INVESTIGATING COMPETITION CASES IN TAIWAN: THE INQUISITORIAL PRINCIPLE AND THE ABUSE OF SUPERIOR BARGAINING POSITION

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I. INTRODUCTION

As a world-renowned technology-producing island, Taiwan is among the most innovative countries in the world.[2] The value gained from implementing the intellectual property rights ("IPRs") created by innovations or implementing those IPRs in collaboration with the IPRs licensed by innovators from other countries has significantly contributed to the economic development of Taiwan.[3] However, the heavy reliance on IPRs has at the same time rendered Taiwan susceptible to IP arrangements that can evoke disputes over their competitive impacts on various markets.

In response to this concern, the Taiwan Fair Trade Commission ("TFTC") is paying increasing attention to alleged anticompetitive IP licensing practices that could weaken the global competitiveness of Taiwanese high-tech companies. Recent issues concerning worldwide competition authorities, such as the determination of fair, reasonable and non-discriminatory ("FRAND") royalties for standard essential patents ("SEPs"), the refusal to license SEPs or the bundled licensing of SEPs and non-SEPs, are also at the top of the TFTC's investigation docket. Moreover, after years of interaction with more experienced jurisdictions like the United States and the European Union, the TFTC will likely refer to the theories of competitive harms adopted by those jurisdictions as its basis for investigations. Despite the ongoing convergence, however, procedural and substantive differences still exist that could shape an enforcement landscape of competition law in Taiwan that is different from that of the United States or the European Union.

This paper describes the following two major differences and re-examines their implications for reviewing IPR cases under competition law in Taiwan: procedural rules for administrative investigations founded upon the inquisitorial principle, and the theory of superior bargaining position rooted in the concept of addressing unequal bargaining power in business transactions.

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2 Taiwan ranked fifth in 2014 and 2015 in terms of the number of invention patents that were granted by the U.S. Patent and Trademark Office ("USPTO"). It ranked first in terms of the number of patent applications per million people to the USPTO in 2015 and sixth in terms of patent impacts in 2014 and 2015. See Chou Pei-Hsuan, Feng Ling-Hui & Chen Hsu-Jen, 2016/2017White Paper for Industry Technologies 24-25 (Taiwan Institute of Economic Research, September, 2016).

3 The overall expenditure of research and development was around three percent of the GDP of Taiwan, ranked eighth globally in the past six years. Chou et al., id., at 17.

II. INQUISITORIAL PRINCIPLE AS THE OVERARCHING STANDARD

In Taiwan, both the Taiwan Fair Trade Act ("TFTA") and IP legislation (patent, copyright, or trademark law) are classified as branches of administrative law. Decisions made by the TFTC are appealable to the administrative courts[4] rather than to the general courts. This legal classification and institutional design is a reflection of the conventional thinking to treat administrative law as an independent body of law, with enforcement principles that may not be consistent with the spirit of fair trials and equality of arms, namely, the legislative and judiciary branches may be inadequate for dealing with certain social and economic matters that require swift solutions to complicated technical problems.[5] With their experience and expertise, administrative agencies are better positioned than the legislative or judiciary branches to advance public interest. To facilitate the realization of this public interest goal, administrative agencies, by the authorization of law, typically enjoy a degree of privilege during the investigation process vis-à-vis the investigated parties.[6] Adjudicatory and rule making powers are the most well-known privileges attesting to the "uniqueness" of administrative agencies and their actions.

In general, administrative law could be viewed as a body of law that aims to avoid the abuse of those privileges by administrative agencies while maintaining the flexibility of administrative discretion. In Taiwan, the Administrative Procedure Act ("APA") is the law specifically enacted to attain this type of enforcement balance. Numerous provisions embodying the principle of due process protection have been established in the law. Nevertheless, the law also clearly declares the inquisitorial principle to be the overarching standard for the procedure of administrative investigations. Article 36 of the APA provides that "an administrative authority shall conduct inquisition regardless of any allegation which may have been made by the party." But provisions granting due process protection are frequently followed by provisos allowing enforcement agencies to bar the application of those provisions based on their discretion. For example:

- The investigated parties may produce evidence or require the authority to investigate evidence, but the authority could deny with reasons such requests if *it deems the request unnecessary* (Art. 37);

- The investigated parties may apply to the authority to examine materials and records, provided that *it is necessary for the protection of the investigated parties' legal rights* (Art. 46);

- Unless otherwise provided by law, the administrative agencies shall have the discretion to hold a public hearing (Art. 107).

