
CHAMBERS GLOBAL PRACTICE GUIDES

Antitrust Litigation 2023

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Taiwan: Law & Practice

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TAIWAN

Law and Practice



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Formosa Transnational Attorneys at Law (FT) is one of the largest and most respected law firms in Taiwan and has long been known for its expertise in litigation and arbitration. Three of the founding partners previously served as judges and one served as a prosecutor prior to the establishment of FT in 1974. FT has since become a full-service law firm with a multinational and high-profile client base. With an elite team of more than 80 attorneys, FT assists multinational clients with issues related to and strategies for fundraising, investments and M&A. FT

also counsels clients in corporate and financial matters, as well as bankruptcy and related laws and regulations, including those associated with corporate governance and operations. The firm also provides comprehensive legal services in connection with the establishment of banks, bank branches and representative offices, syndicated loans, guarantees, trusts and all matters related to financing, stock exchanges and securities. FT advises clients on labour law, employment agreements and many other employment-related matters.

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1. Overview

1.1 Recent Developments in Antitrust Litigation

Antitrust litigation in Taiwan has two prongs: “administrative litigation” (lawsuits initiated by parties against the regulator’s rulings) and “private enforcement” (lawsuits filed by injured parties against alleged infringers).

Administrative Litigation

The prime focus of Taiwan’s antitrust litigation is administrative litigation, in which individuals/entities request a judicial review of rulings made by the Taiwanese Fair Trade Commission (TFTC), the sole governmental agency with authority to regulate matters within the purview of the Taiwanese Fair Trade Act (TFTA).

Most administrative litigation cases arise from TFTC rulings that impose cease-and-desist orders upon individuals/entities found to have violated the TFTA. Such cease-and-desist orders usually come with fines and orders that compel individuals/entities to take mandatory actions to remedy harms resulting from the violations. Individuals/entities who do not accept these rulings may file administrative lawsuits with competent courts, requesting courts to revoke said rulings.

Another source of administrative litigation cases is TFTC denials of applications for TFTC approval. Under the TFTA, enterprises must apply to the TFTC for advance approval if the enterprises plan to engage in concerted practices. Enterprises must also seek approval under the TFTA for mergers that meet certain criteria, such as market share. Applicants whose applications are denied by the TFTC may seek relief from the competent courts.

Jurisdiction over antitrust administrative lawsuits is determined by the subject matter. If IP matters (such as IP licensing) are the subject of a particular lawsuit, Taiwan’s Intellectual Property and Commercial Court (“IP Court”) will be the court of first instance. For matters that do not involve IP, the Taipei Administrative High Court (“High Court”) will be the venue for the first instance.

Private Enforcement

Private enforcement of antitrust law usually proceeds with civil lawsuits initiated by parties injured by alleged violations. Pursuant to Articles 29–33 of the TFTA, if an enterprise violates any provision of the TFTA and thereby infringes upon the rights and interests of another, the aggrieved party may seek proper remedies from the civil courts. Available remedies include permanent injunctions requiring the infringing parties to cease the infringing activities, as well as compensatory damages.

Ordinary courts have jurisdiction over civil claims sounding in Taiwanese antitrust law. Plaintiffs may go to the IP Court if the subject matter of their claims involves IP issues.

Ready-Mixed Cement Concerted Price Increase Cases

There are some notable active antitrust litigation cases regarding concerted action by the Taiwan Cement Corporation (TCC) and four other cement manufacturers. Article 15, Paragraph 1, of the TFTA prohibits concerted action.

In mid-December 2018, the TCC and four other cement manufacturers notified downstream customers of an increase in ready-mixed concrete prices effective 1 January 2019. The TFTC investigated and found that the joint price increase constituted concerted action because it impacted the equilibrium between supply and demand

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in the ready-mixed concrete market in Tainan City and Kaohsiung City, two major cities in southern Taiwan. Accordingly, the TFTC ordered the five companies to cease their unlawful conduct and imposed administrative fines ranging from TWD1 million to TWD20 million (approximately USD33,000 to USD700,000) on the five companies.

