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**SERIAL OFFENDERS: WHY SOME INDUSTRIES SEEM PRONE TO ENDEMIC COLLUSION**

**Contribution from Chinese Taipei**

-- Session IV --

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## SERIAL OFFENDERS: WHY SOME INDUSTRIES SEEM PRONE TO ENDEMIC COLLUSION

### -- Chinese Taipei --

#### 1. Introduction

1. Chinese Taipei's competition law, the Fair Trade Act (FTA), has been amended several times on the penalties imposed on enterprises that restrict competition and commit repeat offenses since it took effect in 1992. The changes can be roughly divided into three stages as described below.

##### *1.1 1992-1999*

2. The FTA was promulgated on February 4<sup>th</sup>, 1991 and took effect on February 4<sup>th</sup>, 1992. Administrative penalties for enterprises that violated the FTA included ceasing or rectifying the conduct within a specified period of time. In the event that the enterprise did not cease or rectify its conduct after the time period had passed, the Fair Trade Commission (FTC) could continue to order the enterprise to cease or rectify the illegal conduct, and could impose a maximum fine of NT\$1 million for each period of time the enterprise failed to cease or rectify the illegal conduct. Enterprises that violated articles on monopoly or concerted actions could face criminal penalties on their first offense, and prison sentences of up to three years and/or fines of up to NT\$1 million could be imposed<sup>1</sup>.

##### *1.2 1999-2015*

3. The first amendment to the FTA was promulgated on February 3<sup>rd</sup>, 1999, and the principle of "precedence of administrative action over judicial adjudication" was adopted, giving the FTC the power to directly impose administrative fines on violators. Criminal penalties for violators of articles on monopoly or concerted actions were removed for the first offense. For enterprises that violated the FTA for the first time, the FTC would order the enterprise to cease or rectify the illegal conduct or take necessary corrective action within a specified time period, and would impose an administrative fine of between NT\$50 thousand and NT\$25 million. In the event that the enterprise did not cease or rectify its conduct after the time period had passed, the FTC would continue to order the enterprise to cease or rectify the illegal

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<sup>1</sup> Article 41 of the FTA (1991): "The FTC may order enterprises that violate articles of the Act to cease or rectify their conduct within a specified time period. In the event the enterprise does not cease or rectify its conduct after the time period has passed, the FTC may continue to order the enterprise to cease or rectify the illegal conduct, and may impose a maximum fine of NT\$1 million for each period of time the enterprise fails to cease or rectify the illegal conduct."

Article 35 of the same Act: "Violators of Article 10, Article 14, Article 20, or Paragraph 1 of Article 23 will be punished by imprisonment not more than three years, detention, and/or a fine of up to NT\$1 million."

conduct, and could impose an administrative fine of between NT\$100 thousand and NT\$50 million for each period of time that the enterprise failed to cease or rectify the illegal conduct<sup>2</sup>.

### 1.3 November 2011-

4. The FTA was amended on November 23<sup>rd</sup>, 2011 to add a leniency program applicable to concerted action cases, and the amounts of the fines for violations were raised in conjunction with the amendments. When the FTC determines that an enterprise has severely violated articles on monopoly or concerted action, the FTC will impose an administrative fine of up to 10% of the enterprise's sales revenue in the previous accounting year. The FTA was amended again on February 4<sup>th</sup>, 2015 to set different fine amounts for different violations, and also raise the fine amount for anticompetitive conducts; the FTC may impose an administrative fine of NT\$100 thousand to NT\$50 million on enterprises that violate articles on monopoly, concerted action, restrictions on resale prices, or other conduct that restricts competition<sup>3</sup>.

