

Unclassified

DAF/COMP/WD(2016)72

Organisation de Coopération et de Développement Économiques  
Organisation for Economic Co-operation and Development

09-Nov-2016

English - Or. English

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS  
COMPETITION COMMITTEE**

**ROUNDTABLE ON "PRICE DISCRIMINATION"**

-- Note by Chinese Taipei --

**29-30 November 2016**

*This document reproduces a written contribution from Chinese Taipei submitted for Item 7 of the 126th OECD Competition committee on 29-30 November 2016.*

*More documents related to this discussion can be found at  
[www.oecd.org/daf/competition/price-discrimination.htm](http://www.oecd.org/daf/competition/price-discrimination.htm)*

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**JT03404976**

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## CHINESE TAIPEI

1. This report will explain laws and regulations as well as cases of price discrimination of the Fair Trade Commission (hereinafter referred to as the “FTC”) of Chinese Taipei.

### 1. Provisions of the Fair Trade Act pertaining to Price Discrimination

2. Article 9 of the Fair Trade Act (hereinafter referred to as the “FTA”) provides that: “Monopolistic enterprises shall not engage in any one of the following conducts: 1. directly or indirectly prevent any other enterprises from competing by unfair means; 2. improperly set, maintain or change the price for goods or the remuneration for services; 3. make a trading counterpart give preferential treatment without justification; or 4. other abusive conducts by its market power.” The primary purposes of regulating monopolistic enterprises are<sup>1</sup>: to prevent market foreclosure or the elimination of competition; and to prohibit monopolistic enterprises from abusing their market position, which may lead to a loss of consumer surplus and further lower the allocation efficiency of social resource. In this regard, a monopolistic enterprise engaging in price discrimination may violate the FTA.

3. Even if an enterprise is not a monopolistic enterprise, price discrimination by the enterprise with market power may constitute an anticompetitive conduct, prohibited by the FTA. According to Subparagraph 2 of Article 20 of the FTA, discrimination means that an enterprise sells the same product or provides service to different enterprises competing at the same level with different prices or non-price conditions, which may impede horizontal competition between its trading counterparts through vertical restraints. A differentiated treatment, however, is not per se illegal in Chinese Taipei. The above-mentioned provision does not require an enterprise must set the same prices for all its trading counterparts.

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<sup>1</sup> Article 8 of the FTA provides that, “An enterprise shall not be deemed a monopolistic enterprise as defined in the preceding article if none of the following circumstances exists:

1. the market share of the enterprise in the relevant market reaches one half of the market;
2. the combined market share of two enterprises in the relevant market reaches two thirds of the market; and
3. the combined market share of three enterprises in the relevant market reaches three fourths of the market.

Under any of the circumstances set forth in the preceding paragraph, where the market share of any individual enterprise does not reach one tenth of the relevant market or where its total sales in the preceding fiscal year are less than the threshold amount as publicly announced by the competent authority, such enterprise shall not be deemed as a monopolistic enterprise.

An enterprise exempted from being deemed as a monopolistic enterprise by any of the preceding two paragraphs may still be deemed a monopolistic enterprise by the competent authority if the establishment of such enterprise or any of the goods or services supplied by such enterprise to the relevant market is subject to legal or technological restraints, or there exists any other circumstance under which the supply and demand of the market are affected and the ability of others to compete is impeded.

The differentiated treatment is illegal when the conduct restrains competition in the relevant market without justifications<sup>2</sup>.

4. According to Article 26 of the Enforcement Rules of the Fair Trade Act, the following factors shall be taken into consideration when determining “just cause” referred to in the above-mentioned provision: (1) Supply and demand conditions in the market; (2) Cost differences; (3) Transaction amounts; (4) Credit risks and other reasonable grounds. In determining whether the discrimination mentioned in the preceding paragraph is likely to restrain competition, the totality of the following factors shall be considered: (1) The intent and purposes of the parties; (2) Market position; (3) The structure of the market to which they belong; (4) The characteristics of the goods or services; and (5) The impact that carrying out such restrictions would have on market competition. The above-mentioned factors are taken into consideration when determining whether or not price discrimination by enterprises is distorting competition between downstream purchasers.

