

Insights on Taiwan Digital Economy White Paper

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1. In the Era of Digital Economy

With the increasing awareness of the competition issues arising from the emergence of novel business models in the digital economy, regulators in different jurisdictions have started to amend the related regulations or promulgated new ones in order to address the potential competition issues. The Taiwan Fair Trade Commission ("TFTC"), likewise, is dedicated to establishing an optimal regulatory framework to handle competition issues and big technology companies. Hence, TFTC released the White Paper on Competition Policy in the Digital Economy in early March 2022. After taking into account the opinions collected from various parties, the TFTC finalized the White Paper and released the official version thereof on December 20, 2022 ("White Paper").²

The White Paper is the TFTC's first comprehensive overview of competition issues specific to the digital economy along with its relevant enforcement stance and policy direction. Therefore, it will definitely play a crucial role in shaping the future trends and development of Taiwan's regulatory regime on competition issues. In this article, we will provide a quick guide to the White Paper and share some implications from all the explored regulatory issues.

2. Overview of the White Paper

The digital economy, as defined hereunder, includes the business activities driven by the digital sector, and the innovative activities involving digital technology in the non-digital sector. To elaborate, there are four main features of the digital economy: (i) use of multi-sided business models; (ii) reliance on data; (iii) volatility (by merging with new businesses and launching new products in order to maintain its dominant position and leverage into other

markets); and (iv) tendency toward a monopoly or oligopoly.

In the White Paper, the TFTC has explored the competition issues and categorized those issues into five major areas. This article will summarize the major points stated in the White Paper and provide some key takeaways.

2.1 Definition of Market and Assessment of Market Power

Given the two-sided/multisided nature of digital platforms, it is challenging to define the market and assess the market power of the businesses. The White Paper mainly focuses on four relevant issues: how the number of "relevant markets" should be defined for two-sided/multisided platforms, the best way to define the market when the price of the product/service concerned is zero, how to define the scope of the relevant markets in the Internet and digital ecosystems, and what the appropriate indicators are for assessing market power when the price of the product/service concerned is zero.

Under the current enforcement stance, the TFTC will consider that a "two-sided non-transaction platform" can be divided into two relevant markets while a "two-sided transaction platform" constitutes a single relevant market. In addition, if the price of the product/service concerned is zero, the modified SSNIP test, SSNDQ test, or SSNIC test can be applied. The TFTC also tends to define the scope of the relevant markets by considering the digital economy's impact on substitution and cost of switching between geographical areas.³ As for the indicators for assessing the market power, the TFTC will take into account the market share, profit or revenue, indirect network effect, single/multi-homing, critical mass, switching costs, and other competition indicators for each side of the platform.

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² The White Paper is available at <https://www.ftc.gov.tw/upload/d83b5225-d541-44ec-a61f-568ab6109d56.pdf>.

³ See the TFTC Commissioners' Meeting No. 1078 (July 4, 2012).

The White Paper also indicates that the TFTC will continue monitoring the latest development in different jurisdictions. Moreover, the TFTC will step up the collection of information on factors relating to the digital economy, and review the TFTC's guidelines on defining the relevant markets.

2.2 Abuse of Dominant Position

Platform operators' business practices (for example, self-preferencing, tying-in, predatory pricing/illegal inducement with low prices, price discrimination, Most-Favored-Nation Clause, resale price maintenance, and restrictions on online sales) may all involve activities that constitute the abuse of dominant position. Hence, the White Paper emphasizes the competition issues in this aspect and concludes with up to nine sub-issues. We will explain below the TFTC's current enforcement stance and future enforcement direction on each sub-issue.

- 2.2.1 Self-Preferencing and Search Bias

Since technology giants (e.g., large platforms) often use the ecosystem that they have built in favor of their own products/services, competitors may not enjoy the same treatment under such an ecosystem. The White Paper indicates that such self-preferencing or search bias may not be deemed illegal *per-se*; whether the products/services provided by a platform operator constitute essential facilities should be determined. In addition, self-preferencing and search bias can be placed in the following framework for analysis: tying-in, price discrimination, refusal to deal, and whether such behavior raises the costs for the competitors.

