Organisation for Economic Co-operation and Development

DAF/COMP/GF/WD(2023)15

Unclassified **English - Or. English**

10 November 2023

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE

Cancels & replaces the same document of 7 November 2023

Global Forum on Competition

Alternatives to Leniency Programmes – Contribution from Chinese Taipei

- Session II -

7-8 December 2023

This contribution is submitted by Chinese Taipei under Session II of the Global Forum on Competition to be held on 7-8 December 2023.

More documentation related to this discussion can be found at: oe.cd/atlp.

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JT03531396

Alternatives to Leniency Programmes

- Contribution from Chinese Taipei -

1. This paper provides an overview of implementing the leniency programme and other cartel detection tools in Chinese Taipei. It also illustrates the roles of these detection tools in cartel investigations with case examples.

1. Leniency Policy

1.1. Statutory basis of the leniency programme in Chinese Taipei

2. An in-depth peer review of competition law and policy in Chinese Taipei was conducted at the OECD's Global Forum on Competition in February 2006. One of the policy options proposed in the final report was to implement a leniency programme as a proactive tool to detect cartels[1]. Following this recommendation, the Chinese Taipei Fair Trade Commission (hereinafter referred to as the 'CTFTC') put forward amendments to the Fair Trade Act ('FTA') in 2011. The 2011 amendments revised Article 35 of the FTA[2] and the leniency programme came into effect in November of that year.

3. To ensure an effective implementation of the leniency programme, the CTFTC issued the 'Regulations on Immunity and Reduction of Fines in Illegal Concerted Action Cases' (hereinafter referred to as the 'Leniency Regulations')[3], which set out how an applicant may qualify for leniency and its relevant requirements. An enterprise that is engaging or has engaged in a horizontal concerted action may be eligible for fine immunity if its application is submitted prior to the CTFTC's investigation, and meets the following criteria: 1) the submission is sufficient to inform the CTFTC of essential details of the concerted action, including when, where and what businesses agree upon; 2) the applicant fulfills obligations subject to conditional immunity granted by the CTFTC. In a case where no one comes forward before the CTFTC launches an investigation, the first leniency applicant whose submission is made during the investigation may also qualify for immunity if the above criteria have been satisfied. For those ineligible for fine immunity, they may nevertheless qualify for a fine reduction. The first four applicants who meet criteria for a

[1] See the full report available at https://www.oecd.org/daf/competition/prosecutionandlawenforcement/38003515.pdf.

[2] Paragraph 1, Article 35 of the FTA provides that: 'The competent authority may grant exemption from or reduction of fines to be imposed in accordance with paragraph 1, 2 of Article 40 on enterprises in violation of Article 15 but meeting one of the following conditions:

1. the enterprise files a complaint or informs the competent authority in writing about the concrete illegal conduct of the concerted action in which it has partaken and also submits the evidence and assists the investigation before the competent authority is aware of the said illegal conduct or initiated an investigation in accordance with this Act;
2. the enterprise reveals the concrete illegal conduct as well as submits the evidence and assists the investigation during the period in which the competent authority investigates the said illegal conduct in accordance with this Act.

[3] See the Leniency Regulations available at https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=J0150012.

fine reduction can be granted a reduction respectively in the ranges of 30%-50%, 20%-30%, 10%-20% and up to 10%.

1.2. Implementation of the leniency programme and its challenges

4. Since the introduction of the leniency programme in Chinese Taipei in 2011, despite few leniency applications, the yearly number of leniency applications and applicants granted for fine immunity and reductions remain stable. The statistics do not show any significant decline in number over the past decade. One possible explanation may relate to traditional culture in industries. Businesses tend to hesitate to step forward to report others in relevant sectors as they are more likely to be condemned or criticized for their business ethics. Another possible reason may be that most cartels occur in oligopoly markets where market participants are more likely to identify who has applied for leniency. As a result, to avoid unintended consequences on market competition and business cooperation in the future, businesses involved in suspected activities generally lack a strong incentive to apply for leniency.

5. To alleviate concerns around the risk of leniency applicants being uncovered, the Leniency Regulations stated that unless otherwise provided by the law, documents containing information on applicants' identities may not be made available for access or be disclosed to any agencies, groups or individuals other than investigation and judicial agencies[4].The CTFTC should also prevent including any personally identifiable information in its decisions[5].By doing so, except for leniency applicants, neither cartel participants nor general public have access to such information that can be used to identify who has applied for leniency. These confidentiality rules, however, come with some challenges in promoting the leniency programme. Information on leniency applications in cartel cases normally will not be shared, to encourage other cartel members to make a confession. Businesses may face difficulties in weighing up the pros and cons of whether they should proceed to apply for immunity or a reduction of financial penalty, and may not fully understand the CTFTC's review criteria applicable to its decisions and particular measures taken to ensure confidentiality.