## 2. Industries prone to endemic collusion

5. Even though the FTA has been amended to impose more severe penalties for illegal conduct, and has doubled the penalty for repeat offenses as criminal penalties are also imposed, it is not uncommon to find repeat offenses due to the same conduct or similar conduct within an industry, or a repeat offense due to the same conduct by the same enterprise. Based on the FTC's enforcement experiences, industries prone

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<sup>2</sup> Article 41 of the FTA (1999): "The FTC may order any enterprise that violates articles of the Act 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\$50 thousand nor more NT\$25 million. Shall such enterprise fails to cease therefrom, rectify the conduct or take any necessary corrective action after the lapse of the prescribed period, the competent authority may continue to order such enterprise to cease therefrom, rectify the conduct or take any necessary corrective action within the time prescribed in the order, and each time may successively assess thereupon an administrative penalty of not less than NT\$100 thousand nor more than NT\$50 million until its ceasing therefrom, rectifying its conduct or taking the necessary corrective action."

Article 35 of the same Act: "Any enterprise that violates Article 10, Article 14, or Paragraph 1 of Article 20 and fails to cease or rectify the conduct or take any necessary corrective action within the time prescribed by the central competent authority in accordance with Article 41, or repeats a similar violation after ceasing the conduct, will be punished by imprisonment not more than three years, detention, and/or a fine of up to NT\$1 million."

<sup>3</sup> Article 40 of the FTA (2015): "The competent authority may order any enterprise that violates Article 9, Article 15, Article 19 and Article 20 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 thousand nor more NT\$50 million. Shall such enterprise fails to cease therefrom, rectify the conduct or take any necessary corrective action after the lapse of the prescribed period, the competent authority may continue to order such enterprise to cease therefrom, rectify the conduct or take any necessary corrective action within the time prescribed in the order, and each time may successively assess thereupon an administrative penalty of not less than NT\$200 thousand nor more than NT\$100 million until its ceasing therefrom, rectifying its conduct or taking the necessary corrective action."

"The competent authority may impose an administrative penalty up to 10% of the total sales income of an enterprise in the previous fiscal year without being subject to the limit of administrative fine set forth in the preceding paragraph if the enterprise is deemed by the central competent authority as in serious violation of Articles 9 or 15."

"The competent authority shall enact the regulations with regard to the calculation of the total sales of the previous fiscal year, definition of serious violations, and calculation of administrative penalties."

to endemic collusion include the gravel industry, cement industry, ready mixed concrete industry, asphalt concrete industry, and liquid petroleum gas industry. Each industry is further described below.

### **2.1 Gravel Industry**

6. Gravel is a material characterized by its being large and heavy in volume, and the longer it is transported the higher the cost, which is a disadvantage in competition. Hence, quarrying companies are densely established along river banks or places where transportation is convenient. Gravel is the main material (roughly 50~70%) used in ready mixed concrete, making it indispensable in construction. Insufficient gravel supply will not only affect the progress of construction, but will also impact a country's overall economic development. Due to the high degree of homogeneity of gravel, "transport distance" is an important factor in the companies' costs, and will result in price differences. Gravel companies often use trade associations to fix gravel prices, distribute volume, or jointly suspend quarrying to raise prices, thereby ensuring their profits and avoiding price competition. The FTC investigated and imposed penalties in relation to 7 cartel cases in the gravel industry between 1996 and 2012, in which 5 cases were concerted action cases carried out by trade associations. The FTC also investigated a repeat concerted action case involving the Hualien County Gravel Association within 2 years, and the final verdict found the association's chairman guilty of criminal charges.

### **2.2 Cement Industry**

7. The cement industry is characterized by domestic demand, a capital-intensive, continuous production process, seasonal demand influenced by the construction industry, high power consumption, and high pollution. The cement market is a regional oligopoly market as cement is heavy and can easily become solidified because of dampness, and transport costs account for a significant proportion of the overall price. Hence, it is difficult to transport cement long distances to sell it. The FTC investigated an international cartel in 2002, when international cement groups in Chinese Taipei and the Philippines agreed to not sell cement to the other party's market. The case involved 11 cement companies and 10 cement storage companies and distributors, which engaged in a number of concerted actions, including raising cement prices, limiting cement shipments, reselling cement, exiting markets or not importing cement. The FTC imposed a total fine of NT\$210 million on these 21 cement suppliers and retailers in 2005. Of the cement companies involved in the case, Taiwan Cement Corporation, the largest cement company in Chinese Taipei, was also penalized by the FTC for its involvement in a ready mixed concrete price fixing case in Chiayi in 2006.