The five companies each initiated administrative lawsuits at the Taipei High Administrative Court seeking to revoke the TFTC's adverse decisions. In 2020, the Taipei High Administrative Court issued judgments holding that, although the five companies certainly appeared to have co-ordinated announcements of price increases, the price increases were economically reasonable. Furthermore, their parallel actions were the result of independent business decisions by each company, which were made in accordance with market competition and in response to the marketing strategies of their competitors. Each of the companies was trying to maximise economic profits. Therefore, the Taipei High Administrative Court concluded that the five companies had not engaged in concerted action under Article 15, Paragraph 1, of the TFTA and accordingly overturned the TFTC's decisions.

The TFTC appealed to the Supreme Administrative Court. In August 2022, the Supreme Administrative Court held that the lower court failed to investigate and explain whether the price increase had been an agreement to act jointly with other companies or an independent business decision based on each company's own economic considerations. Accordingly, the Supreme Administrative Court reversed the lower court's judgments and remanded the cases back to the Taipei High Administrative Court, where they are now pending.

This case will definitely shape how Taiwan antitrust law will be enforced against allegedly concerted actions; it would be prudent to keep posted on this case's further developments.

1.2 Other Developments

Ready-Mixed Cement Concerted Price Increase Cases II

In February 2023, the TFTC issued another decision against the TCC and 17 other cement manufacturers. The TFTC found that, starting in November 2018, the TCC and the other cement manufacturers had agreed to jointly allocate ready-mixed concrete customers in Taoyuan City among themselves to avoid competition with each other since. This agreement was found to have impacted supply and demand in the Taoyuan City ready-mixed concrete market, violating Article 15, Paragraph 1, of the TFTA.

Notably, the TFTC imposed the maximum administrative fine of TWD50 million (approximately USD1.6 million) on the TCC. The TFTC considered a number of factors in deciding to impose the maximum fine, including motivation, impact and previous sanctions history. The TFTC found that the companies were motivated by a shared purpose to avoid competition and raise the price of ready-mixed concrete. In turn, the increased prices had a detrimental impact on the equilibrium between supply and demand in the market. Furthermore, the TFTC took into account the fact that the TCC and two of the other cement manufacturers had been sanctioned by the TFTA for concerted action on numerous previous occasions. They were also some of Taoyuan City's largest companies in terms of the scale of their business from 2019 to 2021. The TCC has filed an administrative lawsuit challenging the TFTC's decision. The High Administrative Court is presently hearing the case.

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2. The Basis for a Claim

2.1 Legal Basis for a Claim

Statutory Legal Basis for Damage Claims

Article 30 of the TFTA provides an express basis for a plaintiff to claim compensatory damages for breach of Taiwanese competition law. Under this provision, if an enterprise violates any provision of the TFTA and thereby infringes upon rights and interests of another, the aggrieved party may go to civil courts to seek compensatory damages.

Injured Parties Required to Establish Elements of Their Claims

Follow-on claims are not available in Taiwan's legal system. Victims (plaintiffs) bear the burden of proof and must establish all the elements for their claims. Even in a situation where the TFTC finds a particular antitrust law violation, the party injured by the violation still has to prove to the courts that the defendant violated the provisions of the TFTA. In other words, the TFTC's rulings do not control the findings of courts in relation to whether an alleged violation has in fact occurred.

2.2 Specialist Courts

No Specialist Competition Courts

There is no specialist competition court or competition judge in Taiwan.

For administrative litigation, the High Court will have jurisdiction over cases where IP issues are not present; the IP Court takes jurisdiction over cases where IP issues are present. For civil claims, while ordinary courts will have jurisdiction, plaintiffs may go to the IP Court if the subject matter of their claims involves IP issues.

Article 7 of the Intellectual Property Case Adjudication Rules deals with the situation where a party mistakenly initiates a civil or administra-

tive action in the IP Court but the IP Court does not have jurisdiction. In this circumstance, the IP Court is required make a ruling which transfers the case to a court with jurisdiction in accordance with Article 28, Paragraph 1, of the Code of Civil Procedure and Article 18 of the Code of Administrative Procedure.