To enforce corrective measures against self-preferencing and search bias, the TFTC aims to engage external experts to assist in the monitoring of the corrective measures. In the future, the TFTC would conduct research on the business models and operation of online search platforms in order to identify the means and consequences of self-preferencing and search bias.

- 2.2.2 Tying-In

Tying-in practices may restrict market access or raise the economic costs of competitors,

thereby having an anti-competition effect. The tie-in activities in the digital industry will make the determination of legitimate causes more complicated. Factors such as cross-subsidization make it even more difficult to assess the effect of competition restrictions.

The TFTC's current view is that a tying-in practice constitutes a violation only when the market power of the main product has been leveraged into the market of the "tied product" and anti-competition concerns have arisen therefrom. The TFTC also considers whether businesses have been locked in due to the dominant position of the platform on the main product market should be determined, and the impact on the efficiency of market competition and the reasonableness of the tying-in practices should be evaluated.

To establish a more optimal regulatory regime, the TFTC will conduct in-depth case studies on the three main aspects: (i) product relationship and nature of tying-in; (ii) network effect and economy of scale; and (iii) impact on competitors and consumers.

- 2.2.3 Predatory Pricing/ Inducement of Low Price

A digital platform may offer free or low-price products/services or even subsidies to rapidly increase the number of its users and foreclose competitors. The TFTC considers that anti-competition concerns will only arise when a platform with a monopoly or substantial market power has been consistently selling its products/services below cost without legitimate reasons. Moreover, the overall profit and loss of the platform are considered to determine the legitimacy of the conduct. The market share of competitors and barriers to market access are also analyzed to determine whether short-term low prices will result in long-term high prices.

Other than the current regulatory strategy, whether the requirement to prove that the platform that has implemented predatory pricing would adopt monopolistic pricing in the future to compensate its previous losses may need to be further evaluated by the TFTC. To avoid misjudging low prices that are beneficial to consumers as predatory pricing or inducement of low prices, the TFTC may use the market

structure and the market position of individual businesses as the preliminary criteria for determination.

- 2.2.4 Price Discrimination

Through data analysis, platform operators can learn consumers' purchase habits, preferences, purchase history, price sensitivity, etc., and pinpoint the "maximum willingness-to-pay" prices for each consumer, thereby charging each consumer different prices. However, such differences may trigger discrimination concerns. While Article 20 of the Taiwan Fair Trade Act ("TFTA") does not apply to personalized pricing, the White Paper states that Subparagraphs 1 and 2, Article 9 and Subparagraphs 2 and 3, Article 20 of the TFTA may apply to cases involving price discrimination.

In addition, the distinction between price discrimination and loyalty rebates should be addressed. The White Paper indicates that when determining whether the offering of loyalty rebates has the effect of foreclosure, not only the market position of the platform and its network effect are considered, whether the products/services concerned constitute essential facilities should also be taken into account.

In the future, the TFTC aims to more precisely understand how platform operators obtain big data and use algorithms and data analyses, as well as the mechanism of personalized pricing. Furthermore, the TFTC will properly update the cost structure of the personalized pricing implemented by platform operators, the operating models, and the cost and economic value of the products/services.

- 2.2.5 Most-Favored-Nation Clauses ("MFNs")

It is not uncommon to find platform operators asking their suppliers not to sell on other platforms or via other channels at lower prices or more favorable transaction terms. Problems arise from MFNs, such as whether online platforms and brick-and-mortar channels should be included in the same relevant market, should the geographic market be defined as nationwide, and if a platform operator's market share has reached the threshold of vertical restraints based on the TFTC's practice, can

such platform be considered as having anti-competition concerns, need to be considered and addressed.

According to the White Paper, in terms of market definition, there is "asymmetric substitution" between online platforms and brick-and-mortar channels. However, the TFTC considers that conducting a market survey on demanders (including consumers) may be one of the optimal approaches to determine the product and geographic markets. In addition, factors such as legitimacy and impact on market competition should be taken into account. The TFTC will also identify the characteristics of the exact types of the MFNs involved as different types of MFNs create varying degrees of anti-competition effect.

