

### Check before shaking hands on IP transactions: new antitrust rules

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On January 22 2015 the Legislative Yuan passed an amendment to the Fair Competition Law, revising 70% of the existing Fair Competition Law. The amendment will take effect once it has been published by the president. As antitrust issues should always be considered in IP transactions, both foreign and domestic players in the Taiwanese market should monitor the progress of the amendment.

The main changes introduced by the amendment are as follows:

- Mergers – the shares held by and sales of affiliate companies, including sister companies, will be included in the calculation of the threshold of prior application.
- Cartels –
  - A cartel agreement will be presumed to exist after considering the market status, the characteristics of the goods or services, the costs, the profits and the reasonable economic concerns. If a cartel agreement is presumed to exist, the burden of proof is shifted to the companies accused of concerted action.
  - The types of concerted action that can be approved have been widened. The existing Fair Competition Law provides only limited types of concerted action that can be approved, while the amendment states that if the concerted action is beneficial to the macro economy and the public interest, it is eligible to file for Fair Trade Commission approval.
- Investigations – it will be possible to stop the investigation of antitrust cases. This is intended to encourage the companies involved to stop or amend any illegal action proactively in order to reduce damage to the market.
- Penalties – the penalty for a cartel will be up to NT\$100 million (approximately US\$3.3million) or, in serious cases, up to one-tenth of the company's turnover in the previous year. Certain penalties are doubled by the new law and the statutory limitation for administrative punishment is extended from three years to five years. If the illegal action is conducted by a trade association or group, the members of such association or group can also be punished.
- Appeal – an appeal against a decision of the Fair Trade Commission will be submitted to the courts rather than to the administrative authority.



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The draft of the amendment gave the Fair Trade Commission the power of search and detention, but the relevant articles were removed from the final amendment.

For rights holders, the greatest change introduced by the amendment is the possible presumption of a cartel agreement and the high financial and criminal penalties that this entails. The presumption of an agreement means that the companies involved must defend themselves by proving that such an agreement did not exist, which is difficult. The companies under investigation would be required to submit many documents to explain the rationality of their business decisions. For example, parties which are close to closing an IP deal transaction must choose the wording of the transaction documents and communications carefully in order to avoid any hint of a cartel and even to establish evidence of the non-existence of a cartel.

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