2.3 Decisions of National Competition Authorities

The TFTC's Rulings Do Not Bind Courts

The TFTC's rulings do not bind Taiwanese courts that hear cases where antitrust law issues are present.

In particular, even if the TFTC has issued a ruling that imposes sanctions upon an alleged offender, in a civil lawsuit initiated by a victim of the alleged offender's infringing activities, courts will independently examine the plaintiff's claim without being bound by the TFTC's findings in its ruling.

Likewise, in situations where the TFTC finds no violation of antitrust law provisions, the TFTC's findings do not preclude Taiwanese courts from rendering different decisions.

Similarly, decisions by foreign antitrust regulators do not bind Taiwanese courts.

The TFTC Does Not Intervene in Antitrust Damage Lawsuits

In most cases, the TFTC does not intervene in actions seeking compensatory damages brought by parties injured by violations of antitrust law.

2.4 Burden and Standard of Proof

Administrative Litigation Proceedings

Generally speaking, in administrative litigation proceedings, a party bears the burden of proof regarding the facts that they allege in their favour,

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except either where the law provides otherwise or where the circumstances render it manifestly unfair. In addition, courts will look into the factual matters and request the parties or any other third parties to produce evidentiary materials that the courts deem necessary.

At the same time, the parties may request the courts to investigate factual issues and produce evidence that the parties would like the courts to take into consideration. In addition, the parties may request the courts to order the other parties or any other third parties to produce evidentiary materials that are relevant to the cases.

Civil Proceedings

Plaintiffs in civil proceedings will have to produce evidence that suffices to establish each element required for a tort claim. Tortfeasor defendants will usually not have to establish any facts in relation to the elements required for a tort claim.

In situations where a party of a proceeding raises a “pass-on” defence, the party raising the defence must bear the burden of proof. In other words, that party needs to produce evidence that sufficiently establishes the facts supporting the “pass-on” defence.

2.5 Direct and Indirect Purchasers

Taiwan antitrust law does not specify whether an indirect purchaser may bring a claim for damages against an alleged violator. In other words, there is no provision explicitly preventing an indirect purchaser from bringing a claim for damages against the alleged violator.

Under the tort provisions prescribed in Taiwan’s Civil Code, however, one of the elements for a victim (plaintiff) to establish is causation. An indirect purchaser who does not have direct transactions with the alleged violator will need

to establish that the alleged violation caused the resulting injuries that the indirect purchaser suffered.

2.6 Timetable

Administrative Litigation

It usually takes six months to one and a half years for courts to render first-instance judgments in administrative litigation cases.

In situations where an appeal is filed against a first-instance judgment, it usually takes one to two years for the Administrative Supreme Court to render its final judgment.

Private Enforcement

It usually takes six months to one and a half years for courts to render first-instance judgments in private enforcement cases (civil lawsuits).

The above timetable does not cover the time during which the appellate court and the Supreme Court render their judgments upon appeal.

In situations where there is a parallel investigation by the TFTC, parties may not apply for an order to stay the civil proceedings. This is because Taiwanese courts are not bound by the TFTC’s findings of facts and will make their own decisions on antitrust law issues in civil proceedings.

3. Class/Collective Actions

3.1 Availability

Class actions are available in Taiwan but are limited as follows:

- pursuant to Articles 53 and 54 of the Consumer Protection Act, consumer advocacy associations may file a civil lawsuit with the

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competent court when enterprises materially breach the provisions of the Act; and

- pursuant to Article 28, Paragraph 1, of the Securities Investor and Futures Trader Protection Act, the institution designated by this Act may institute an action in its own name to protect the public interest.

Under the above-mentioned Acts, any of the victims may join a class action lawsuit on an opt-in basis. Meanwhile, a victim who has joined a class action lawsuit may withdraw from the action before the conclusion of the proceedings.

Collective actions are available in Taiwan as well. In accordance with Taiwan's Civil Procedural Code, members of a public interest association may appoint the association as a plaintiff to file a civil action on their behalf.

Taiwanese antitrust law does not provide an ad hoc basis for a class/collective action. It is thus uncertain whether a class/collective action could be brought by indirect purchasers and/or direct purchasers.