The stress of the inquisitorial principle in the APA also reflects the view of treating substantive justice as more valuable than procedural justice under the civil law tradition. Procedural rules are treated as supplementary mechanisms to pursue substantive justice, and their application may be compromised in so far as substantive justice is achieved. This observation can be evidenced by Article 174 of the APA, in which the decisions or dispositions concerning procedural matters made by administrative agencies during investigations cannot be independently appealed to the administrative courts unless substantive issues have also been controverted and appealed, or otherwise provided by the law.

III. INQUISITORIAL PRINCIPLE IN COMPETITION CASES

Articles 26 and 27 of the TFTA are the primary procedural provisions governing the investigation of competition cases in Taiwan. In addition to the TFTA, the TFTC has promulgated several administrative regulations to clarify the issues concerning investigation procedures, such as Regulation Governing Access to Materials and Files of the Fair Trade Commission, TFTC Guidelines on the Procedures of Public Hearings, and TFTC Guidelines on Holding Oral Debate Proceedings. Through these regulations, the TFTC aims to provide a transparent enforcement environment that conforms to the due process requirement for investigating competition cases. However, they are also bound by the inquisitorial principle established in the APA.

Under Article 26, the TFTC can initiate *ex-officio* investigations into conduct that might violate the TFTA and harm public interest. Article 27 authorizes the TFTC to notify the investigated parties and related third parties to appear before it, to submit relevant materials and documents, and to conduct on-site inspections. The TFTC may seize the materials and documents for evidentiary purposes, but the

4 This includes the Intellectual Property Court which has jurisdiction over issues cutting across IP and the TFTA.

5 See Peter L. Strauss, Todd Rakoff, Roy A. Schotland & Cynthia R. Farina, Administrative Law: Cases and Comments 24 (9th ed. 1995), citing James M. Landis, The Administrative Process 7, 30-38, 46 (1938).

6 See Yeh Jiunn-rong, When Taiwan Confronts Administrative Procedure Act: Procedural Establishments for Taiwan in Transition 127-28 (2nd ed. 2010).

scope and duration of seizure are limited to what is necessary for investigating, inspecting, verifying or preserving evidence. Article 31 of the TFTA Enforcement Rules further provides that the TFTC needs to specify, *inter alia*, the matters to be investigated and the explanations or materials that the notified party is required to provide with respect to the investigation in its notice. The requests for access to materials and files is typically granted by the TFTC, but it can deny such requests if it deems access as an impediment to the TFTC's enforcement efforts to pursue the public interest.[7] Although the investigated party can file a written application to the TFTC for holding a public hearing, a hearing shall be initiated by the Commission and shall be held only when the TFTC deems it necessary and approves the application.[8] The investigated parties can also request to be present or to hold an oral debate proceeding, but such requests are subject to approval by the Commissioners' Meeting.[9]