6. Therefore, the CTFTC has organized various advocacy and educational activities to enhance business awareness of the leniency programme and its relevant rules. It also increased the maximum penalty for serious cartel offences[6] to strengthen incentives for leniency applications. In addition to the leniency programme, the CTFTC has adopted multiple reactive and proactive tools to detect cartel behavior, which are explained in the following sections.

[4] Article 20 of the Leniency Regulations.

[5] Article 18 of the Leniency Regulations

[6] Under The Regulations for Calculation of Administrative Fins for Serious Violations of Article 9 and 15 pf the FTA, the maximum fine can reach up to 10 % of its total sales in the previous fiscal year for a business found in serious violation of cartel provisions.

2. Reactive cartel detection tools

2.1. Rewards for information leading to cartel detection

7. The informant reward programme is one important reactive cartel detection tool adopted by the CTFTC. Given that internal staff or trading counterparts are more likely to acquire information with regard to concerted actions, in October 2015 the CTFTC issued the 'Regulations on Payment of Rewards for Reporting of Illegal Concerted Actions' (hereinafter referred to as the 'Rewards Regulations')[7] to encourage whistleblowing. Informants may be granted financial rewards when they provide evidence not yet known to the CTFTC, and where the CTFTC's investigation establishes a violation of cartel provisions. Depending on the value of the evidence, rewards can range from 5% to 20% of the total amount of fines imposed on cartel members. The Rewards Regulations was further revised in 2021 by expanding the reward ranges and simplifying payment processes. It provides that a reward not more than NT$ 1 million (equivalent to US$ 310,000) will be paid as a cash lump sum once an infringement decision is made by the CTFTC[8].

8. Comparatively speaking, information obtained from leniency applications tends to be more specific and relevant, which can be used as direct evidence to establish the existence of cartel conduct, since such information is only known to the applicants, i.e. cartel members. The probative value of evidence provided by individual informants can otherwise vary to a great degree. Sometimes they may be internal business documents, but at times they may simply refer to the informant's life experiences and perceptions. Based on the CTFTC's enforcement experiences, due to the simplicity and accessibility of the informant reward programme, it has served to complement the current leniency programme that has been unable to attract more applications. The reward programme offers economic incentives not only to internal stakeholders but also to the general public, encouraging them to report any conduct that may raise cartel related concerns. This allows the CTFTC to collect cartel related information from a wider variety of different sources and in a timely manner.

[7] See the Rewards Regulation available at https://law.moj.gov.tw/ENG/LawClass/LawAll.aspx?pcode=J0150022.

[8] Paragraph 1, Article 5 of the Rewards Regulations provides that: 'After an imposition of a fine on an illegal concerted action, the competent authority's criteria for granting any reporting reward based on the value of evidence provided by the informer are as follows:

1. In the case that the informer provides evidence and data helpful to initiation of the investigation proceeding, the reporting reward will be 5% of the sum of the fine with a minimum of one hundred thousand (100,000) New Taiwan Dollars and a maximum of one million (1,000,000) New Taiwan Dollars;
2. In the case that the informer provides evidence and data indirectly proving the agreement of the concerted action, the reporting reward will be 10% of the sum of the fine with a minimum of one hundred thousand (100,000) New Taiwan Dollars and a maximum of ten million (10,000,000) New Taiwan Dollars; and
3. In the case that the informer provides evidence and data directly proving the agreement of the concerted action without any need for further investigation, the reporting reward will be 20% of the sum of the fine with a minimum of one hundred thousand (100,000) New Taiwan Dollars and a maximum of twenty million (20,000,000) New Taiwan Dollars.

