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Purchasing Power and Buyers' Cartels – Note by Chinese Taipei

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More documents related to this discussion can be found at
<https://www.oecd.org/daf/competition/purchasing-power-and-buyers-cartels.htm>

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1. This paper outlines relevant statutory provisions in Chinese Taipei's competition law, and then provides some case examples as well as enforcement experience on joint procurement and substantial purchasing power.

1. Provisions that regulate joint procurement and substantial purchasing power under the Fair Trade Act

2. From a competition perspective, regardless of being a buyer or a supplier, any firm with a dominant position will be able to exercise its market power to hamper and impede competition in a relevant market. The same provisions under the Fair Trade Act (hereinafter referred to as the FTA) will be applied to buyers and suppliers, which include 'prohibited conduct by a monopolistic enterprise', 'prohibition of cartels and exemptions', 'improper restrictions imposed by a firm on its trading counterpart's business activity' and 'any obviously unfair conduct'.

3. Abuse of dominance can occur in a monopolistic market where a supplier misuses its market position, and in a monopsonistic market where a buyer abuses its monopsony power. Article 9 of the FTA should be applicable to both scenarios. Furthermore, subparagraph 3 of the same provision provides that 'Monopolistic enterprises shall not make a trading counterpart give preferential treatment without justification'. It suggests that the rule of reason still applies when the Chinese Taipei Fair Trade Commission (CTFTC) determines if a buyer misuses its monopsony power to influence upstream firms. In terms of subparagraph 4, it is a general provision prohibiting any type of abuse of market dominance, which ought to be determined on a case-by-case basis.

4. Under the FTA, a 'concerted action' is prohibited unless the CTFTC grants a specific exemption. For example, as supply of bulk grain in Chinese Taipei relies on international trade imports, it leads to a common practice in the industry, i.e. a joint purchasing agreement among a number of smaller buyers. Such practice is treated as a concerted action under the FTA and thus requires an application for exemption to the CTFTC prior to its implementation. Subparagraph 5, Article 15 of the FTA provides that 'No enterprise shall engage in any concerted action; unless the concerted action that meets one of the following requirements is beneficial to the economy as a whole and is in the public interest, and the application with the competent authority for such concerted action has been approved: ... 5. joint acts in regards to the importation of foreign goods, or services for the purpose of strengthening trade.' Article 16 further articulates as follows:

- 'The competent authority may impose conditions or undertakings in the approval it grants pursuant to the provisions of the preceding article. The approval shall specify a time limit not exceeding five years. The enterprises involved may, with justification, file a written application for an extension thereof with the competent authority within three to six months prior to the expiration of such period; provided, however, that the term of each extension shall not exceed five years.'
- Under this Article, the CTFTC is empowered to impose obligations on businesses engaging in joint purchasing agreements for the purpose of ensuring joint purchases beneficial to the overall economy and being in the public interest, and preventing the businesses from misusing superior power associated with joint purchases and thereby undertaking anti-competitive behaviour.

5. The majority of businesses in Chinese Taipei are small-and-medium sized enterprises (SMEs). A particularly important focus for competition enforcement is placed on unfair restrictions on SMEs' business activities imposed by large retailers with substantial bargaining power, or their other obviously unfair conduct. Two statutory provisions that may apply to such anti-competitive or unfair competition issues are as follows:

- Subparagraph 5, Article 20 of the FTA states that 'No enterprise shall engage in imposing improper restrictions on its trading counterparts' business activity as part of the requirements for trade engagement, which is likely to restrict competition.' Article 25 of the FTA also provides that 'In addition to what is provided for in this Act, no enterprise shall otherwise have any deceptive or obviously unfair conduct that is able to affect trading order.'
- Given that large retailers, commonly referred to as 'distribution enterprises' in Chinese Taipei, have a superior position in marketing/sales channels, they are able to exercise direct or indirect influence over their upstream suppliers, rivals and downstream consumers. The 'Policy Statements on Distribution Industry' issued by the CTFTC collates and analyzes various types of conduct in violation of the FTA to increase the industry's awareness and enhance competition compliance.