3.2 Procedure

Taiwan antitrust law does not provide an ad hoc basis for a class/collective action.

Under the Consumer Protection Act, an association advocating for consumer protection must be approved by regulators before it may bring a class action on behalf of consumers.

Under the Securities Investor and Futures Trader Protection Act, only the institution established in accordance with this Act could bring a class action. This institution is known as the Investors Protection Centre.

Please note that the two types of class action (under the Consumer Protection Act and under the Securities Investor and Futures Trader Protection Act) may not be relevant to antitrust law issues.

3.3 Settlement

The TFTA does not provide an ad hoc basis for a class/collective action.

Nonetheless, pursuant to Article 377, paragraph 1, of Taiwan's Code of Civil Procedure, the court may seek to persuade the parties to settle at any time in the proceeding. In this scenario, there will be judicial involvement in the settlement of a collective action rather than a private settlement occurring outside of the court.

4. Challenging a Claim at an Early Stage

4.1 Strike-Out/Summary Judgment

There is no strike-out/summary judgment available in civil proceedings in Taiwan.

A court hearing a civil lawsuit may dismiss a claim at an earlier stage without looking into the substance of the claim only if the plaintiff fails to fulfil the formal requirements, such as paying the court fees that are due at the moment of filing the lawsuit.

4.2 Jurisdiction/Applicable Law Jurisdiction

Generally speaking, a district court will have proper jurisdiction over a civil lawsuit if defendants have domiciles or residences in the territory subject to the court's jurisdiction.

At the same time, when a civil lawsuit is based on tortious activities, a district court will have

proper jurisdiction over the lawsuit if the harm or injury occurs within the territory subject to the court's jurisdiction.

Applicable Law

In a civil lawsuit where a foreign element is present (for instance, if any of the parties are foreigners or foreign companies), the courts will determine the applicable law. Generally speaking, the law of the country that is most connected to the subject matter will be the applicable law.

4.3 Limitation Periods

A civil damage claim arising from a violation of the TFTA may be initiated only within one of the two following periods, whichever lapses earlier:

- two years from the date when the injured party becomes aware of the violation and knows the identity of the person liable for the harm; or
- ten years from the date on which the infringing conduct is committed.

5. Disclosure/Discovery

5.1 Disclosure/Discovery Procedure

For background, discovery is not available in civil/criminal/administrative litigation proceedings in Taiwan.

Court Order to Produce Materials

A party to civil litigation may file a motion to order the opposing party or a third party to produce specific materials as evidence. In making such a motion, the moving party shall specifically identify the requested materials; overly broad or vague requests will be denied. If the requested materials are relevant to a fact substantially related to the moving party's underlying arguments, the court may grant the motion

and order the requested party (or third party) to produce the requested materials.

Such a court order is different from a search warrant. As such, if the requested party (or third party) disobeys the court order, the court cannot compel the requested party (or third party) to produce the requested materials; however, the court may render a ruling that imposes sanctions upon the requested party (or third party) in certain situations.

Court Order to Preserve Evidence

A party may also file a motion for an evidence-preservation order if there is a possibility that the evidentiary materials under the possession of the opposing party or a third party will be destroyed or altered. The moving party may file the motion before or during litigation proceedings.

The courts will grant such a motion when it is established that the requested materials are subject to the likelihood of being destroyed, hidden or altered.

An evidence-preservation order is also different from a search warrant. While the courts may request the requested party (or third party) to produce the requested materials, failure to produce the requested materials will result only in court sanctions or in courts' stipulation of a certain fact in the lawsuit proceeding.

The TFTC's Investigation Power

When the TFTC is investigating an alleged violation, it may order the parties under investigation to produce materials that it finds relevant to the violation. Disobedience of this request will result in administrative penalties. The TFTC may also conduct an on-site search and may seize any materials that it finds relevant to any alleged violations.

Any parties that have interests in any of the TFTC's current/past investigations may request the TFTC's approval for access to the materials collected by the TFTC during its investigation. The TFTC will consider whether the requesting party has grounds to have access to the materials.