5. The FTC has established regulations for the cable television, telecommunications, and electronic marketplaces, in which price discrimination may be a violation of the FTA. In the case of the Explanation of the Fair Trade Commission of Regulations on the Telecommunications Industry, several just causes for price discrimination by monopolistic enterprises are listed as follows: (1) Average pricing based on the obligation to universal service. (2) Off-peak pricing adopted to increase network utilization. (3) Provide subscribers with combination rates, package rates, or quantity discount rates. (4) Ramsey pricing<sup>3</sup> to recover fixed cost or common cost. (5) Pricing to reflect on different connection costs between internal and external subscribers.

## **2. Development of price discrimination in the digital economy**

6. In the case of electronic marketplaces, which are the main digital trading spaces used by enterprises for e-commerce, a virtual open space is provided on the Internet as a trading platform using network technology, and brings enterprises together from upstream to downstream to form an online trading community. Electronic marketplaces allow buyers and sellers to quickly find suitable trading partners and products and complete transactions for products or services. The FTC established the “Explanation of the Fair Trade Commission of Regulations on Electronic Marketplaces” on the basis of two principles “maintaining fair and reasonable market competition order in e-commerce” and “not going against the nature of network technology and not obstructing its development potential,” so that participants of electronic marketplaces may understand relevant regulations in the FTA.

7. In the actual operations of an electronic marketplace, there may be potential exclusive clauses, or product information disclosed on the platform may benefit certain participants of the electronic marketplace. The differentiated treatment may cause higher cost or lower utility for other participants in the electronic marketplace. If the exclusive restrains competition in the relevant market, it may be deemed as a violation of the FTA.

8. When determining the impact of exclusive conduct on competition, a number of factors can be taken into consideration, including whether or not it increases the cost of competitors and whether or not it

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<sup>2</sup> Subparagraph 2 of Article 20 of the Fair Trade Act states that, “No enterprise shall engage in any of the following acts that is likely to restrain competition: ...2. treating another enterprise discriminatively without justification. ...”

<sup>3</sup> Ramsey pricing refers to setting higher prices for consumers with less elastic demand and lower prices for consumers with more elastic demand under the condition that total revenue is equal to total cost (i.e., there is no excess profit), in order to gain the greatest social surplus without affecting the enterprise’s normal operations.

lowers the downstream competitiveness of its rivals in the service market provided by the electronic marketplace. In addition, from the perspective of customers, factors that must be taken into consideration include the scope of damages caused by restricting competitors from using the electronic marketplace, as well as the cost of alternatives adopted by these enterprises to prevent or reduce their losses. When evaluating the scope of damages, it is necessary to consider the potential impact on market competition from the enterprises excluded from the market, and whether or not exclusive conduct is a reasonable and necessary means that provides the benefit of promoting competition, and is capable of compensating the losses from restraining competition. As electronic marketplaces become more mature, concerns of violating the FTA may be raised, but these concerns are not new and can still be analyzed using traditional methods of the FTA. The explanation above is specific to the characteristics of electronic marketplaces, using conduct that is likely to violate current provisions of the FTA, and improving the legal environment for operating electronic marketplaces.

### **3. Case examples for Price discrimination in Chinese Taipei**

#### ***3.1 The case of warehouse rent collection by TIPC Ltd.***

9. Chinese Taipei's local harbor administrative agencies, Taichung Harbor Bureau and Keelung Harbor Bureau, were merged into a state-owned company, TIPC Ltd. (TIPC) on March 1<sup>st</sup>, 2012. TIPC and its subsidiaries own all international ports and their facilities in Chinese Taipei, and operate the international ports exclusively in accordance with the Commercial Port Law. Since no other enterprises can copy or replace the ports and facilities owned by TIPC, it is deemed a monopolistic enterprise as referred to in the FTA.

10. In 2012, the FTC received complaints that, when collecting rent for warehouse buildings in the Port of Taichung, TIPC used the current value of buildings as the basis for calculating rent for those new entrants who did not co-build the building with TIPC. However, for those incumbents who did co-build the building with TIPC, the rent was calculated by original cost of construction and the annual growth rate of the consumer price index was also excluded. TIPC was thus alleged to violate provisions of the FTA on monopolistic enterprises abusing their market position by discriminatively treating downstream freight loading and unloading forwarders without justification. The FTC's investigation revealed that TIPC should be able to consider fair competition in its downstream market once a tenancy agreement expires, and adjust conditions of the agreement accordingly. Yet, it extended its contracts with trading counterparts using old trading conditions. As a result, when downstream stevedores gain the right to rent or continue renting port facilities, new entrants will have to pay higher rent than existing market participants due to different calculation formulas used for the buildings, raising concerns of restraining competition in the stevedoring market.