2. Joint purchasing agreements - the CTFTC's approval of jointly purchasing and importing wheat

6. The ratio of the volume of locally supplied wheat to overall wheat supply in Chinese Taipei is only 0.36%, suggesting that domestic markets highly rely on imported wheat for grain processing and consumption. Under Subparagraph 5, Article 15 and Article 16 of the FTA, 42 local wheat processors, including 21 flour mills, 12 soy sauce producers and 9 trading companies, submitted an application to the CTFTC for an exemption to jointly purchase and import wheat. The CTFTC has granted this specific exemption for the following reasons. First, subject to the domestic market size, the yearly volume of imported wheat in Chinese Taipei totalling around 1 million tonnes accounts for less than 1 percent of global wheat trade. Furthermore, as wheat processors in Chinese Taipei, of which most are flour mills, are typically SMEs, their individual purchasing volumes are limited. Through joint purchase and import agreements, the local wheat processors are more likely to be able to bargain with international grain suppliers in terms of import volumes, to secure stable supply and negotiate better deals with preferred purchasing terms and conditions. In addition, costs incurred in dry bulk shipping can be shared among the applicants. The parties involved in the agreements are required to periodically apply for an extension of the cartel exemption.

7. In accordance with Paragraph 1, Article 16 of the FTA, the CTFTC imposed three obligations on the applicants to ensure the fulfillment of the following purposes: (1) jointly purchasing wheat is beneficial for the overall economy and is in the interest of the public; (2) associated economic benefits can be passed on to downstream businesses or consumers, and (3) the CTFTC can effectively monitor whether the implementation of the concerted action contravenes the original purposes specified in its application.

- The obligations are summarized as follows: (1) any applicant(s) cannot engage in any other concerted action despite this approval or other regulations, or reject a request to join the concerted action made by any other business provided that there is no justification; (2) any applicant(s) cannot impose restrictions on any other applicants' discretion in deciding the volume of its wheat procurement and import,

and nor can the applicant(s) prohibit any other applicant from solely procuring and importing wheat; (3) applicants shall submit a quarterly report on the implementation of the concerted action to the CTFTC, including registered volumes and actual volumes per vessel of wheat procurement for individual importers; duration of procurement and the latest shipment dates; dates of shipping and arrival as well as volumes of individual applicants' imports, processing, sales and inventory.

8. Joint wheat procurement and import is mainly used for flour production, representing more than 90 per cent of its total volumes. The flour milling businesses are indeed the applicants who initially applied for the exemption of joint procurement and import. Such concerted actions have been implemented for 30 years. In 2013, several trading companies filed complaints to the CTFTC, stating that the flour milling businesses rejected their request to enter into the joint procurement agreement and claimed that such conduct failed to meet one of the obligations attached to the CTFTC's approval, that is, no justification for a refusal to allow other businesses to join the approved concerted action.

- The flour milling businesses justified their decisions by stressing that purchasing volumes of the trading companies could be volatile due to the nature of its resale purpose, which would further affect the allocation of cargo hold and shipments. Moreover, these trading companies' financial abilities could vary to a considerable degree. If they cannot issue letters of credit on time, this could delay the process of joint wheat procurement and ultimately affect the stable supply of grain. The CTFTC found that the trading companies purchased and imported wheat to resell it to Kinmen Kaoliang Liquor Inc. and Taiwan Tobacco and Liquor Corporation for brewing Kaoliang liquor. This amounted to approximately 15,000 tonnes per year. The investigation showed that some of the flour milling businesses leveraged their cost advantages resulting from joint wheat procurement to win the tenders for wheat supply to these two liquor companies. This gave them disproportionate advantages to compete with the trading companies in such a small market for wheat-for-resale.
- To ensure free competition and efficiency in the wheat-for-resale market, the CTFTC facilitated communications between the flour milling business and the trading companies. Both parties reached an agreement where the respective businesses engaged in the approved concerted action were required to pay different amounts of deposits depending on their purchasing volumes to ensure timely issuance of a letter of credit. The trading companies would also cooperate with the flour milling businesses to register their purchasing volumes based on shipping schedules and cargo hold. After the flour milling businesses' concerns were addressed, the trading companies successfully entered into the joint procurement agreement.