- 2.2.6 Resale Price Maintenance (RPM)

Since digital platform operators can use AI and algorithms to monitor downstream distributors' compliance with RPM agreements, the RPM may be deemed a related issue in the digital economy. The TFTC's focus is not only on the effect on intra-brand competition, but also on competition among brands. Whether the RPM agreements have the effect of encouraging the downstream businesses to improve the efficiency or quality of pre-sales services will also be taken into account.

The White Paper also indicates that the TFTC will take market power into consideration due to the following reasons: (i) both the legal requirements and the TFTC's practice take market power into consideration; (ii) US precedents expressly provide that serious attention must be given to RPM agreements implemented by businesses with market power; and (iii) the legitimate causes and positive effects specified under Article 25 of the Enforcement Rules of the TFTA depend largely on the market power of the businesses involved.

- 2.2.7 Restrictions Relating to Online Sales Channels

Platform operators may use their dominant position to implement customer foreclosure or input foreclosure. As such, manufacturers might selectively exclude online platforms from their distribution channels. However, it is challenging to assess a platform's indirect network and

identify whether online platforms are imposing geographical restrictions/geo-blocking in Taiwan. Furthermore, platform operations are cyclical, and it is not easy to determine what stage of the life cycle a platform is in.

Currently, when the TFTC determines whether the restriction above constitutes a violation of the TFTA, an assessment is conducted based on the relevant business relationship, purchasing pattern, network effect, the economies of scale, and the impact on consumers. On the other hand, when determining whether "preventing free riders" is a legitimate reason for imposing such a restriction, the decision is based on the percentages of consumers who opt for a platform "with pre-sale service and high prices" and a platform "with no pre-sale service and low prices".

For future regulatory development regarding market position, a specific threshold for initiating investigation may be set by referring to the cases in the US and the EU. In addition, the TFTC plans to conduct an in-depth study on the characteristics of the online sales platforms to effectively explore other types of restrictions on accessing such platforms.

- 2.2.8 Data Privacy and Market Competition

A privacy dispute may arise where a digital platform fails to obtain consumers' consent to use their data or the platform and the consumers have different perceptions on the scope of use of the consumer data. In practice, the TFTC can intervene only when such a privacy dispute also gives rise to undue restrictions on market competition. Disputes that arise from unclear contractual terms are subject to the Personal Data Protection Act. For future enforcement, the TFTC may generally maintain the current stance. However, the TFTC will be following the development in these areas both domestically and internationally. As the Ministry of Digital Affairs ("MODA") has been established, the TFTC will pay special attention to the allocation of rights and responsibilities in relation to data privacy between the TFTC and the MODA.

- 2.2.9 Profit-Sharing of Digital Advertising and Payments to News Media

If digital platforms monetize the online traffic that they have attracted using the content created by news media, it is disputable whether they need to share their profit with the news media. The White Paper states that the TFTC fully cooperates with the efforts and tasks assigned by the Executive Yuan's coordination group and will provide opinions on competition issues thereto.

In the event that the news media outlets wish to pool their bargaining power through collective bargaining, as it may involve concerted actions among industry peers, they may apply to the TFTC for a waiver of concerted action pursuant to the TFTA. The TFTC will facilitate the negotiation between the news media outlets and the digital platforms as a part of its ex officio duties as the competent authority.

2.3 Merger

According to the White Paper, technology giants tend to acquire start-ups in their infancy to eliminate potential competitors. Also, platform operators will acquire businesses that own data in order to obtain more personal data of consumers. The TFTC illustrates its regulatory tendency and future enforcement directions in the following two areas:

- 2.3.1 Killer Acquisition

The unresolved issue is whether digital technology giants' acquisitions of potentially competitive start-ups constitute a violation of the competition law. Thus far, the TFTC has no experience in handling killer acquisitions, even though it has dealt with conglomerate merger cases of technology giants and has accumulated law enforcement experience in examining merger cases from the perspective of potential competition. For future enforcement, the TFTC will continue to monitor international development trends and adjust relevant review standards. Moreover, when dealing with the issues of killer acquisitions, the TFTC should also consider the benefits arising from technological innovations.