9. To protect informants from retaliation, the Rewards Regulations includes confidentiality provisions concerning informants' identities and information that is likely to lead to their identification[9]. Since the leniency policy is only applicable to businesses that engage in cartel agreements, the applicants could be easily identified by the types of evidence they submit. However, as information provided by an informant (through the reward programme) is potentially known to numerous individuals/entities, the risk of being discovered seems considerably lower. This has resulted in more informants who are willing to report suspected cartel behavior. The case below serves as an example of informant identity exposure risk. The CTFTC received a complaint from an employee against its employer who was allegedly involved in a concerted action. The informant provided a screenshot of group conversations as evidence of a cartel agreement. Due to a large number of participants in the group chat, the employer would not be able to identify the informant, despite disclosure of the screenshot during the investigation. Until now, the total rewards under the programme have reached US$ 1,000,000, and an upward trend has been observed in terms of the number of application and the amount of rewards since the reward programme was revised in 2021.

2.2. Referrals from governmental agencies

10. When sector regulators interact with regulated industries and suspect if certain business practices may be viewed as concerted actions, they may send referrals to the CTFTC for further action or investigation. Since sector-specific laws and regulations do not typically cover competition enforcement, the understanding of illegality of a cartel may vary across different sector regulators. This suggests that sector regulators may need a longer processing time to clarify and comprehend issues before referrals can be made with confidence. In this regard, referrals from sector regulators may not be as timely a detection tool as the leniency programme and the informant reward programme. However, with long experiences in monitoring regulated industries, sector regulators have acquired a wealth of industry data and received numerous complaints about industry-specific issues, which equip them to more easily recognize and distinguish uncommon situations in industries. Referrals from sector regulators can be an effective tool to facilitate the CTFTC to screen and detect if cartel conduct exists.

11. In practice, the CTFTC received a leniency application from a cartel participant and a referral from a sector regulator for the same matter shortly after the CTFTC granted the applicant fine immunity. By comparing the information contained in the application and the referral, the CTFTC noted that the sector regulator indeed had learned of the cartel conduct earlier than the submission of the leniency application. The sector regulator could not inform the CTFTC of the cartel conduct before the submission, as it took further steps to collect information to learn about the situation. When looking into the evidence submitted by the leniency applicant and the sector regulator, the CTFTC found that the information provided by the leniency applicant was more specific and valuable, which included the details on how/when/where businesses engaged in agreements and the parties to the agreements. In this case, the evidence submitted by the leniency applicant had higher probative value to prove the relevant facts at issue.

[9] See Article 10 of the Rewards Regulations.

2.3. Media news

12. In terms of timeliness, media news has been considered as one of the most effective channels for the CTFTC to acquire industry related information. Unlike where evidence obtained from leniency applications are often circulated among cartel participants only, media news is composed of various external information. Media outlets are particularly sensitive to price information relevant to consumer staples. Through monitoring media news, the CTFTC can rapidly perceive price changes in consumer staples and take actions accordingly. For example, in 2021 media news reported that a supply shortage of imported dried scallops occurred in consequence of port congestion resulting from the COVID-19 pandemic, which led to inflated prices of 20% or more. The CTFTC then carried out an ex-officio investigation into the relevant market. In collaboration with the Customs Administration, Ministry of Finance, the CTFTC examined the data on custom declarations for imported dried scallops, and found that there was no justification for price increases by reviewing volumes and costs of the import firms under investigation. The findings also showed that via an instant messaging app, the firms under investigation had shared with each other online prices and product photos of dried scallops to coordinate information on products, pricing and price adjustments. The CTFTC confirmed the existence of a concerted action among the import firms.

3. Proactive cartel detection tools

3.1. Monitoring programme and joint inspection

13. Apart from utilizing reactive measures for cartel detection, a monitoring programme has been designed for the CTFTC to actively collect data on prices and outputs in selected industries, and facilitate timely identification of unusual price fluctuations since 2021. The CTFTC has focused on industries concerning consumer staples, which include corn, garlic, bananas, soy flour and tissues. Data on commodity prices and quantities have been collected through the progarmme, and at times individual datasets on prices and quantities of wholesale markets in different geographic markets were also collected for further comparison.

14. During traditional holidays or when facing greater pressure from price inflation in specific markets, a 'Price Inspection Task Force' comprising CTFTC, the MOJIB (the Investigation Bureau, the Ministry of Justice), the Ministry of Finance (MoF) and the Ministry of Agriculture (MoA) is capable conduct joint inquiries into respective markets to uncover the reasons behind price changes in consumer staples. In the Task Force, the CTFTC is in charge of cartel investigations to determine if price hikes are associated with concerted actions among competitors[10]. The CTFTC conducts on-site inspections to interview market participants in order to understand the followings: the causes of price adjustments, affected commodities, the extent of price increases, lists of suppliers and supporting documentation. It also cooperates with other governmental agencies to trace sources of supply chains, to learn if prices soar at certain stages of supply chains, and thereby assists it to identify potential concerted actions.