5.2 Legal Professional Privilege

As noted earlier, there is no discovery in Taiwan's legal system. When a party is requested to produce certain documents that are privileged, the requested party may refuse to obey the production order and explain to the courts the grounds for its refusal. It will be subject to the courts' discretion whether to impose any sanctions in response to a party's refusal to produce.

5.3 Leniency Materials/Settlement Agreements

The TFTC will keep confidential materials that relate to leniency and/or settlement agreement. In particular, the TFTC may reduce sanctions on a member of a concerted action if the member actively reports the concerted action to the TFTC and helps the TFTC to investigate the concerted action. In this situation, the identity of the whistle-blower will be kept confidential.

In the TFTC's history of enforcement of the TFTA, there are two cases where the TFTC settled with the investigated enterprises. The enterprises in these cases were Microsoft and Qualcomm. Except for the published version of the settlement terms, the specific terms and conditions of the settlements for these two cases were protected from disclosure.

6. Witness and Expert Evidence

6.1 Witnesses of Fact

Witness testimony is one of the five types of evidentiary methods under the Taiwan Code of Civil Procedure, the Code of Criminal Procedure, and the Administrative Litigation Act.

Pursuant to Article 302 of the Taiwan Code of Civil Procedure, Article 176-1 of the Code of Criminal Procedure, and Article 142 of the Administrative Litigation Act, every person is under a general duty to testify in a lawsuit proceeding if this person has witnessed a certain set of facts that are relevant to the proceeding. That is, witnesses are required to state their own observations to the court in the trial proceedings as ordered or summoned by the court.

Pursuant to Article 305 of the Taiwan Code of Civil Procedure and Article 143-1 of the Administrative Litigation Act, a witness may, by consent of the parties, make written statements that set forth their testimony.

In most cases, a witness of facts will be subject to direct examination by the party that calls the witness and to cross-examination by the opposing party.

When being called to testify in a lawsuit proceeding, a witness may decline to answer any questions if the witness has proper grounds (such as self-incrimination) to do so. Otherwise, the witness will have to answer questions raised in the direct and/or cross-examination, as well as questions raised by the presiding judge. Failure to give testimony without due cause will result in sanctions.

6.2 Expert Evidence

Expert opinions are frequently relied upon by courts in antitrust law cases. In particular, when it comes to complicated economic issues or technology issues, courts tend to request institutions with relevant knowledge or experience to render expert opinions.

In most cases, expert opinions are made in the form of a written statement. Authors of these opinions will be called to testify only if the courts consider it necessary.

When testifying in court, an expert witness will be examined and cross-examined by the parties. The expert witness will also have to answer questions raised by the presiding judges.

In some cases, parties will appoint their own experts to produce expert opinions without the court's prior permission. In this situation, the opposing party will usually dispute the qualifications of the expert. It will be subject to the court's discretion whether to accept the opinions made by an expert appointed by one of the parties.

7. Damages

7.1 Assessment of Damages

Article 30 of the TFTA stipulates that an enterprise that violates any of the provisions of the TFTA and thereby infringes upon the rights and interests of another shall be liable for damages arising therefrom. The amount of damages shall be assessed on the basis of actual injury suffered by the victim(s), and then, in practice, the court can possibly take the following factors into consideration:

- the impact of the violation on the related market and industries;

- the degree of severity of the violation;
- the interest(s) acquired by the perpetrator from the violation;
- the duration of the violation; and
- the intent or the degree of negligence of the perpetrator.

Pursuant to Article 31, Paragraph 1, of the TFTA, courts may grant enhanced damages if the victim (plaintiff) has established that the infringer (defendant) committed the violation wilfully. In these circumstances, the court has the discretion to treble the amount of the victim's established loss.

7.2 "Passing-On" Defences

The TFTA does not expressly provide for a pass-on defence. Taiwan's courts have not yet directly addressed whether a pass-on defence will be viable when considering the amount of damages.

