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ABUSE OF DOMINANCE IN DIGITAL MARKETS – Contribution from Chinese Taipei

- Session II -

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More documentation related to this discussion can be found at: oe.cd/dmkt.

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Abuse of dominance in digital markets

- Contribution by Chinese Taipei –

1. Challenges to Law Enforcers in Digital Market Cases

1. Domestic cases associated with abuse of dominance primarily involve competition restriction practices specified in the Fair Trade Act, including monopolization, boycotting, discriminative treatment, and adoption of improper means to gain trading opportunities. Since 2011, the Commissioners' Meeting of the FTC has reviewed five important cases: 1) whether Microsoft Corporation was in violation of the Fair Trade Act by stopping its Windows XP updating service and implementing the "Windows with Bing" licensing plan that was directed at original equipment manufacturers; 2) whether Google Inc. and Google International LLC Taiwan Branch abused their dominance in the search engine service market and impeded or eliminated competitors; 3) complaints accusing Google Inc. of violating the Fair Trade Act by obstructing the sale of FREEdi YT player apps on Google Play Store; 4) complaints accusing Google Inc. of violating the Fair Trade Act by removing the apps developed by domestic businesses from Google Play Store; and 5) whether Apple Asia LLC Taiwan (manager of Apple Pay) was in violation of the Fair Trade Act by impeding competition in the domestic mobile payment service market. After reviewing the cases, the FTC did not sanction any of the businesses involved. Therefore, the FTC has not processed any cases in which abuse of dominance in the digital market was involved and sanctions were imposed.

2. The industrial characteristics and transaction patterns in the digital market may facilitate competition and enhance consumer interests, but businesses can also make use of such characteristics to create competition restraints when making transactions. As a consequence, the competition law authority is likely to face the following challenges because of the characteristics:

1.1. Increasing uncertainty in market definition

3. Being borderless, the Internet allows domestic consumers to access platforms set up by foreign companies and purchase products or services from foreign suppliers. Besides purchasing physical products at brick-and-mortar stores, consumers can also buy physical products or non-physical products (such as music, e-books, cell phone games, etc.) online. As a result, when seeking to define a market, the competition agency faces the problems of 1) whether physical outlets and online stores should be defined as belonging to the same relevant market; 2) whether reasonable substitutability exists between physical products and digital products; and 3) whether competition exists between foreign online shopping platforms and domestic online store operators and, therefore, whether the corresponding geographic market should be expanded.

1.2. Growing difficulty in market power assessment

4. Competition agencies often apply market concentration, market share, price standard or profit margin as the indicator for measuring market power. However, "multi-sided market" characteristics exist in the business patterns of some enterprises in the digital market and this may cause some enterprises to adopt "free of charge" pricing in relation to the users of a certain side. Consequently, the use of static indicators for the measurement of market power may become inapplicable. Nevertheless, this by no means suggests that such enterprises have no market power. It only means that appropriate measurement indicators or methods have to be found.

1.3. Increasing difficulty in determining price collusion

5. As far as market competition is concerned, market transparency can be a double-edged sword. On the one hand, it helps reduce consumers' searching costs, enhances the incentive for suppliers to engage in price competition, and promotes competition. On the other hand, with the emergence of price comparison sites and the development of pricing algorithms, suppliers are able to respond to the price cuts of competitors at an earlier time. Suppliers find it difficult to adopt secret price cutting for market expansion, while competitors find it easier to keep a close watch on each other. In turn, price coordination or the stability of price collusion between businesses can increase, and, due to growing insidiousness, it might become more and more difficult to prove the existence of a "mutual understanding."

1.4. Difficulty in the maintenance of multi-homing

6. Although the digital market allows new businesses and small retailers with limited capital and resources to display their products on a third-party platform with a large clientele, makes it easier for potential customers to access their product information, and increases transaction opportunities, as the network effect of two-/multi-sided platforms increases, the big ones get bigger and users become more likely to be locked in to certain platforms and are either unable to or find it difficult to switch to other platforms. Eventually, multi-homing becomes obstructed.

