FOCUS ON INNOVATION: A REVIEW OF THE TAIWAN FAIR TRADE COMMISSION'S INVESTIGATION ON GOOGLE MAPS

By Su-Wan Wang & Elizabeth Xiao-Ru Wang [1,2]

I. INTRODUCTION

The Taiwanese Competition Authority has recently confronted issues surrounding Google's search practices. Specifically, a number of independent providers of digital map programs complained to the Taiwan Fair Trade Commission ("TFTC") about Google's search result algorithms. These firms alleged that Google's search results gave Google Maps, and not competing map services, favorable placement on its search results pages, reflecting an unfair competitive practice. The map providers also claimed that Google's conduct deprived them of business opportunities, resulting in a loss of revenue, and violating Taiwan's competition statutes. In responding to these concerns, the TFTC conducted a multi-year investigation and closed the probe in the summer of 2015 with a finding of no violations.

Drawing on publicly available information, this article describes the key elements of

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[1] Ms. Su-Wan Wang is a Commissioner at Taiwan Fair Trade Commission ("TFTC"). Dr. Elizabeth Xiao-Ru Wang is a Senior Vice President at Compass Lexecon. Commissioner Wang was involved in the TFTC investigation on Google. Dr. Elizabeth Wang has consulted for Google, but was not involved in the Taiwan case. The views expressed in this paper, however, are solely those of the authors and do not reflect any confidential information gained during the authors' work on that matter. All the facts characterized in this paper reflect information in the public record. They do not reflect or represent the views of the Taiwan Fair Trade Commission, Compass Lexecon, or any of the organizations with which the authors are affiliated.

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the TFTC's analysis and the basis for its decision. In the investigation, the TFTC focused its analyses under the framework of the abuse of dominance, where the alleged abuse took the form of refusals to include competing maps on Google's search results pages.

We start our discussion by providing background of the case. We then explain how the TFTC's examined whether Google had market dominance, and whether Google's conduct constituted an abuse of dominance. We then describe the two primary economic tests employed by the TFTC for the agency's refusal to deal analysis, the essential facility test and the profit sacrifice test. Lastly, we offer brief concluding remarks.

II. CASE BACKGROUND

In Taiwan as in many other countries, when a user enters a query containing location information on Google, Google may show the relevant locations on a map at the top on the search engine results page ("SERP"). The maps on Google's SERP, known as Google Maps, are a type of "thematic" results that draw on specialized location-related searches that Google performs using its internal map data. For example, a query of "誠品書店 (Eslite Bookstore)" on Google Taiwan would return a map showing three branches of the Eslite Bookstore, with addresses of each location pinned into the map. (See screen shot below.) This map is placed at the second spot on the SERP after the official website of www.eslite.com, and it contains the thematic results from Google Maps, which are built from Google's internal map data.

A group of independent Taiwanese map providers argued that Google had manipulated its search algorithms and result rankings by placing Google Maps results at eye-catching spots on the SERP, while failing to include other maps on Google's SERP or use maps based on competing map providers' data. The map providers claimed that Google's conduct led them to lose business opportunities and suffered a loss in revenue.[3]

In response to these concerns raised by the map providers, the TFTC initiated an in-depth investigation in the winter of 2012.[4] The Commission's probe focused on the following key areas: whether Google is a monopolistic enterprise, and whether Google abuses its

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[3] " The Legality of Google's Vertical Search Service from the Perspective of Monopolistic Enterprises （以獨占事業的觀點論析Google垂直搜尋服務的違法性）" (Chen 2015), by Haokai Chen (陳浩凱) who is a case handler of the TFTC investigation on Google Maps, Taiwan FTC Newsletter （公平交易通訊）, No. 066, November, 2015 (in Chinese). The English version of this article appears in Taiwan FTC Newsletter No. 066, December, 2015.

[4] "Taiwan Fair Trade Agency Closes Investigations Into Google", by Debra Mao and Brian Womack, August 6, 2015, http://www.bloomberg.com/news/articles/2015-08-06/taiwan-fair-trade-agency-closes-investigations-into-google.

dominance by refusing to include competing providers' maps. After evaluating the available evidence, the TFTC found that Google was a monopolistic enterprise in the market for internet searches. However, it also concluded that Google did not reduce users' choice of map services, and that Google Maps did not hinder independent map providers' abilities to engage with their customers. With the evidence "inadequate to determine that Google Inc. has violated the Fair Trade Act",[5] the Commission ended the investigation in the summer of 2015. As TFTC Vice-Chairperson Chiu Yung-ho noted: "[o]ur investigation shows that this [search display] practice could be seen as providing convenience to users and in line with users' benefits."[6]