7.3 Interest

Pursuant to Article 203; Article 229, Paragraph 2; and Article 233, Paragraph 1, of Taiwan's Civil Code, if an enterprise is found by courts to be liable for compensation of damages to the injured parties, the violating enterprise shall be held by the court to be liable for interest of 5% per annum from a designated date (usually the date that the defendant receives the copy of the plaintiff's complaint) until the full settlement of the compensation.

8. Liability and Contribution

8.1 Joint and Several Liability

Under Taiwanese law, when a tortious activity is committed with the involvement of multiple persons, then those persons will be held jointly and severally liable for the tortious activity.

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While the TFTA allows the TFTC to reduce administrative penalties when a member of a concerted action directly reports to the TFTC and helps the TFTC to investigate the concerted action, such leniency does not prevent this reporting member from being sued by any person injured by a concerted action.

8.2 Contribution

When multiple parties are held jointly and severally liable for a certain tortious activity, the internal share of the joint and several liability will be determined in accordance with the proportion of their contribution to the tortious activity and to the resulting injuries.

In a situation where the parties held jointly and severally liable for a certain tortious activity consider that there is a third party who also caused the same tortious conduct and/or the resulting injuries, the parties may file a lawsuit to request the third party to contribute a certain share of the joint liability.

9. Other Remedies

9.1 Injunctions

Injunctive relief is available in both administrative and civil antitrust litigation.

To obtain an injunction, the moving party will have to establish facts showing that the injunction is needed to prevent the moving party from suffering severe and irremediable harm.

When hearing a motion for injunctive relief, courts will notify the opposing parties and request the opposing parties to make comments on the motion.

Courts usually will render orders upon a motion for injunction within one or two months.

The moving party will be responsible for any injuries that the opposing party suffers due to an injunction in situations where the injunction is later considered ungrounded by courts in ordinary lawsuit proceedings.

9.2 Alternative Dispute Resolution

Alternative dispute resolutions are available but not mandated for antitrust cases. In both civil and administrative lawsuit proceedings, parties may settle the cases with the involvement of courts.

In administrative lawsuit proceedings, where the TFTC is a party, alternative dispute resolution is available only in extremely exceptional cases and is thus de facto unavailable.

10. Funding and Costs

10.1 Litigation Funding

Private litigation funding is prohibited in Taiwan. Public (government-sponsored) funding is available in certain fields as specified by special laws and regulations.

10.2 Costs

Courts will order the losing parties to bear the costs and/or expenses incurred from the lawsuit proceedings.

In most cases, each party will have to bear its own attorney fees. The prevailing party in a third-instance proceeding, however, may request the Supreme Court to order the losing party to reimburse a limited amount of attorney fees for the third-instance proceeding.

Under Taiwanese law, in a civil lawsuit initiated by a foreign plaintiff (a foreigner or a foreign company) who does not have residence in Taiwan, the defendant in the lawsuit may request the court to order the plaintiff to post a bond of a certain amount sufficient to cover the total amount of the court fees for the second and third instances and any other necessary litigation expenses. The same rule does not apply to administrative litigation.

11. Appeals

11.1 Basis of Appeal

Appeals are available for both administrative litigation and private enforcement.

Administrative Litigation

Any parties who are not satisfied with the judgments by the first-instance court (either the IP Court or the High Court) will be allowed to appeal to the Administrative Supreme Court, whose rulings will be final and conclusive.

The appealing party may only argue issues related to matters of law. The Administrative Supreme Court will not examine the lower courts' findings of facts, except in some extremely exceptional situations.

Private Enforcement

Any parties who are not satisfied with the judgments by the first-instance court (either the IP Court or the High Court) will be allowed to appeal to the appellate court. In a case where the value of the subject matter exceeds TWD1.5 million, the party who does not accept the judgment of the appellate court may file an appeal to the Supreme Court.

At the level of the appellate courts (the second-instance proceedings), both parties may argue issues of fact and law. The appellate courts will examine the lower courts' findings of facts and may render a judgment based on different findings of fact.

At the level of the Supreme Court (the third-instance proceedings), the appellant party may only argue questions of law. The Supreme Court will not examine the appellate courts' findings of facts, except in some extremely exceptional situations.

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