1.5. More dynamic considerations than ever

7. Due to rapid changes in the industrial environment, the current market status or plan of a business cannot reflect the market status and actions of the business in the future. Besides increasing the difficulty in the assessment of whether the conduct of a business involves significant competition restraints, this condition can also result in the competition agency being unable to evaluate merger cases involving enterprises with insignificant business scales at the moment but with potential to innovate and develop in the future. It will also be hard to judge the market power of such enterprises or measure the post-merger influence on the market according to the existing market power of such enterprises. Faced with such rapidly changing markets, the competition agency has to take more dynamic considerations into account.

8. The management practices of many businesses in the digital market are simultaneously characterized by the effects of "anti-competition" and "promoting competition". When reviewing related cases, the competent authority has to analyze the justifiability of such practices in accordance with the nature of each case as well as evaluate the anti-competition and competition-promoting effects of the practices. This challenges

the ability of the competition agency to conduct its investigations and perform analysis. The following is a description of the experiences of the FTC accumulated from processing cases associated with search engine services and mobile device app download platforms.

2. Cases Involving Search Engine Services

2.1. Background

9. When consumers entered an address on Google as the keyword, a Google Maps location thumbnail was displayed at the top or on the right side of the first search results page and a click could link to the corresponding website. For consumers, this seemed to be a rather convenient service. After a vertical search was conducted, the results were clustered and displayed in a particular format on a dedicated page (such as news or images). Google LLC considered giving priority to vertical search results and displaying the contents of extended service items was the outcome of identification of the associations with the keyword and information compliant with the needs of the user. It was an improvement in search service quality and also a trend in search service development. However, operators of domestic e-map information service websites believed that Google LLC was taking advantage of its dominance in the online search service market to manipulate search program algorithms and the arrangement of search results and display Google Maps thumbnails in the most conspicuous spot on the search result page after the name of a store or institution was entered as the keyword. It was unfair competition that caused domestic e-map information website operators to suffer loss of business opportunities and a reduction in income.

2.2. Should Google LLC be considered a monopoly?

10. According to statistics from StatCounter, Google LLC was the largest business in the domestic online search service market. In addition, the domestic sales of Google LLC totaled over NT$2 billion. In other words, the market share and sales of Google LLC both met the monopoly standards specified in Article 8 of the Fair Trade Act. Moreover, due to the characteristic of “the big ones get bigger” in the search engine service market, other competitors or potential competitors were unable to give Google LLC any competitive pressure and keep its market power in check. Therefore, Google complied with the description of a monopoly set forth in the Fair Trade Act.

11. Through the consolidation of its existing resources, a monopoly could maintain its competitive edge with even more efficiency. Even if competitors were put in a disadvantageous position or forced to pull out of the market, this process of the survival of the fittest was the result of normal market competition functions. The purpose of competition law was to protect the competition process and not to determine winners and losers in the market, so that misjudgments, chilling effects, or a weakening of incentives for businesses to engage in innovative efforts and consumer interests as a result of over-intervention in the unilateral acts of businesses could be prevented. Hence, under competition law, a monopoly had no obligation to help its competitors. The competition law authority would request that a monopoly help its competitors only in two exceptional situations, that is, where 1) the monopoly refused to provide key equipment or elements to its competitors, and 2) the monopoly refused transactions even if it had to sacrifice short-term profits due to its intention to monopolize profits after the elimination of its competitors.

2.3. Did vertical search services involve the abuse of market status by a monopoly?

12. Despite the large market share and frequency of use of the regular search services offered by Google LLC, due to the learning effect (the accuracy and quality of search results improving as a consequence of the increase in search engine users) and two-sided market (search engines with more users generating higher advertising revenue and more resources being invested to upgrade search quality), the market status of Google LLC could reinforce itself. Operators single-handedly managing map information service websites were unable to adopt economically reasonable methods to duplicate a search engine equivalent to Google's search engine in terms of both scale and quality within a short period.