3. Substantial purchasing power - Carrefour's business practices in violation of Article 25 of the FTA

9. 'Distribution enterprises' provide vital marketing/sales channels for suppliers to sell their products. As both parties normally maintain long lasting relationships, most suppliers become heavily dependent on these retail outlets. Charging additional fees by distribution enterprises is a common practice that is not considered per se illegal. However, the CTFTC is of the opinion that the additional fees levied by distribution enterprises on suppliers may constitute an abuse of market power/superior bargaining positions in any of the following circumstances where: (1) Prior to charging additional fees, a distribution

enterprise fails to consult with its suppliers and enter into a written agreement specifying items, purposes and amounts (or calculation methods) applied to additional fees, sales promotion plans, and default remedies; (2) In spite of a written agreement, additional fees charged by a distribution enterprise are deemed ‘not directly related’ or ‘disproportionate’ to sales, or not compliant with reasonable commercial terms of trade.

- For individual suppliers, inappropriately charging additional fees may lead to an increase in operating costs and a profit squeeze, which is likely to violate the spirit of fair trade. Overall, improper additional fees imposed by distribution enterprises may have an even greater impact on their suppliers’ business operations as most are SMEs, which in turn can bring adverse effects on overall economic development.

10. A business’s market power and its scale will not be the sole determinant of assessing whether the business holds a ‘superior bargaining position’. In a case where a distribution enterprise does not have a significant market share, it can still be considered as having a superior bargaining position and significant market power if the distribution enterprise is indispensable to its upstream supplier’s business operation, or the upstream supplier is excessively dependent on the marketing/sales channel provided by the distribution enterprise. Such business dependency will be contingent upon whether there are ‘sufficient and reasonable alternatives’ for the upstream supplier. The CTFTC’s assessment needs to be grounded on the impact of business dependency on specific goods or services, or specific transactions between the distribution enterprise and its supplier in question.

- The aspects to be considered in determining ‘sufficient and reasonable alternatives’ are as follows: (1) alternative options - that is, there are other sales channels in the relevant market where the upstream supplier does not necessarily need to engage in a transaction with the distribution enterprise. If demand or supply of any specific product or service can only be satisfied by the particular business, it suggests that there is no alternative for the business’ trading counterparts; (2) sufficient alternatives - for the distribution enterprise’s trading counterparts and consumers, alternative sales channels in the relevant market can be functionally substituted for the distribution enterprise; (3) reasonable alternatives - the CTFTC also takes into account individual costs and risks arising from switching to another sales channel and the impact of using an alternative channel on the upstream supplier’s ability to compete with its rivals.

11. The CTFTC received complaints from consumers and 13 industry associations, including the Confectionery, Biscuit and Floury Food Industry Association, for Carrefour’s alleged violation of Article 25 of the FTA. Complainants pointed out that Carrefour rebranded ‘Wellcome’ as ‘Carrefour Market Easygo’ (Transliterated) after completing its acquisition of Wellcome Taiwan Co. in December 2020, and then charged a fee for opening promotions to those suppliers who had provided products to Wellcome prior to the acquisition.