IV. THEORY OF ABUSING SUPERIOR BARGAINING POSITION

In addition to typical antitrust violations, such as price collusion or abusive conduct undertaken by monopolists, whose legality under competition law typically hinges on market centered and effect-based analysis, Chapter 3 of the TFTA contains provisions purporting to regulate unfair competitive means for which market power or anticompetitive market impact may not be as decisive a reviewing factor as it is in antitrust cases. Article 25 of the TFTA, which prohibits enterprises from engaging in "deceptive or patently unfair conduct" that is "able to affect trading order," is the representative provision in this chapter. The key difference between Article 25 and other similar fairness oriented provisions is the "affecting trading order" requirements. As is emphasized by the TFTC in its Guidelines on Cases of Article 25 of the TFTA, conduct incapable of affecting trading order should not be examined under the TFTA. Instead, it should be governed by civil law or consumer protection legislation (Article 2 of the Guidelines). It is unclear from the article whether market power gained from market share held by an enterprise is a prerequisite for the enterprise to be able to affect trading order. The TFTC apparently holds that it is not. According to Article 5 of the Guidelines, market power is only one of the factors that the TFTC will take into account to determine whether trading order can be affected. Evidence showing the frequency of the alleged conduct being implemented, the existence of an information asymmetry problem between the implementing enterprise and its contracting counterparts, the warning or deterring effects on other enterprises generated by the unfair conduct, or the unavailability of alternate dispute resolving mechanisms in the market can also be examined by the TFTC in this regard.

The theory of abusing superior bargaining position ("ASBP") is another frequently applied theory by the TFTC to establish a firm's ability to affect trading order under Article 25. It represents the TFTC's intention to reconcile the discrepancy arising from attaching a divergent degree of importance to market power and effect-based analysis in antirust and unfair competition cases. The ASBP theory intends to provide an approach that is based on the market rather than conduct-based analysis. However, the theory also attempts to incorporate fairness into the analytical framework by defining "market power" and "dominant position" differently from the conventional defining method. Under the ASBP theory, dominance and market power are not concepts that can be defined solely by comparing horizontally the economic power held by individual competitors in the market. Rather, market power can arise in the form of *reliance* between parties in a vertical transaction relationship, in the sense that one of the parties is unlikely or unable to deviate from the business relationship. In short, this is an economic power or dominance derived from the advantageous bargaining position a firm holds relative to its contractual counterparts.[10]

One of the challenges facing the ASBP theory is how to measure reliance and the degree to which it will render deviation from the existing relationship implausible. In a 2015 case involving government project bidding,[11] Dell Corporation of Taiwan was fined by the TFTC for entering into an arrangement with its distributors and retailers to not sell software designated by the government for this project to the winning bidder. According to sales data collected by an industry surveyor, the market share for the designated software was approximately three percent in the relevant market. Given this seemingly trivial market share, the TFTC still held that Dell possessed the market power to execute a boycott. Relying on the ASBP theory, the TFTC demonstrated that it would consider the possibility, sufficiency and reasonability of deviation from the existing relationship by the relying party to determine whether a superior bargaining position had been created by the alleged reliance. The possibility of deviation depends on the availability of other business channels for the relying party to obtain the

7 See Appendix II to the Regulation Governing Access to Materials and Files of the Fair Trade Commission.

8 See Article 5 of the TFTC Guidelines on the Procedures of Public Hearings.

9 See Article 2 of the TFTC Guidelines on Holding Oral Debate Proceedings.

10 Therefore, ASBP is sometimes referred to as abuse of "relative market power" in Taiwan. See Wu Hsiu-Ming, *Relative Market Dominant Position from the Perspective of Reliance Theory in* Wu Hsiu-Min, The Origin and Development of Competition Law and System 426, 431-32 (2004).

11 Gong-Chu-Zi No. 104033. This is a boycott case governed by then Article 19 of the TFTA, not Article 25. But it was also an unfair competition case.

required supplies. Whether deviation was sufficient depended on whether alternate supply channels were functionally substitutable for the products supplied by the relied-upon party. The reasonability of deviation would involve the evaluation of the risk and burden that would be borne by the relying party and the impact on its competitiveness if it switched to alternate supply channels. The TFTC concluded that once the software was designated by the government as essential for the project, it would be implausible for there to be any sufficient alternate supplies to make switching to other business channels by the winning bidders possible and reasonable.

