form of refusal to deal. The Taichung Port subsidiary of the Taiwan International Ports Corporation possessed certain key harbour facilities that were rented out to downstream cargo loading businesses at discriminatory rates, and the TFTC concluded that such discriminatory treatment for key essential facilities constituted an abuse of dominance (TFTC Decision Gong-Chu-Zi No. 103043).

20 Predatory product design or a failure to disclose new technology

There is currently no court precedent on this subject matter.

21 Price discrimination

Paragraph 2 of article 9 of the FTA provides that a dominant business shall not improperly set, maintain or change the price for goods or the remuneration for services. Outside of the dominance context, the FTA also prohibits discriminatory treatment without justification under paragraph 2, article 20 for any business that has attained a 'substantial market position'. In practice, whether the pricing is discriminatory has generally depended on whether there was a proper justification for doing so in that particular case, which would be determined on a case-by-case basis.

22 Exploitative prices or terms of supply

Exploitative pricing may be considered to fall under 'improperly set, maintain or change the price for goods or the remuneration for services' in paragraph 2 of article 9 of the FTA. The TFTC has penalised a collective monopoly of CD-R enterprises for refusal to negotiate with licensees and improperly maintaining royalty rates (TFTC Decision Gong-Chu-Zi No. 104027). The TFTC also found in the aforementioned *Qualcomm* case that Qualcomm's 'no licence no chip' policy had unfairly forced handset manufacturers to accept patent licence terms that are favourable to Qualcomm, which constituted direct or indirect prevention of other enterprises from competing.

23 Abuse of administrative or government process

In terms of abuse of administrative or governmental procedure to eliminate competition, it may theoretically be considered to fall under abuse of dominance through 'directly or indirectly prevent[ing] by unfair means other enterprises from competing' per paragraph 1, article 9 of the FTA, or otherwise under the all-inclusive 'other abuse of dominance' under paragraph 4 of the same. However, there has yet to be any precedent of a monopolistic business penalised for abusing administrative or governmental procedure.

24 Mergers and acquisitions as exclusionary practices

While the FTA itself does not explicitly prohibit an enterprise from becoming a monopoly through mergers, theoretically the exclusionary effect is taken into account when the TFTC decides whether to approve the reported merger. In practice, the TFTC will scrutinise any proposed merger that would create a monopoly in the market more strictly. In a case concerning the proposed merger of karaoke chains, the TFTC found that such a merger would cause the relevant market to be bereft of all competition or otherwise exclude competition, thus the merger was rejected for 'clear concern of restriction of competition' (2010 Su-Zi No. 779 Decision at the Taiwan High Administrative Court).

25 Other abuses

'Improper cross-subsidisation' may also be deemed abusive conduct by a monopoly. For example, in the digital convergence and telecommunications sector, this refers to an entity engaging in many different telecommunications services who uses profits from a market in which it has a dominant position to subsidise its other business in a more competitive market, or using the profits from a regulated or restricted market to subsidise its other business in an unrestricted market. However, the courts have thought the entity must also be engaged in exploitative pricing in addition to the above before the practice may be considered a violation of the FTA.

In practice, provision of over-spec product (ie, product with specifications or capabilities that are beyond the consumer's needs) may also constitute abusive behaviour. There was a case in which a monopolistic gas supplier used larger-flow gas meters that exceeded the users' needs and caused users to pay at higher basic rates. The courts found that the failure to install the most appropriate gas meters caused the gas supplier to unjustly profit from the information asymmetry, which constitute an abuse of dominance (2001 Taiwan High Administrative Court Decision Su-Zi No. 1091).

Enforcement proceedings

26 Enforcement authorities

Which authorities are responsible for enforcement of the dominance rules and what powers of investigation do they have?

Per article 6 of the FTA, the TFTC is the central competent authority on enforcement of dominance rules. The TFTC may investigate ex officio, notify the parties and any related third party to appear to make statements or submit necessary materials or exhibits, dispatch personnel for onsite inspection, etc. The TFTC may seize any article obtained from the investigation that may serve as evidence despite rarely doing so in actual practice (article 26 and 27 of the FTA).

Although abuse of dominance may occasionally involve criminal liability, the FTA prioritises enforcement of administrative authority; the prosecutor only enters into the investigation when the actor persists in refusing to rectify its conduct after administrative sanctions

Update and trends

After all of the FTA's 50 articles were last amended on 4 February 2015, there was no further amendment of dominance-related articles. However, the TFTC has been conducting some internal programmes aiming at dealing with e-commerce, the digital economy or other new business models resulting from destructive innovations.

There is currently a draft amendment to article 27-1 of the FTA to provide the TFTC with powers to conduct search and seizure. If passed, this will allow the TFTC to conduct searches during an investigation and immediately seize any evidence it finds.

have been issued. Consequently, it is rare in practice for a prosecutor to initiate criminal prosecution for violations of the FTA.

