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Abusive Conducts by Digital Platforms: Enforcement Experience of Taiwan



## 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** 

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

- Released on December 20, 2022 (<u>https://www.ftc.gov.tw/upload/420797f3-a37e-41d2-a9b9-ab51d1c77b47.pdf</u>)
- Purposes
  - $\rightarrow\,$  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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# 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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### 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
  - $\rightarrow\,$  SSNIP as a starting point, but will consider other non-price tests and the interrelationship of various sides of markets
  - $\rightarrow\,$  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

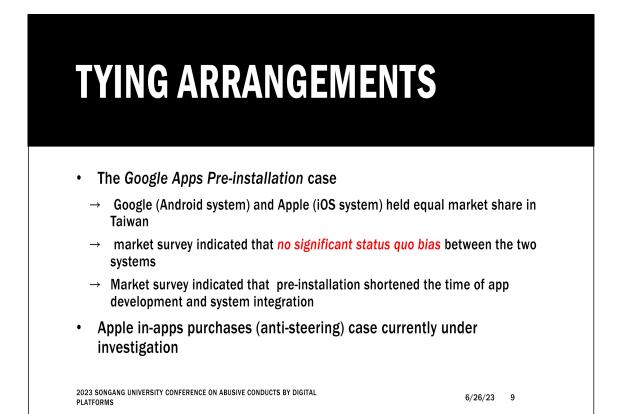
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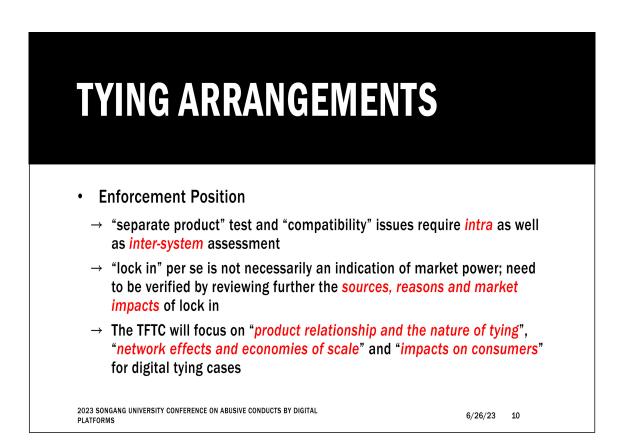
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### SELF-PREFERENCING AND SEARCH BIAS

- The Google Map case (2015)
  - $\rightarrow\,$  Whether Google had abused its power at the online search market to favor the content of Google Map
  - $\rightarrow$  TFTC: Google search is not the only or essential way to obtain online mapping information
- Enforcement Position
  - $\rightarrow$  Reviewed under the rule of reason
  - $\rightarrow$  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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### 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 TFTC 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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### 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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