### **2.3 Ready Mixed Concrete Industry**

8. Ready mixed concrete is mixed from gravel, cement and water. Because factories are easy to establish, its technology is simple, products are homogeneous, and products cannot be stored (it is necessary for there to be only a brief amount of time from mixing, initial setting to pouring, and ready mixed concrete cannot be used after it solidifies), the market where ready mixed concrete is sold is within a 1 hour driving distance of the factory. Hence, the ready mixed concrete market is a regional oligopoly with homogeneous products, in which market participants have extremely similar cost structures (the transport cost accounts for a high percentage of the product price), market demand or product specifications, and market participants can only compete on the basis of price. However, ready mixed concrete companies are often involved in their upstream industries (cement, gravel), making it easy for them to collude with each other. The companies often engage in cartel activity, such as through reaching agreements to share the market, engaging in base-point pricing, taking turns to suspend production or carrying out production to control supply, distributing shipment quantities, and limiting shipments. the higher the cost, which is a disadvantage in competition. Hence, quarrying companies are densely established along river banks or

places where transportation is convenient. Gravel is the main material (roughly 50~70%) used in ready mixed concrete, making it indispensable in construction. Insufficient gravel supply will not only affect the progress of construction, but will also impact a country's overall economic development. Due to the high degree of homogeneity of gravel, "transport distance" is an important factor in the companies' costs, and will result in price differences. Gravel companies often use trade associations to fix gravel prices, distribute volume, or jointly suspend quarrying to raise prices, thereby ensuring their profits and avoiding price competition. The FTC investigated and imposed penalties in relation to 7 cartel cases in the gravel industry between 1996 and 2012, in which 5 cases were concerted action cases carried out by trade associations. The FTC also investigated a repeat concerted action case involving the Hualien County Gravel Association within 2 years, and the final verdict found the association's chairman guilty of criminal charges.

9. The FTC has investigated a total of 9 cartel cases in the ready mixed concrete industry since 1997, investigating up to 120 companies involved in the cases. Goldsun Co., Ltd., the largest ready mixed concrete company in Chinese Taipei, was involved in numerous concerted action cases in different areas, and was penalized by the FTC in all of the cases.

#### **2.4 Asphalt Concrete Industry**

10. Asphalt concrete mainly consists of asphalt and gravel, and products are highly homogeneous. Asphalt must be kept at temperatures of at least 120°C to maintain its viscosity, and must be kept at temperatures of at least 150°C before shipment. Hence, storage of asphalt concrete is extremely costly and it cannot be produced too far in advance. Moreover, at least 95% of construction using asphalt concrete is government-funded, so producers mainly focus on meeting the requirements of construction outsourcing departments or clients. Therefore, the asphalt concrete industry is a highly customized demand-oriented industry. Other characteristics of the industry include the need for economies of scale and low transparency of product information. Consequently, asphalt concrete companies can easily gain extravagant profits through collusion, which usually takes the form of bid rigging.

11. The FTC investigated 2 concerted action cases in the asphalt concrete industry in 2014. In one of the cases, 16 asphalt concrete companies in Tainan City area reached a mutual understanding to collect a "stability fund" from downstream clients, causing the price of asphalt concrete to rise; the FTC imposed a total fine of NT\$39.5 million on the asphalt concrete companies. In the other case, 7 asphalt concrete companies in the Chiayi County area jointly raised the price of asphalt concrete, and the FTC imposed a total fine of NT\$20.5 million on the asphalt concrete companies. Of the asphalt concrete companies involved in these two cases, Chien Chung Construction Co., Ltd., which is the largest asphalt concrete supplier in Chinese Taipei, was involved in different concerted actions in different areas, and was penalized by the FTC in all of the cases.