27 Sanctions and remedies

What sanctions and remedies may the authorities impose? May individuals be fined or sanctioned?

For abuse of dominance, the TFTC may order the enterprise to cease therefrom, rectify its conduct or take necessary corrective action within the time prescribed in the order; in addition, it may assess upon such enterprise an administrative penalty of not less than NT\$100,000 but no more than NT\$50 million. If such enterprise fails to rectify its conduct as ordered, the TFTC may successively assess an administrative penalty of not less than NT\$200,000 but no more than NT\$100 million for each failure until rectification. For serious violations of the FTA, the TFTC may impose an administrative penalty up to 10 per cent of the total sales income of an enterprise in the previous fiscal year without being subject to the aforementioned limit of administrative fines (article 40 of the FTA regarding the calculation of administrative penalties of serious violations of articles 9 and 15).

The above-mentioned 'rectifying conduct or taking necessary corrective action' includes specific performance, such as in the *Qualcomm* decision, in which the TFTC ordered Qualcomm to cease and desist from continuing to apply specific offending contractual terms, as well as accept requests from chipset or handset manufacturers to renegotiate those contracts. While 'structural remedies' may in theory part of the 'rectifying conduct or taking necessary corrective action', as the FTA only prohibits the dominant enterprise from abuse of dominance rather than causing the enterprise to no longer be dominant, the TFTC has never prescribed structural remedies for FTA violations.

For criminal liabilities, continued failure to comply with the TFTC's order or a return to engaging in the same violations may result in imprisonment for not more than three years or detention, or by a fine of not more than NT\$100 million, or by both. Moreover, according to articles 15 and 16 of the Administrative Penalty Act, when an enterprise is in violation of the FTA, natural persons, whether they are the directors of the enterprise or any other individuals with the authority to represent the enterprise whose intentional act or gross negligence caused the enterprise to be in violation of the FTA, or other employees whose failure to properly perform their duty to supervise led to such violation of the FTA, shall likewise be levied a fine. However, as mentioned above, the prioritisation of the enforcement of administrative authority over the judicial in the case of the FTA has caused criminal prosecution for FTA violations to nearly completely disappear.

28 Enforcement process

Can the competition enforcers impose sanctions directly or must they petition a court or other authority?

The TFTC may impose sanctions directly on the enterprise.

29 Enforcement record

What is the recent enforcement record in your jurisdiction?

In the past, the rules on abuse of dominance were rarely enforced by the TFTC, but the trend seems to have changed in recent years. As stated above, some of the landmark cases in this area were only determined in the past decade. The latest high-profile decision is the *Qualcomm* decision, in which the TFTC imposed on Qualcomm a

record fine of NT\$23.4 billion for its abuse of dominance. In general, the improper setting of the price for goods or the amount of royalties, as well as the refusal to deal are the most common type of abusive conducts sanctioned.

30 Contractual consequences

Where a clause in a contract involving a dominant company is inconsistent with the legislation, is the clause (or the entire contract) invalidated?

According to court practices, a contractual clause that is inconsistent with the provisions of article 9 of the FTA does not invalidate the clause or the entire contract; however, such conduct must cease, and there are grounds to claims for damages, as well as the exclusion and prevention of infringement (Taiwan Shilin District Court Decision 2007 Chong-Su-Zi No. 268, Intellectual Property Court Decision 2012 Min-Zhuan-Shang-Geng(II)-Zi No. 3).

31 Private enforcement

To what extent is private enforcement possible? Does the legislation provide a basis for a court or other authority to order a dominant firm to grant access, supply goods or services, conclude a contract or invalidate a provision or contract?

Private enforcement is allowed under the FTA; however, it is more related to damages rather than specific performance remedy. However, certain types of specific performance are available under article 29 of the FTA: an enterprise may petition a court to order another to cease and desist from infringing (or prevent, if there is a risk of infringement) on its rights through an FTA violation.

32 Damages

Do companies harmed by abusive practices have a claim for damages? Who adjudicates claims and how are damages calculated or assessed?

Yes, any enterprise that has been harmed by abusive practices may file for damages at the civil courts in Taiwan. Treble damages may be available for intentional abusive practices. Profits from abusive practice may be requested to be used as a basis for assessing damages (articles 30 and 31 of the FTA).

Although the FTA provides the legal basis for civil remedies, the private enforcement of claim for damages arising from restrictive competition in Taiwan is still rare, even as there are already examples of enterprises filing claims for damages in concerted action cases.

33 Appeals

To what court may authority decisions finding an abuse be appealed?

The TFTC's decision may be challenged by filing an administrative lawsuit with the High Administrative Court. Appeals for cases involving intellectual property rights may be filed with the Intellectual Property Court. Administrative lawsuits have two instances where the first instance review and decide both the facts and the law, while the second and final instance only reviews matters of law.

Unilateral conduct

34 Unilateral conduct by non-dominant firms

Are there any rules applying to the unilateral conduct of non-dominant firms?

Not applicable.



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