- Role of Privacy in Merger Review

One of the issues addressed in the White Paper is whether personal data protection is a parameter for assessing competition when

reviewing the establishment of a new joint venture. Thus far, the TFTC has not included privacy protection in its analysis but will start to consider how privacy protection can be internalized in a merger review from the perspective of "quality" competition. Nonetheless, the White Paper indicates that if the TFTC wants to examine privacy issues in a merger filing case, it must first determine whether there is competition by the means of privacy protection, and such privacy issues should be considered only when the parties use privacy protection as a way to retain or attract users. In the context of protecting privacy and maintaining competition, the TFTC should consider not only the potential disadvantage of reduction in privacy protection after the merger, but also the potential disadvantage to competition that may result from enhancing privacy protection.

The White Paper also recognizes the difficulty of quantifying the extent and necessity of privacy protection which can pose a challenge to law enforcement in terms of seeing privacy protection as a "competition on quality". In the short term, the TFTC may seek the views of privacy and consumer protection authorities in order to apply the rule of reason test properly and to allow for a more comprehensive analysis in merger reviews. In addition, the TFTC will continue to look at how other countries develop a more objective and even quantitative analysis with a view to improve enforcement.

2.4 Algorithm and Concerted Action

In the digital economy, the use of algorithmic technology has become a facilitating mechanism for concerted action and a tool for collusion and mutual supervision between the parties. The difficulty of proving that the existence of collusion has increased and there is a risk that algorithms may become a tool for concerted action.

The TFTC currently examines the facts and evidence specific to the case comprehensively and will engage external experts when necessary to review the programs or commands related to the algorithms. The TFTC also states that concerted actions through algorithms are still within the scope of the TFTA.

Given the ongoing development of the algorithm, the TFTC will conduct market research and industry survey to facilitate case reviews. Moreover, relevant laws and regulations should be amended to strengthen the TFTC's authority on conducting market survey.

2.5 Online False Advertising

Internet advertising helps to enhance consumers' ability to obtain information about products and services, expand opportunities for businesses to enter new markets, and reduce business operating costs. However, if businesses use false advertisements to promote their products/services, they might not only prevent consumers from making transaction decisions based on accurate information, but also hinder fair competition with other law-abiding competitors.

Under the current regulatory framework, the provisions on false advertising under the TFTA also apply to the new types of online advertising with target audiences. The TFTC has also worked with other agencies to raise the general public's awareness on advertising laws and regulations.

In the future, it is expectable that the capability and capacity to investigate and address online false advertising and new types/technologies of advertising activities will be strengthened. In addition, the TFTC would proactively amend relevant laws and regulations in this area.

3. Conclusion

The White Paper states the following principles regarding the competition issues in the era of digital economy:

- (i) local nexus is more important than replicating the experience of others;
- (ii) commitment to construct the contestability of the digital market;
- (iii) careful assessment of the need for and role of *ex-ante* control;
- (iv) international cooperation and domestic collaboration;

- (v) further explore the essence of competition and enhance analytical capability; and
- (vi) strengthen digital enforcement capability through the cultivation of IT ability and talent.

Following the principles above, in the short term, there are three immediate changes that can be realized. First, "relative market dominance" will be excluded as one of the criteria for determining the "anti-competition concern" under Article 20 of the TFTA. Second, the market power of the businesses involved in the relevant market will be included as one of the factors to be considered when reviewing cases involving RPM agreements. Third, the TFTC's handling guidelines relating to market definitions will be reviewed. In the long run, amendments should be made to the relevant laws:

- (i) when the TFTA is being amended in the future, including vertical collusion into the

scope of concerted actions under Article 14 of the TFTA;

- (ii) amending the relevant laws and regulations to strengthen the TFTC's authority on conducting market survey;
- (iii) after amassing relevant enforcement experiences, the TFTC will establish principles for handling cases involving digital economy; and
- (iv) reviewing the TFTC's Disposal Directions (Guidelines) on Online Advertisements and incorporating the issue of KOL/influencer marketing therein.

Following the release of the White Paper, the TFTC stated that the content of this White Paper only reflects the TFTC's position at this moment in time and does not preclude future adjustments to varying degrees in response to economic development and changes of the industry.