#### **2.5 Liquid Petroleum Gas (LPG) Industry**

12. Liquid Petroleum Gas (LPG) is commonly referred to as "bottled gas" and is regarded as a daily essential in Chinese Taipei. The LPG market is divided into 4 levels including production or import, distribution, gas filling, and retail. At present, there are 2 upstream suppliers, 10 distributors, 119 gas filling companies, and some 3,400 retailers (commonly known as "gas shops"). In the industry, most distributors also operate gas filling companies, or gas filling companies are also gas shops. In Chinese Taipei, bottled gas is classified as a hazardous object and must be stored in a storage room compliant with relevant regulations. The location of storage rooms and sales venues are also regulated. Due to the heavy loads involved in transporting bottled gas, the industry implemented a "manual delivery center" system that takes into consideration both the transportation cost and the regulations on safe storage. However, the FTC determined that the operations of the "manual delivery center" can easily result in concerted actions such as price-fixing or market division. The FTC thus established the "Disposal Directions for the

Operations of the Bottled Gas Manual Delivery Center” for the industry to follow and avoid violating the FTA.

13. Gas filling companies are resellers between wholesalers and retailers. After transporting LPG from the upstream distributors, gas filling companies transfer the LPG into gas cylinders and then deliver the gas cylinders to gas shops. Hence, gas filling companies are in an extremely advantageous position in the market. Of the cases handled by the FTC over the years, gas filling companies have severely damaged market order by forming organizations to jointly raise prices, restrict trading counterparts, distribute trading volume, and even introduce outsiders to disrupt the market. The FTC has imposed heavy fines in each case. For example, in 2001, the FTC imposed a total fine of NT\$130 million on 27 gas filling companies in the southern part of the island for jointly raising transport and gas filling fees, refraining from competition, and restricting trading counterparts of gas shops. In 2003, the FTC again imposed a total fine of NT\$343.75 million on 30 gas filling companies in the northern area to form an organization for similar conduct. In sum, the FTC imposed penalties in six cases of violations by gas filling companies between 1999 and 2014, and investigated a total of 13 similar cases up to 2014.

14. In addition, cases at the retail level include regional gas shop associations setting a reference price through the board of directors’ meeting or general assembly; gas shops agreeing to jointly raise prices; and introducing new outsiders so that gas companies may refrain from price competition.

### **3. Conclusion**

15. The industries described above, including the gravel industry, cement industry, ready mixed concrete industry, asphalt concrete industry, and LPG industry, have become regional industries due to heavy products that lead to high transport costs, limited transport distance due to product characteristics, or legal regulations. Based on the FTC’s experience, such industries are prone to endemic collusion, which may be in the form of different companies within the same industry engaging in anticompetitive actions in different areas over numerous years, e.g., the gravel industry and LPG industry; the same company engaging in the same or different concerted actions in different areas, e.g., the ready mixed concrete industry and asphalt concrete industry; or the same company engaging in the same concerted action in different product markets, e.g., the cement industry and ready mixed concrete industry.

16. Why are these industries prone to collusion? Based on the FTC’s enforcement experiences, repeat offenses due to collusion are caused by certain characteristics of the above-mentioned industries, including homogeneous products, similar cost structures among competitors, high transport cost ratios (high marginal cost ratios), and low-tech products. From the perspective of market structure, cartels often arise in oligopolistic industries or regional oligopolistic industries, e.g., the cement industry and ready mixed concrete industry. From a long-term perspective, collusion sometimes becomes a common behavior in the industry to ensure profits, e.g., the gravel industry or LPG industry, but the situation has significantly improved under close monitoring by the FTC. In addition, in industries such as the ready mixed concrete industry and LPG industry, companies are often involved in upstream and downstream industries, making it easier for them to collude with each other. The same companies may be members of cartels in different product markets or at different levels.

17. How does the FTC respond to these regional industries that repeatedly collude with each other? The FTC has always placed equal emphasis on promoting competition and imposing penalties to ensure market competition and maintain market order. The FTC continuously promotes competition in these industries and has established directions for specific industries to follow. The FTC closely and continuously monitors those companies that have been involved in previous cases, and will impose even more severe penalties on serial offenders in accordance with the FTA. In practice, in light of regional industries being prone to form cartels, the competition law of Chinese Taipei has clear stipulations and

penalties for repeat offenses, only that hefty fines alone cannot effectively prevent anticompetitive actions. Even though the leniency policy was introduced into the Act in 2011, it has not yet been implemented in any cases in the industries mentioned in this paper.