III. THE ANALYSIS OF MARKET DOMINANCE

The Taiwan Fair Trade Act ("TFTA") went into effect in February 1992 and was last amended in 2015. It covers two broad categories of business behavior: (i) exclusionary conduct, which generally addresses traditional antitrust issues (including abusive conduct by a monopolistic enterprise, mergers and acquisitions, concerted conduct, and other restrictive conduct) and (ii) unfair trade practices, which addresses practices such as counterfeiting and false advertising, among others.[7]

The TFTC's primary approach in analyzing complaints against Google Maps relied upon an abuse of dominance framework. The TFTA defines a monopolistic enterprise as "any enterprise that faces no competition or has a dominant position to enable it to exclude competition in the relevant market."[8] Based on the criteria specified by the Act, a company that possesses a market share over 50 percent is presumed to be a monopolistic enterprise.[9] Article 9 of the TFTA states that:

> [m]onopolistic enterprises shall not engage in any one of the following conducts:
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> - directly or indirectly prevent any other enterprises from competing by unfair means;
> - improperly set, maintain or change the price for goods or the remuneration for services;
> - make a trading counterpart give preferential treatment without justification; or

[5] TFTC 2015.
[6] See "Taiwan Fair Trade Commission Closes Investigations Into Allegations that Google Abused Dominant Position", by D Daniel Sokol, August 8, 2015, "http://lawprofessors.typepad.com/antitrustprof_blog/2015/08/taiwan-fair-trade-commission-closes-investigations-into-allegations-that-google-abused-dominant-posi.html.
[7] Taiwan Fair Trade Act, available http://www.ftc.gov.tw/internet/english/doc/docDetail.aspx?uid=1295&docid=13970.
[8] See Article 7 of the TFTA.
[9] See Article 8 of the TFTA.

- other abusive conducts by its market power.

When assessing whether Google is a monopolistic enterprise in internet searches, the TFTC examined Google's market shares in internet search as well as an online advertising platform. The TFTC observed that Google is the largest internet service provider in Taiwan, and its 2013 revenue in Taiwan is over NT$2 billion (approximately USD$70 million), the minimum size requirement of a monopolistic enterprise. According to statistics from StatCounter, in 2013 Google accounted for a 59.72 percent share of internet searches, and a 52.02 percent share of online keyword ads in Taiwan,[10] both above the 50 percent threshold for classifying a firm as dominant. The Commission further recognized that competitive rivalry between the services of internet search engines has the characteristics of a winner-take-all competition and that it is therefore difficult for smaller market players or potential entrants to impose effective competitive constraints. Based on these reasons, the TFTC found Google to be a monopolistic enterprise.

Independent map providers alleged that Google had abused its dominant position by manipulating its search algorithms in order to provide Google Maps with preferred placement on Google's SERPs. As noted above, the TFTA prohibits a monopolistic enterprise from impeding its competitors.

IV. THE ANALYSIS OF REFUSAL TO DEAL

In essence, the independent map providers' complaints against Google Maps can be characterized as objecting to Google (as a search engine) refusing to put competing maps on Google's SERPs. As discussed in Chen (2015), the TFTC examined Google's failure to include competing maps through the lens of a refusal to deal by a monopolistic enterprise. The TFTC has articulated a position that refusals to deal with competitors are generally lawful, even for a monopolistic enterprise. The TFTC has explained that having market dominance by itself is not an antitrust violation under Taiwan's competition law, and that a monopolistic enterprise can legitimately disadvantage or even drive its less efficient competitors out of the market by virtue of becoming a low-cost provider offering better and cheaper services to consumers. As Taiwan's competition law aims to protect competition and not competitors, and because it is concerned over the chilling effect that government intervention in refusal to deal cases can have on R&D, innovation or other conduct that might improve consumer welfare, the TFTC is highly cautious about intervening in such cases. The TFTC will, however, consider a monopolistic enterprise's refusal to deal as a violation of the TFTA only if at least one of two relatively uncommon sets of circumstances is present: (i) where the monopolistic enterprise refuses to share an essential facility with competitors; or (ii) where the monopolistic enterprise sacrifices its short-term profits to exclude competitors.

A. The Essential Facility Test

Although the TFTA does not explicitly outline an essential facilities doctrine, the TFTC has effectively adopted a standard that it is a violation of Taiwan's competition law for an owner to

[10] Chen (2015) in Supra note 2.

use an essential facility to exclude competition. Thus, a key component of the TFTC's analysis of whether Google's alleged exclusion of competing maps is unlawful was to determine whether Google's successful search engine is an essential facility. What constitutes an "essential facility" has been the subject of much debate within the antitrust community. The U.S. appeals court decision on the *MCI Communications v. AT&T Corp.* perhaps provided formulation of an essential facilities test: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."[11] The TFTC examined the replicability and uniqueness of (or lack of alternatives to) Google's search engine for users seeking to access services provided by other map providers.