V. INVESTIGATING IP-RELATED COMPETITION CASES: THE INQUISITORIAL PRINCIPLE

For international high-tech companies baffled or frustrated by the manner in which the TFTC has handled procedural matters in IP-related cases, understanding how the inquisitorial principle is incorporated into the procedural regulations in Taiwan to assist government in pursuing public interest may offer some clarification if not comfort to those companies. To narrow the gap between procedural protections used by different legal system requires global competition authorities to engage in constant and long-term dialogues to form a consensus on the optimal degree to which state power should be involved in regulating innovative behavior. Before this type of adjustment is made, it would be more practical for the investigated companies to argue around instead of against the inquisitorial principle. In accordance with this observation, it may be advisable for investigated companies to not only show that the TFTC's procedural disposition under the APA or the TFTA would raise due process concerns, but also to specify the type of substantive harms associated with the unwarranted exercise of discretionary power. This could be further testified by Article 174 of the APA, which predicates the appeal of procedural issues upon the appeal of substantive issues.

As Professor Sutherland cautioned half a century ago, the trust in administrative agencies' inquisitorial and discretionary powers and their contribution to public interest goals was based on the belief that "a discretionary government will be carried on by an assumed enlightened and apolitical elite…. The shortcoming of this view is its neglect of the possibility that a governing elite might be neither enlightened, nor apolitical, nor wisely selected."[12] The problems and costs from misapplying the inquisitorial power are particularly acute in IP-related cases because the highly dynamic nature characterizing the competition in high-tech markets frequently renders the review of substantive requirements, such as the existence of market power, the network effect and the extent of strategic foreclosure, not so much a journey of finding the ultimate truth as a process of making educated conjecture to minimize potential error costs. This trait in turn makes the determination by the competition agency more challenging and controversial regarding the "necessity" of allowing various requests by the investigated parties for procedural protection. To address this enforcement uncertainty, this paper suggest that competition agencies, including the TFTC, should not treat the inquisitorial principle for procedural matters as carrying a fixed enforcement intensity that mandates a uniform application of the principle to all types of cases. Rather, the degree of discretion that competition agencies are authorized to exercise should vary with the types of cases under investigation. One practical criterion for determining the exercisable level of discretionary power is the various investigative obstacles facing various types of potential violations that might hinder the pursuance of public interest. Under this criterion, it may be more justifiable for the competition agency to enjoy a higher degree of procedural discretionary power in cartel cases than in cases of vertical restraints due to the difficulty of detecting violations and discovering evidence in the former.[13]

VI. INVESTIGATING IP-RELATED COMPETITION CASES: THE ASBP THEORY

The ASBP theory has been applied in a series of cases concerning licensing practices in the CD-R industry in Taiwan. For example, in one of these cases, CD-R patent holder Philips Co. requested its Taiwanese licensees to provide it with a "manufacturing equipment list" and a "written sales report." The TFTC maintained that the patents held by Philips were essential technologies for the manufacture of CD-R. Thus, Philips enjoyed a superior bargaining position or relative market power over its licensees because deviations by the licensees to other alternate licensors were unlikely.[14] Given that the information requested by Philips was competitively sensitive and that Philips was also a CD-R supplier, such a licensing requirement constituted patently unfair conduct under Article 25 (then Article 24). On appeal, the decision was reversed by the Taipei High Administrative Court on the grounds that the provided information was not competitively sensitive and was necessary for the determination of licensing royalties; however, the TFTC's reasoning for Philips' superior bargaining position was upheld by the court.[15]