13. Besides acquiring hyperlinks to target websites by using the search functions of search engines or portal sites, users could also key in the URL of the target website directly and use the bookmark function of the browser to keep a record of websites they often used. Users with a high demand for address information could access related information through this approach without being restricted by the search results of a search engine. Therefore, for operators of other map information service websites, the general search services offered by Google LLC were not the only and necessary means to offer map information services to users.

14. Domestic e-map service operators confirmed that they made a profit by providing map information to website managers (allowing them to include maps on their web pages, like renting out maps) and collecting e-map information service fees from them. No charges were collected from users. Hence, even though domestic e-map service operators claimed Google LLC could display Google Maps services on the first search results page to intercept users originally intending to make their queries on domestic e-map service websites, this condition had no influence on the domestic e-map service operators' business pattern of providing map information to website operators and collecting map information service fees from them. Despite the fact that Google LLC controlled most of the general search service market share, it did not have the capacity to stop or intercept users who chose other map information service websites over Google. Neither was it capable of impeding other map websites from making transactions with paying customers and reducing their revenue sources by adopting the aforementioned strategy.

15. Although Google did not link to the web pages of competitors and display a general search result at the top of or in a conspicuous position on their web pages, there was no evidence showing that this practice by Google was a sacrifice of short-term profits or it was incompliant with Google's economic reasonableness. First of all, before displaying Google Maps services at the top of the first page or in a conspicuous spot, Google had never shown at the same spot the map website of any competitor, and there was no concrete proof indicating that Google intended to terminate an originally profitable trading relationship by displaying Google Maps services and not displaying the website of any competitor. Secondly, the general search services of Google were different from keyword advertising in paid search. General search order was decided according to the correlation between the keyword entered and the website contents, unlike paid search services in which the order was determined by the bid value offered by advertisers. Under such circumstances, it was impossible to consider that Google LLC sacrificed originally deserved revenue by not displaying the map websites of competitors at the top of a web page or in a conspicuous spot. Furthermore, if Google LLC placed the map website of a competitor at the same location as its own Google Maps or in an even more conspicuous spot free of charge, it would be an economically unreasonable practice. In other words, there was no evidence indicating that Google LLC sacrificed short-term profits or engaged in any conduct incompliant with its economic reasonableness by placing Google Maps services at the top of a web page or in a conspicuous spot and not displaying the map website of any

competitor in the same place or in an even more conspicuous spot. The practice of Google LLC was the result of a justifiable and legitimate business assessment; it was not a refusal of a transaction or anti-competitive conduct.

16. When competitors adopted specific business practices, such practices were often advantageous to customers. Although Google LLC displayed Google Maps thumbnails at the top of the first search result page or in a conspicuous spot on the right, if such presentation did not facilitate users' search activity or lowered the quality of Google search, competitors like Yahoo! Kimo could just choose an inconspicuous spot on the search results page to display its maps and easily exhibit the difference compared to Google's general search services to take over users giving up on Google's general search services. Nonetheless, Yahoo! Kimo chose the same search result presentation as Google. Apparently, the display function could indeed help upgrade user experience; therefore, competitors released similar functions.

17. Google LLC displayed its map services in a conspicuous spot on search result pages to allow users to search for map information quickly and upgrade search experience. Forbidding the practice would deprive consumers of the convenience and jeopardize consumers' interests. More importantly, it could even deter website operators from conducting further R&D or innovative activity. In turn, the decision would protect competitors instead of competition and consumer interests. In short, by integrating its general search services and Google Maps services, Google LLC made it possible for users to perform searches conveniently and rapidly. Based on existing evidence, it was difficult to consider that there was any violation of the Fair Trade Act.