12. Carrefour operates a chain of two separate distribution channels, i.e. hypermarkets and supermarkets across most metropolitan areas. The CTFTC’s investigation found that after its acquisition of Wellcome in 2020, the total number of Carrefour’s hypermarkets and supermarkets amounted to more than 300 stores, representing the third largest hypermarket and supermarket operator in Chinese Taipei. The CTFTC identified Carrefour as a business with superior bargaining position and substantial purchasing power on account of the findings below. The majority of suppliers who were charged additional fees for opening promotions were SMEs. Carrefour was their main or even sole trading

counterpart and had maintained a long-term business relationship with them. If Carrefour suspended or terminated supply agreements, it would be extremely difficult for the suppliers to switch to other buyers or create new partnerships in a short-term time frame and recoup the losses incurred after losing their major trading counterpart.

13. The CTFTC was of the opinion that the additional fees levied in 2021 by Carrefour on its suppliers in accordance with their supply agreements signed in 2020 constituted ‘obviously unfair conduct’. First, for those suppliers who had entered into supply agreements with both Carrefour and Wellcome, the number of distribution channels remained unchanged after the merger between the two distribution enterprises. Carrefour defended itself noting that charging additional fees for opening promotions was an agreed obligation specified in the supply agreements with the suppliers. The CTFTC found that the number of store openings, types of stores, and expected gains were essential to be considered when the suppliers negotiated with Carrefour for additional fees. When the suppliers signed the contract with Carrefour in 2020, they were unlikely to foresee that Carrefour would acquire Wellcome in a few months. The amount for opening promotions fees under the 2020 supply agreements was agreed due to the information with regard to the numbers and types of hypermarkets and supermarkets owned by Carrefour at the time, and historical records of store openings as well as suppliers’ practical experiences. As a result of fundamental changes in circumstances in 2021, Carrefour’s behavior in charging improper additional fees was determined as ‘obviously unfair conduct’ under Article 25 of the FTA.

14. Furthermore, the additional fees for opening promotions imposed by Carrefour not only placed the suppliers in an inferior position, but also created additional cost burden on them that would eventually be passed down to the retail prices of the products, leading in turn to an adverse impact on consumer welfare. Carrefour’s behavior had a significant influence over Carrefour’s upstream suppliers, either for those who were charged or who could be charged such additional fees. The CTFTC concluded that additional fees for rebranding ‘Wellcome’ as ‘Carrefour Market Easygo’ (Transliterated) charged by Carrefour to its suppliers who had been Wellcome’s suppliers prior to the merger, constituted ‘obviously unfair conduct that could affect trading order’. The CTFTC ordered Carrefour to cease its illegal conduct immediately and imposed a fine of NTD \$1.5 million for its violation of Article 25 of the FTA.

4. Legality of ‘no-poach’ clause in a confidentiality agreement between ‘C Bank’ and a potential buyer who intended to acquire C Bank’s consumer banking business

15. In terms of application of the FTA to concerted actions in labor markets, the CTFTC had affirmed that labor is one of the inputs for production of goods or services, which should be subject to scrutiny under the FTA. If businesses agree not to hire or recruit one another's employees, or to jointly decide their employees’ wage levels, either in the form of contracts, agreements or any other form of mutual understanding, they are agreeing not to compete in labor markets. Such no-poach or wage-fixing agreements not only cause direct impacts on the benefits stemming from competition employees are entitled to, but also result in an adverse effect on volumes, quality and innovation for the supply of goods and services, which will ultimately cause harm to consumer welfare and overall economic efficiency.

16. However, ‘no-poach’ clauses are not the so-called hard core cartels that are normally classified as per se illegal. The CTFTC determines the legality of such concerted actions on a case-by-case basis by taking into consideration various factors, for example,

the context of a particular situation and the reason why businesses engage in no-poach conduct. Prior to its final decision, the CTFTC shall review if such a no-poach clause is incorporated in a valid commercial arrangement and assess the following factors: whether the clause can facilitate fulfillment of the master arrangement; whether it is reasonably necessary to the above purpose; whether there are less restrictive alternatives available for the parties involved, and the impact of no-poaching on market competition.