11. The FTC considered that TIPC leased the buildings to downstream stevedores at different times, which resulted in different applicable laws, and that it has no motive for illegal conduct or intention for unfair competition. Moreover, TIPC began formulating a common formula for calculating rent after commercial ports were restructured. It is clear that TIPC had intended to rectify the different formulas for calculating rent. Therefore, the FTC did not impose a fine but required TIPC to revise, announce, and implement the rent calculation formula for commercial port facilities before January 1<sup>st</sup>, 2015.

#### ***3.2 The case of price discrimination by Chung Hwa Pulp Corporation against its distributors***

12. Copper plate paper and wood free paper are the main types of cultural paper used in Chinese Taipei. Chung Hwa Pulp Corporation has had roughly a 25% share of the cultural paper market in each of the last two years, the highest in the cultural paper market. Cultural paper is a highly open market, imported paper is tax free, shipment is fast, and there are no barriers to entry. Moreover, paper factories in

Indonesia and China are rapidly increasing their production capacity, so it is very hard for paper factories in Chinese Taipei to compete with international paper corporations. The ratio of imported cultural paper has sequentially increased each year over the last three years and reached 42% in 2014, which is far higher than the market shares of Chung Hwa Pulp Corporation. It is apparent that foreign paper corporations have entered the cultural paper market of Chinese Taipei and are competing with local enterprises.

13. There is a significant difference in the amount of cultural paper purchased by distributors in different areas of Chinese Taipei, in which the demand of the northern area accounts for 60% and that of the central area only accounts for 10%. Hence, Chung Hwa Pulp Corporation discriminatively set prices based on purchases, and the price per pound was NT\$0.2-0.3 lower for distributors in the northern area than for distributors in the central area. The quotation from Chung Hwa Pulp Corporation given to distributors already included the shipping fee, which was on average NT\$1,000 per ton. The distance of shipments in the northern and central areas was not considered, and the shipping fee was shared according to the sales ratio (northern to central is roughly 6:1). However, Chung Hwa Pulp Corporation did not restrict distributors from selling paper products to other areas.

14. The FTC's investigation showed that, if the price in the central area was higher than in the northern area, considering that the quotation from Chung Hwa Pulp Corporation already included the shipping fee, the shipping fee per pound for distributors in the central area was NT\$0.32 higher than for distributors in the northern area, which was extremely close to the average price difference between distributors in the two areas (no higher than NT\$0.3 per pound). This showed that Chung Hwa Pulp Corporation did indeed discriminatively set prices based on sales volume. However, Chung Hwa Pulp Corporation did not have significant market power, even if it did discriminatively set prices for different areas, and with imported paper able to immediately and fully participate in competition in the cultural paper market, the damage to competitors was limited.

15. The FTC concluded that, taking into consideration the market power and price raising ability of Chung Hwa Pulp Corporation, as well as competition between brands, dividing distribution areas for price discrimination was not likely to restrain competition in the cultural paper market, and was not a violation of Subparagraph 5 of Article 20 of the FTA based on current evidence. However, price differences between areas may result in insufficient trading liquidity across areas, damaging the rights of consumers in certain areas, and limiting competition within the brand. The Commission has thus warned Chung Hwa Pulp Corporation to take note of relevant provisions of the FTA.

#### **4. Conclusion**

16. Besides analyzing the evidence for each case, the FTC also chooses a suitable economic analysis method based on the data it has collected and the characteristics of the relevant industry. When determining whether or not a case has violated provisions of the FTA, the following factors may be taken into account by the FTC : (1) Practices and trading manner of the specific industry; (2) Opinion of the industry's competent authority regarding the fee rate (a non-economic investigation may be challenged by other policy stances); (3) If specific enterprises are subjected to discriminative treatment; (4) Pricing standard; (5) Distribution channel structure and trading volume; (6) Business risk and cost; (7) Quantity and characteristics of the product in the market; and (8) If the enterprises are at the same competition stage.