3. Cases Involving Mobile Device App Download Platforms

3.1. Background

18. Developers released apps for mobile devices on download platforms and allowed users to download them. Such platforms also provided developers with cash flow services. The informer managed an information service business and released its apps on the iOS platform and the Android platform. The total number of members exceeded two million people. However, the informer's apps available on Google Play were removed by Google LLC without warning and the reason given was that the apps were in violation of the development personnel plan policy and development personnel release protocol of Google Play. The informer thought Google play was the main release platform for Android devices while related statistics indicated that Google Play accounted for over 90% of the market. Apparently, Google Play had its monopolistic status. Therefore, the informer believed that Google LLC had violated Article 9 of the Fair Trade Act by randomly removing its apps.

3.2. Should Google LLC be considered a monopoly?

19. The reason why not all the app download channels, including downloading and sideloading through personal computers, were included in the relevant product market in this case was that the versions of apps for mobile devices and those for personal computers were different. There was no reasonable substitutability between the computer version and the mobile device version; hence, they could not be regarded as belonging to the same market. Sideloading allowed developers to provide apps to users, but users had to adjust the security setting of their mobile devices before installation. It was not so convenient; besides, users needed to access an app download platform to search for the app they intended to download among a variety of apps with similar functions. For developers, releasing apps on app

download platforms allowed them to reach a lot more potential users than those choosing to sideload apps. As far as developers were concerned, reasonable substitutability did not exist between sideload and download platforms; hence, these platforms could not be included in the same market. As for the reason why app download platforms were not subdivided into Android, iOS and Windows app download platforms according to their mobile operating systems (or ecosystems, as referred to in the industry) was that the key to the success of a mobile operating system was the types and quantity of apps that the operating system could support. In addition to other app download platforms for the same ecosystem (Samsung Galaxy Apps Store, for instance), app download platforms, such as Google Play, also had to face competitive pressure from app download platforms for different ecosystems, (such as the iOS App Store). If each app download platform raised its charges, lowered the quality or removed apps randomly as accused by the informer in this case, app developers would choose to develop apps that supported other operating systems or increased their dependence on other ecosystems. In the end, the quantity and types of apps would decrease and the development of ecosystems would be impeded.

20. Estimation of the market share of Google Play in the domestic market and the sales of Google LLC according to the global revenue showed that both had reached the standards for monopoly confirmation. However, as already mentioned, Google Play still had to face competition from other app download platforms for the same ecosystem, such as the Samsung Galaxy Apps Store, and app download platforms for different ecosystems, such as the iOS App Store. Google Play was thus not without competitors. Objectively speaking, it did not have the "overwhelming status and the capacity to eliminate competition." In other words, it was difficult to consider that Google LLC met the description of a monopoly defined in Article 7 of the Fair Trade Act.

3.3. Did the practices of mobile device app download platforms involve abuse of market status by monopolistic businesses?

21. Abuse of monopolistic power could be divided into abuse by obstruction and abuse by exploitation. The former referred to a monopolistic business eliminating horizontal competitors or potential competitors or blocking them from maintaining or expanding their market power by adopting practices such as predatory pricing, vertical squeeze or refusal of transaction. As for the latter, it involved a monopolistic enterprise taking advantage of its market power to obtain profits beyond the level of competition, such as overpricing, or requesting trading counterparts to give it special offers (abuse of monopolistic buying power), etc.

22. In this case, Google LLC's removal of the apps of the informer from Google Play was not abuse by obstruction. Google LLC and the informer were not horizontal competitors and no potential competition existed in between either. The decision of Google LLC to remove the apps was not intended to exclude the informer from competition. Hence, it was not a practice of abuse by obstruction. Google LLC's removal of the informer's apps from Google Play was not abuse by exploitation either. Part of the revenue of Google Play came from commissions on paid apps. Removing apps could not increase the revenue of Google Play. On the contrary, it would only reduce the income from commissions on paid apps. Besides, the key to the success of a mobile operating system was the quantity and types of apps. By randomly removing apps from Google Play, Google LLC not only would reduce the attraction of Google Play to users and software developers, but could also put the Android ecosystem in a disadvantageous position when facing competition from other ecosystems. Since the decision of Google LLC to remove apps from Google Play could not increase the revenue of Google Play or create value for the Android ecosystem, the conduct, therefore, could not have been regarded as a practice of abuse by exploitation.