17. The Commissioners' meeting discussed the case at the end of 2021, which involved an agreement between C Bank and a potential buyer who intended to acquire C Bank's consumer banking business. The CTFTC's findings indicated that C Bank signed a confidential agreement with this potential buyer, ensuring information disclosed to the potential buyer that would only be used for the purpose of due diligence. The no-poach clause in the confidential agreement was designed to serve the same purpose. It aimed to prevent the buyer from making use of confidential information obtained during the due diligence process on C Bank's employees, i.e. employees' positions, wages, responsibilities, team members and performances to solicit or recruit key employees prior to the proposed acquisition. Before the proposed acquisition closed, poaching C Bank's employees would contravene the goals of due diligence, hinder C Bank's ordinary course of consumer banking business, and impair the value of the proposed transaction as well as the acquirer's interests.

18. The no-poach clause was part of the agreement for the proposed acquisition of C Bank's consumer banking business by the potential buyer. The clause was only applied to those employees who acted on behalf of the potential buyer and were able to access confidential information on C Bank's employees. These employees were thus not allowed to recruit C Bank's employees in consumer banking business sectors within a certain period of time due to the proposed acquisition. Considering the actual impact on market competition for the limited-duration clause that was restricted to specific staff, and the potential buyer had alternative recruitment channels to hire C Bank's employees in consumer banking business sectors (such as job advertisements or head-hunting companies), the Commissioners' meeting concluded that the no-poach clause agreed between C Bank and the potential buyer did not violate the provisions on concerted actions under the FTA.

5. Conclusion

19. Businesses need to purchase production inputs including labor to produce or provide goods and services. When a business holds a superior bargaining position, it may exercise its market power to impact its upstream suppliers and influence the employment decisions in the labor markets. In some situations, the superior bargaining power may occur in the form of buyers' cartel, substantial purchasing power or joint procurement that will directly bring out anti-competitive effects on the relevant upstream market. However, for downstream businesses and end consumers, these effects are not as noticeable as those resulting from abuse of monopoly (or cartels among sellers/suppliers), which can pose challenges to the CTFTC's law enforcement activities.

20. As explained above, there are provisions as to joint procurement and substantial purchasing power contained in the FTA. To improve industry compliance and enhance clarity and consistency of competition law enforcement, the CTFTC has published Policy Statements on Distribution Industry, the Guidelines on Trade Practices between Department Stores and Counters, and Guidelines on Concerted Petroleum Purchasing by Individual Petrol Stations and other relevant disposal directions. Theories of harm apply to both monopoly and monopsony, as well as 'buyers' cartels' and 'sellers' cartels'. There are

no significant discrepancies in analyzing anti-competitive effects for both, for example, vertical foreclosure/exclusionary effects where particular upstream suppliers are denied access to a downstream buyer with market power; or anti-competitive effects of horizontal agreements and the impact of misusing market power on trading order in markets.

- The FTA lists several cartel exceptions that can be permitted by the CTFTC - joint procurement and import of foreign goods is one of them. Given that Chinese Taipei lacks natural resources, relies heavily on imports, and the majority of local businesses are SMEs, it is necessary for local businesses to take collective actions to negotiate better terms and conditions for international trade and reduce costs of importing raw materials. The CTFTC can grant a conditional approval to minimize the accompanying anti-competitive effect of a proposed concerted action and ensure that it is beneficial to the overall economy and in the interests of the public.
- With regard to competition issues in labor markets, the CTFTC will first see if an alleged anti-competitive clause is part of a valid master agreement, and then apply the rule of reason to determine whether the clause is beyond the reasonable and necessary extent for fulfillment of the master agreement, and its impact on market competition. The CTFTC will also consult the Ministry of Labor or other related government agencies during its decision-making process

21. The adverse impact of misusing buying power on market competition and consumers is not as noticeable as the abuse of market power by the seller on the provisions of products and services. Competition enforcement requires a more flexible and refined approach to carefully examine the underlying reasons and context of a particular case and its pro- and anti-competitive effects on market competition and consumer welfare. This suggests that the CTFTC may need to be more cautious and sophisticated in its investigation processes.