12 Arthur E. Sutherland, The Law at Harvard: A History of Ideas and Men, 1817-1967, 305-306 (1967).

13 See Herbert Hovenkamp, Federal Antitrust Policy: the Law of Competition and its Practice 888 (5th ed. 2015).

14 Gong-Chu-Zi No. 095045; Gung-Chu-Zi No. 100012.

15 Judgment Su-Zi No. 3612 (Taipei High Administrative Court, 2007).

The ASBP theory misguided the TFTC to equate economic reliance in a vertical relationship with the re-allocation of revenue by the party that held the better bargaining position to exclude and foreclose market competition. This is a problematic development for reviewing IP-related cases under the TFTA and deserves critical re-examination. A less confusing way of describing a vertical business relationship where one party has a strong economic reliance on its contractual counterparts and cannot deviate from the relationship is simply to say that the party is locked in that business relationship. If the party's decision to enter this relationship was made with full information regarding its resulting consequences, "lock-in" in essence represents the binding effect of a valid contract. It should not raise any competition issue unless the relied upon party has a monopoly or dominant power pre-contractually to make transacting with alternate suppliers implausible. In fact, this point was recognized by the administrative court in the CD-R case. The court stressed in the decision that insofar as the licensees were aware pre-contractually of the indispensability of Philips' CD-R patents and could foresee their duties under the licensing agreement, they should be prohibited from alleging post-contractually the lock-in effect resulting from the entering of the licensing arrangement and their inferior bargaining position as a competitive harm.[16] It therefore could also be argued that a SEP holder's market power should not be judged by merely referring to the indispensability of its patents *after* those patents become SEPs. Neither should the competitive harms from SEP licensing arrangements be inferred from the concern that the arrangements were negotiated between licensees and an unsubstitutable patent holder.

Opportunistic behavior by the SEP holders may be implemented after SEP licensing agreements are completed and economic reliance is created. However, an ongoing debate exists regarding whether this type of dispute should be treated as a contract law issue or competition law issue. Supporters of competition law argue that contract law gives the victims in ASBP cases the right to abrogate the contract and to seek damages, but is inadequate in addressing the core issue of these cases: the superior bargaining position held by the defendant.[17] The risk and cost inherent in the contract litigation process may also dissuade victims from relying on contract law to challenge the reasonableness of licensing terms.[18] However, the ASBP theory has its own, likely higher, costs.

First, the loosely defined "reliance" would subject the TFTC's decisions to critiques of being subjective and arbitrary, and could thereby evoke more challenges of those decisions. Concurrently, neglecting horizontal market power and zeroing in on unique vertical business characteristics to establish market dominance may lead to an excessively broad inclusion of the types of acts that have the potential to create reliance, but in effect are competitively neutral or even beneficial. Gradually, this could erode the foundation of competition law enforcement: to protect competition, not competitors. Furthermore, unless the competition agency can devise certain objective or quantifiable criteria similar to market share or concentration ration to measure the degree of economic reliance and the plausibility of deviation, application of the ASBP theory is destined to be a highly ad hoc and lamentably fact intensive enforcement process. Contract litigation in court proceedings under the adversarial principle has the comparative advantage over the administrative investigation process characterized by the inquisitorial principle to ensure the persuasiveness of judgments on the probative value of evidence and the impartiality of the final decision. Finally, if a technology or a patent is so essential to licensees that it is impossible for them to deviate from the licensing relationship with the patent holder, this implies that the relevant market in this case should be narrowly defined to include only the essential patent holder in the market. Any exclusionary arrangements imposed by the patent holder monopolist to its licensees could be reviewed under the conventional analytical framework for abuse of monopoly power. It is not necessary to rely on the ASBP theory to contain the potential harms from the exploitation of advantageous bargaining positions.

VII. CONCLUSION

Although a trend is growing toward the convergence of global competition law, differences in law and institutional designs still exist among different jurisdictions. This paper describes two main differences in Taiwanese law that may influence its competition agency to approach the same competition issues with different enforcement principles from other jurisdictions. As the analysis has demonstrated, this paper suggests that the exercise of inquisitorial power by the TFTC be limited and cautioned against using the ASBP theory to establish a market power requirement in competition cases. Despite the proposal for reforms, it is unlikely to see significant changes mirroring the proposal in the short term because this requires adjustments of deep-rooted views toward the function of procedural rules and the legislative purpose of competition law. Still, this paper may benefit the business community by assisting them to design more practical legal compliance programs and to better control the risk of violating the TFTA in Taiwan.

16 Id.

17 Albert A. Foer, *Abuse of Superior Bargaining Position (ASBP): What Can We Learn from Our Trading Partners*? AAI Working Paper No. 16-02 (September 29, 2016).

18 Id.