23. As the removal of the informer's apps from Google Play by Google LLC was neither abuse by obstruction nor abuse by exploitation, abuse of monopolistic power as described in the Fair Trade Act was out of the question. The informer argued that the decision by Google LLC to remove its apps was ambiguous and without any clear, justifiable, consistent and predictable standards. Moreover, before executing the decision to remove the apps, Google LLC did not give it a time period to make improvements or a chance to appeal. Therefore, it was a practice of abuse of monopolistic power. Nevertheless, even if what the informer said was true, the incident was not a result of the market power of Google LLC and it could not enhance or expand the market power of Google LLC. In other words, there was no connection between the incident and the market power of Google LLC. What is more, the record of correspondence between Google LLC and the informer showed that the informer had violated the policy of Google Play on a number of occasions prior to the removal of its apps or termination of its account. The informer claimed that Google LLC had not given a developer any opportunity for rectification or accepted appeals. However, Google LLC did give the informer an opportunity to make corrections before removing the apps of the informer. After the app removal, Google LLC also accepted the appeal from the informer and notified the informer of the handling result.

24. Based on the evidence mentioned above, it was difficult to consider that the decision by Google LLC to remove the apps of the informer from Google Play involved the abuse of market power by a dominating business or an abuse of monopolistic power in violation of Article 9 of the Fair Trade Act.

4. Analytical Measures and Instruments Applied by the FTC to Handle Digital Market Cases

25. After reviewing the tendencies of foreign competition authorities in law enforcement involving the digital industry, the FTC's own law enforcement experience and the opinions of competition law scholars and specialists, the FTC's conclusion is that the regulations set forth in the existing Fair Trade Act suffice and there is no need to stipulate further regulations specifically to govern the digital industry, Nonetheless, it is necessary to adjust the measures and instruments for competition analysis. The details are as follows:

1. Under the digital economy, the characteristics of two-sided or multi-sided platforms can cause competition law cases to involve several different relevant markets. If the competition law authority misjudges the number of relevant markets, it will be unable to fully assess the interdependence between the markets associated with multi-sided platforms. In addition, discriminant trading and non-trading markets are also important. With non-trading markets, the competition law authority needs to define a number of relevant markets in order to comprehensively assess the market power of each business and the influence on competition.
2. When defining a relevant market with no nominal prices, if the hypothetical monopoly test is adopted, cross-side network effects, consumers' product ratings and quantities used, and price structure asymmetry must be taken into account. If quality variables are applied to replace price variables, the adoption of SSNDQ to replace the conventional SSNIP method can be considered. If quality variables are difficult to observe or measure, the market definition procedure may be skipped and diversion ratios or upward pricing pressure (UPP) can be applied instead to measure competition effects directly and focus on the evidence of qualification or quantification of competition effects.