After considering a number of characteristics in the business of search engines, the TFTC found that Google's search engine cannot be easily replicated by a competitor in the short run. It explained that the services provided by search engines often feature economies of learning. As more queries are conducted on a search engine, the more accurate and better targeted the search engine's search results become. The fact that Google is the most popular search engine in Taiwan contributes to the high quality of its search results. In addition, Internet search is a two-sided market where users attract ad revenue which can fund R&D, and R&D leads to more innovations in search services that attract more users conducting more queries on the search engine. This positive feedback effect among users' queries, ad revenue, R&D and innovation allows Google to maintain advantages over its rivals. For these reasons, the TFTC concluded that it is difficult and economically prohibitive for a rival to catch up with Google and to produce an alternative search engine with similar scale and quality in the short run.

Importantly, however, the TFTC observed that Google's search engine is far from being the only channel for users to access map information. Users can visit websites containing competing maps through a number of methods. For example, a user can search for the targeted website through portal sites (such as the Taiwan government's portal at www.gov.tw), or can enter the website's URL directly; she can also circumvent Google search in the future if she bookmarks the website.

Furthermore, TFTC found that Google Maps does not hinder the ability of independent map providers from continuing to practice their existing business model. Taiwanese map providers typically offer local businesses (e.g. a restaurant or a shop) map information for a fee so that the business can embed a map with its location within its webpage. When its potential patrons can easily find the location of a business for free through Google search, businesses may have less incentive to pay for a map services that can supply maps for their own websites. However, Google's provision of Google Maps results does not obstruct map providers from approaching customers and continuing to offer them their map services.

In conclusion, the TFTC found that Google is neither the sole nor an indispensable channel for users to access map information, and that Google Maps does not hamper other

[11] 708 F.2d at 1132-33.

map providers' existing business model. Therefore, Google's search engine does not constitute an essential facility for purposes of providing map services.

B. The Profit Sacrifice Test

The TFTC recognizes that it can be difficult to distinguish between competitive and exclusionary conduct. In the process of determining whether a refusal to deal by a monopolistic enterprise constitutes exclusionary conduct, the TFTC utilizes a profit sacrifice test. This test examines whether the monopolistic enterprise has sacrificed short-run profits in exchange for foreclosing its rivals. In response to the other map providers' complaints during the Google Maps investigation, Google explained that including Google Maps results displaying location information on the SERPs had improved user search experiences by allowing users to more easily find what they were looking for. Including information like Google Maps (as well as other thematic search results) in the main search result pages is an innovation that has been adopted by many search engines and has become an industry norm. The TFTC found no evidence that Google sacrificed any short-run profits by excluding competing maps from favorable placement.

The TFTC employed a three-prong approach in applying its profits sacrifice test. First, it noted that prior to launching Google Maps in Taiwan, Google had never included any competitors' maps. Therefore, including Google's own map search results was not a termination of an existing profitable arrangement. Second, Google's organic search results are not paid links where the ranking of the ads depends on the bids from the advertisers and the ads' quality scores.[12] Google offers its Google Maps for free. It does not directly generate any revenue from its organic search results, regardless of whether the search result is a Google Map, a competing map, or another link to a company's website. By putting Google Maps at eye-catching spots on the SERP, Google does not lose any revenue it would have gained if the competing maps had been placed in those spots instead. Third, when it is free to include organic search results on the SERP, it makes no economic sense for Google to assign competing maps to more preferred placements than its own Google Maps.[13]

TFTC's profit sacrifice test found that Google's placement of Google Maps is not an example of anticompetitive conduct, but instead represents an improvement to its users' experience. Had the placement of Google Maps harmed consumers, competitors would have easily differentiated themselves from Google by excluding such features. However, the fact that other search engines such as Yahoo Taiwan have also chosen to display map search results is an indication that such a practice is beneficial to users.

V. CONCLUSION

As highlighted by the TFTC's investigation on Google Maps, the enforcement of competition

[12] For discussion of Google's advertising revenue, see "How Exactly Does Google AdWords Work?" by Chuck Topinka, August 15, 2014, http://www.forbes.com/sites/quora/2014/08/15/how-exactly-does-google-adwords-work/#473c113441ec.
[13] See Chen (2015).

law often faces difficult tasks in distinguishing between competitive conduct and exclusionary conduct. Although the TFTC found that Google is a monopolistic enterprise in providing internet searches, it found that Google's exclusion of competing maps does not violate the Taiwan Fair Trade Act. Evidence reviewed by the TFTC indicated that Google's search engine is not an essential facility for map providers, and that in providing Google Maps results, Google is not sacrificing profits but enhancing its product to improve its users' search experiences. The TFTC concluded that if it were to stop Google from displaying its Google Maps, it would not only harm consumer welfare, but could also hinder Google and other internet businesses' incentives to innovate.