

1-2

Abusive Conducts by Digital
Platforms: Enforcement
Experience of Taiwan

ABUSIVE CONDUCTS AND THE THEORIES OF HARM IN DIGITAL ECONOMY

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OUTLINES

Main Characteristics of Digital Economy

The White Paper on Competition Policy in the Digital Economy (Taiwan Fair Trade Commission)

Challenges, Responses and New Theories of Harm

Comments and Final Thoughts

MAIN CHARACTERISTICS OF DIGITAL ECONOMY

- Digital platforms as an important intermediary for market transactions
- Data as a crucial input for market competition
- Cross-sector or industry expansion is the driver for growth
- Trend towards market concentration /winner takes all!
 - TFTC, The White Paper on Competition Policy in the Digital Economy (the “White Paper”)–

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6/26/23 3

WHITE PAPER ON COMPETITION POLICY IN THE DIGITAL ECONOMY (2022)

- Released on December 20, 2022
(<https://www.ftc.gov.tw/upload/420797f3-a37e-41d2-a9b9-ab51d1c77b47.pdf>)
- Purposes
 - Made known to the public regarding the TFTC's enforcement stance towards competition issues in digital economy
 - Checklist for reassessing future enforcement of the Taiwan Fair Trade Act (TFTA) and policies in digital economy
 - Focusing on **digital platforms**

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ABUSIVE CONDUCTS COVERED BY THE WHITE PAPER

- Definition of Relevant Market and Measurement of Market Power
- Self-preferencing and Search Bias
- Tying Arrangements
- Predatory Pricing / Inducement with Low Price
- Price Discrimination
- Most-Favored-Nation (MFN) Clauses
- Resale Price Maintenance
- Online Sales Channels
- Data Privacy and Market Competition
- Advertisement revenue sharing with news media

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6/26/23 5

THE OVERARCHING ENFORCEMENT PRINCIPLES

- Local nexus is more important than duplicating others' experience
- Committing to establishing *market contestability*
- Cautious assessments of the necessity of *ex ante regulations* and the role the TFTC plays
- International cooperation and domestic collaboration

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6/26/23 6

MARKET DEFINITION AND THE MEASUREMENT OF MARKET POWER

- A precondition for establishing abuses
- The challenges from network effect, two-sided (multi-sided) market and zero pricing
- Enforcement Position
 - SSNIP as a starting point, but will consider other non-price tests and the interrelationship of various sides of markets
 - A holistic perspective on market power, including the concept of ecosystem, technical characteristics and business models
 - The amended “Guidelines on Market Definition” is currently under review by the Commissioners’ Meeting

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6/26/23 7

SELF-PREFERENCING AND SEARCH BIAS

- The *Google Map* case (2015)
 - Whether Google had abused its power at the online search market to favor the content of Google Map
 - TFTA: Google search is not the only or essential way to obtain online mapping information
- Enforcement Position
 - Reviewed under the rule of reason
 - Reviewed under the legal framework of tying, price discrimination, or refusal to deal in the TFTA
 - Is platform essential and unavoidable? Is self-preferencing strategy rational for platform, i.e., sacrificing short-term profits to gain long-term market dominance?

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TYING ARRANGEMENTS

- The *Google Apps Pre-installation* case
 - Google (Android system) and Apple (iOS system) held equal market share in Taiwan
 - market survey indicated that *no significant status quo bias* between the two systems
 - Market survey indicated that pre-installation shortened the time of app development and system integration
- Apple in-apps purchases (anti-steering) case currently under investigation

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TYING ARRANGEMENTS

- Enforcement Position
 - “separate product” test and “compatibility” issues require *intra* as well as *inter-system* assessment
 - “lock in” per se is not necessarily an indication of market power; need to be verified by reviewing further the *sources, reasons and market impacts* of lock in
 - The TFTC will focus on “*product relationship and the nature of tying*”, “*network effects and economies of scale*” and “*impacts on consumers*” for digital tying cases

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6/26/23 10

MFN(MOST-FAVORED-NATION) CLAUSE

- E-commerce platform MFN (2016)
- Food-delivery platform MFN (2021)(still pending in court)
 - A “narrow MFN” case (requiring in-restaurant prices to be the same as their listed prices in platform)
 - A duopoly market (foodpanda and Uber Eats being the two key players)
 - The TFTA held it violative of Article 20(5) of the TFTA (“improper restrictions on its trading counterparts' business activity as part of the requirements for trade engagement.”)

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6/26/23 11

MFN(MOST-FAVORED-NATION) CLAUSE

- Enforcement Position
 - Reviewing the degree of substitution between online and offline platforms (symmetrical or asymmetrical)
 - Different types of MFNs / different corresponding regulatory frameworks
 - e.g. Article 20(5) does not require the competitive harms to be “real”; “potential” or “likely” will suffice.
 - Suggesting **not to rely on “superior bargaining position”** to establish market power in Article 20 cases. / Compare Japan’s regulation!

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6/26/23 12

PRIVACY ISSUES

- In Taiwan, privacy infringements are governed principally by Personal Data Protection Act and Consumer Protection Act
- To date, no cases under the TFTA concerning data abuses by platforms to impede market competition
- Enforcement Position
 - Treating privacy protection as a parameter of competition (quality competition)
 - Only when **competition** has been unduly restrained by platform operators' abuses of data will the TFTC intervene

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EX ANTE REGULATIONS

- Currently, no legislations or administrative guidelines specific to digital-platform competition by the TFTC
- A **failed attempt** by the National Communication Commission (NCC) to enact **Digital Intermediary Service Act** (similar to the Digital Service Act in EU)
- **Fraud and misinformation** disseminated through digital platforms is the predominant concern for government
- Taiwan AI Action Plan 2.0 (2023-2026)
 - cross-agencies task force to review and respond to the impacts from artificial intelligence

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CHALLENGES, RESPONSES AND NEW THEORIES OF HARM

- In summary, traditional theories of harm focus on the following two adverse effects from abusive conducts
 - Foreclosure / exclusion of market competition
 - Rent extraction / exploitative abuses
- Limits of traditional theories for digital market asserted by researchers (OECD *Abuse of Dominance in Digital Markets*, 2020):
 - Forced free riding
 - Abusive leveraging
 - Privacy policy tying

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6/26/23 15

COMMENTS AND FINAL THOUGHTS

- The new theories of harm could frequently be factored into the traditional theories, such as refusal to deal or tying
- Departing from the traditional theories creates **uncertainty** and **unpredictability**
 - Increases the potential for committing type-1 error and diminish the incentive to innovate
 - Industry-level conditions such as the scale (prevalence) of digital economy and the maturity or comparative advantages of digital technology (technological exporting or importing) of a country are also important factors for assessing costs from false positive
- Instead, enhancing the analytical quality under the traditional theories with effective (digital-related) enforcement tools and empirical evidence
- Given its complexity, a **case-by-case and issue-driven approach** based on rule of reason might be more desirable

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6/26/23 16



Thanks for Listening
Comments and Suggestions are Welcomed!

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