3. When the participants on different sides of a platform apparently have influence on one another (meaning the effect on the participants on one side of the platform goes up as the number of participants or quantity used on another side increases), if, during market definition and competition effect analysis, the market power of a business is judged only in accordance with the indicator (such as market share) in the single market associated with the product or service involved, such market power is often unable to reflect the actual market competition. For this reason, two-sided market characteristics and the interaction between the participants on both sides must be taken into consideration.
4. When evaluating competition effects, all possible influence of the conduct of competition on the participants on both sides must be considered. The platform operator has to ensure that there are enough and properly proportioned participants on both sides. Although certain restrictive practices may seem likely to jeopardize the interests of the participants on one side, they can be business decisions beneficial to the interests of the participants on the other side.
5. Network effects do not necessarily represent an increase in market power or a reduction in competition. Within a platform economy, competition is no longer static "competition in the market." On the contrary, it is dynamic "competition for the market." Quantity is not the only consideration in network effect evaluation; density must also be taken into account. In spite of the network effect of platforms often leading to the result of users being locked in, if the switching cost of customers changing from one platform to another is insignificant, or customers can join different platforms at the same time ("multi-homing"), when a specific platform fails to meet the expectations of customers, reverse network effects can occur and result in a rapid loss of customers.
6. The intervention of competition law in a platform economy must be based on a clearly defined and reasonable "theory of harm." The business scale or market share of each customer cannot be the only factor in the assessment of competition effects. At the same time, the principle of "protecting competition, not protecting competitors" must be strictly followed, and the impact on consumer interests must be adopted as the standard in the judgment of competition effects.
7. To adjust competition analysis methods and instruments as mentioned earlier, the characteristics of the digital industry must be considered when investigating cases associated with the digital economy and collecting evidence, such as evaluating dynamic competition and reviewing merger cases related to digital businesses, in order to gather sufficient information to engage in competition analysis.

5. Law Enforcement Measures Taken by the FTC in Digital Market Cases

5.1. Creation of the Digital Economy Competition Policy Team

26. In order to have a firm grasp of the development and changes in markets related to the digital industry, the FTC created the Digital Economy Competition Policy Team in April 2017 to keep a close watch on the development of new business patterns in the country and study competition issues likely to occur as well as work out solutions in advance.

5.2. The standpoints of the FTC as a law enforcer

27. The development of the digital market may have changed traditional business operation patterns, but the practices of enterprises competing in the digital market have not deviated from the basic principles of economic practices. The core standards in the existing Fair Trade Act and related administrative rules are still sufficient to regulate competition restrictions and unfair competition practices in the digital market. In other words, there is no need to make further regulations specifically for the digital market at the moment. The FTC will keep a close watch on the tendencies in the enforcement of competition law in different countries and the dynamic development of the digital market. Competition regulations will be reviewed from time to time to see if it is necessary to amend such regulations or make new ones to perfect the regulations and ensure that competition order can be maintained.

28. In the enforcement of the Fair Trade Act, the development of the digital market has no influence on the basic principles of competition law, but the characteristics of the industry still have an effect on market definition, market power assessment and the methods and instruments applied. So far, the FTC has not handled many cases involving competition restriction practices in the digital market. The FTC needs to accumulate more experience, so that the standpoints, handling principles and establishment of policies can improve over time and get closer to the nature of the industry in order to take the characteristics of the industry into consideration when investigating and analyzing cases associated with the digital market and to choose appropriate analytical methods to comprehensively evaluate competition.

5.3. Future prospects

29. The development of the digital market involves many aspects. Issues associated with different areas, such as network technology innovation, new business patterns, the utilization of digital information, personal information protection and consumer protection, can appear. As a consequence, the competition law authority, when trying to understand the digital market and in regulating the competition practices of enterprises, may need to solicit the opinions of the competent authorities of related industries. If industrial regulations are disadvantageous to market competition and innovation and the enhancement of consumer interests, the FTC may have to coordinate with the competent authorities of related industries to amend related regulations.

30. The FTC will continue to investigate and study the digital market to understand the dynamic development of the industry and likely competition concerns, establish law enforcement standards with regard to competition problems in the digital market in accordance with the experience accumulated from handling actual cases, and assess the necessity of establishing law enforcement standards at the right time to ensure that enterprises and the competent authorities of related industries clearly understand the standpoints of the FTC toward competition issues in the digital market and the factors to be taken into account, so that enterprises can know exactly the regulations to follow and continue to innovate and increase the overall social welfare without jeopardizing market competition.