15. Taking the example of a joint inspection in January 2022 into price fluctuations in supply chains of corn and soybean - the Task Force looked into raw materials, i.e. corn and soybean, and downstream products including fodder and soybean oil, and extended its

[10] Other governmental agencies are responsible for investigations into different types of illegal conduct, for example price gouging and hoarding.

inspection into livestock related meat such as chicken and pork. The CTFTC and the MoF worked collaboratively to review data derived from custom declarations, including import prices and volumes. Each went through cost and pricing datasets item by item to point out any significant pricing markups. They also ran data verification to ensure accuracy by examining data stored in the MoF's E-Invoice Platform and internal data provided by enterprises under investigation.

3.2. Detection from non-cartel complaints

16. Sometimes cartel conduct may be discovered unexpectedly while the CTFTC is probing into other anti-competitive practices. For instance, the CTFTC received a complaint for resale price maintenance (RPM), alleging that a gas distributor in Kaohsiung and Pingtung areas threatened to cut supply if downstream retailers refused to increase prices of gas cylinders to end consumers. However, the CTFTC's investigation revealed that RPM was not decided by the gas distributor at its own discretion. Instead, an increase in the price of gas cylinders was an agreement reached among 19 local gas distributors in multiple social events. Based on the CTFTC's empirical experience, cartel conduct could be potentially uncovered from complaints that appear to be irrelevant, after scrutinizing factors coming into play in price setting.

3.3. Education and advocacy

17. Over the past three years[11], with the above measures, the yearly number of the CTFTC's infringement decisions on cartel conduct has remained stable. The CTFTC continues to endeavor to enhance overall awareness of competition compliance through a series of educational and advocacy activities. For the general public, the CTFTC has published advertisements at metro stations, on instant messaging apps and online media, to improve general understanding of cartel conduct, promote the informant reward programme and encourage people to come forward. For industrial sectors, every year the CTFTC organizes industry-oriented seminars and clarify business practices that may be considered as concerted actions. The CTFTC also sends letters to businesses to address the importance of compliance. Where it is appropriate, the CTFTC may introduce the requirements and effects of the leniency programme to enterprises under investigation. This aims to improve certainty and predictability of the leniency programme so as to mobilize leniency applicants. It is envisaged that the combination of the above tools further reinforces the CTFTC's capabilities of fighting cartels and discourages businesses from engaging in cartels.

[11] 2023 Statistics until August 2023

4. Conclusions

18. Up to the present, most investigations are triggered by information obtained with reactive detection tools. The interactions between the leniency programme and other detection tools are summarized as below:

a) Since the leniency program came into effect in 2011, businesses remain reluctant to apply for immunity or fine reductions as a result of the influence of traditional culture in industries and concerns around confidentiality. In spite of the well-established confidentiality rules in place, for the purpose of minimizing the risk of the public deducing applicants' identities with case details, the CTFTC does not intend to disclose leniency applications in cartel cases. This approach has resulted in unintended challenges in promoting the leniency programme.

b) The informant reward programme is considered as a complementary measure to the current leniency programme in terms of case numbers. High rewards provide incentives to internal employees, trading counterparts and the general public to report suspicious behavior. Due to the simplicity and accessibility as well as lower risk of identity exposure, there has been an upward trend in recent years - both in the number of infringement decisions through the programme and the amount of financial rewards.

c) Regarding timeliness, media news has been one of the most effective channels for the CTFTC to acquire industry related information rapidly. Unlike where evidence obtained from leniency applications are often circulated among cartel participants only, media news is composed of various external information. In addition to reactive measures, the CTFTC has built a monitoring programme to actively monitor industry developments in selected sectors, particularly those affecting our daily lives. The CTFTC and other governmental agencies have also formed an inter-agency task force to conduct joint inspections. The task force takes joint actions to collect data and verifies the accuracy of the data acquired from businesses with data stored within agencies.

d) In practice, most investigations are triggered by information obtained with reactive detection tools. Through competition advocacy, the CTFTC organized separate activities for the general public, individual industries and businesses that are allegedly involved in concerted actions, to enhance their understanding of relevant detection tools. The combination of the above tools is expected to equip the CTFTC for effective cartel enforcement and discourage businesses from engaging in cartels.