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The Evolving Concept of Market Power in the Digital Economy – Note by Chinese Taipei

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More documents related to this discussion can be found at

<https://www.oecd.org/daf/competition/market-power-in-the-digital-economy-and-competition-policy.htm>

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1. This paper presents the key aspects that the Chinese Taipei Fair Trade Commission (CTFTC) takes into consideration when it assesses market power in the digital economy and illustrates this with an example of how the CTFTC determines market power of a digital platform.

1. Introduction: challenges of enforcement in digital markets

2. Market definition and market power assessment play an essential role in competition enforcement. It enables competition authorities to assess if a business holds a dominant market position in the relevant market, thereby being incentivized or being able to engage in conduct that may hinder market competition. Of those applicable measures, a business' market share has been identified as an important indicator for the existence of a dominant market position. However, in the era of the digital economy, a business' current market position is less likely to reflect its market power in the foreseeable future due to the nature of a rapidly changing industrial environment. Business scales along with market shares are no longer treated as reliable indicators of market power, which further increases the difficulties for competition authorities to determine whether business conduct is likely to substantially lessen competition. As a result, dynamic considerations in competition assessment need to be taken into greater account than ever in such fast-evolving markets.

3. There are two factors that may also affect market power assessment in the digital economy: (1) users are often offered multi-homing options to access multiple platforms in parallel for products or services; (2) existing digital platform operators are at greater risk of being replaced by their rivals on account of innovation competition. Competition authorities face an unprecedented challenge of identifying effective indicators of market power and corresponding measures to conduct competition assessments.

2. Assessment of market power

2.1. Evolving concept

4. Under the Fair Trade Act (hereinafter referred to as the FTA), a monopolistic enterprise refers to a business facing no competition or having a dominant position to enable it to exclude competition in the relevant market. When the CTFTC determines if it constitutes a monopoly, the following factors can be considered: (1) the market share of the enterprise in a relevant market; (2) the possibility of substitution of the goods or services following changes in the relevant market, on different aspects including time and geographic areas; (3) the ability of the enterprise to influence prices in the relevant market; (4) whether formidable barriers exist for other enterprises to enter the relevant market; (5) import and export statuses of the goods or services. Data on production, sales, inventory, and import/export value (volume) for the enterprise in the relevant market are applied for the purpose of calculating its market share.

5. In most case decisions previously made by the CTFTC, market shares and market structures served as a reliable indicator of market power. As many digital platforms provide zero-price services, price-based metrics including profits, sales and revenues, which are conventionally used to calculate market shares, may not be applicable in the digital

economy. The CTFTC therefore considers non-price-based metrics and methods, for example, the number of active users, website traffic, the number of downloads and transactions, to calculate market shares and assess market power in an adapted approach for digital markets.

6. Under a traditional analytic framework, market share is often used as a proxy of a business' ability to influence prices and exclude market competition, yet barriers to market entry also play a key role in determining a business' market position. In digital markets, barriers to entry arising from network effects and characteristics of two-sided markets are a prerequisite for businesses to acquire and maintain their dominant positions. Namely, in a contestable market with low barriers to market entry, potential competitors are able to compete with incumbents by using 'hit and run' tactics, which may lead to a situation similar to perfect competition despite the fact that the market structure is currently monopolistic or oligopolistic. In other words, as long as entry is sufficient, potential competitors will be able to pressure existing firms and to a certain extent weaken incumbents' abilities to control the relevant market. On the contrary, higher barriers to entry are more likely to further reinforce and strengthen market positions held by existing businesses.

2.2. Considerations of market power

7. In practice, each side of an online platform and its overall business model should be considered when assessing its market power. Considerations that may affect market power assessment are as follows:

- Estimating market power of two-sided markets in a finely judged manner
While market shares are commonly used as a proxy for market concentration and market power, traditional approaches of defining a one-sided market need to be adjusted to reflect market power of a two-sided market. Market shares on each side of a platform should be modified with a careful consideration of competition restraints on each side and interrelationships among respective groups of platform users. In a case where a platform operator does not charge any fee for users on one side of the platform, price-based metrics, for example the value of sales can be replaced by non-price data including the numbers of active users, downloads and transactions, as well as website traffic to calculate its market share.
- Observing changes in profitability and revenues on each side of a platform
Changes in profitability on each side of a platform can be also used as an indicator of market power. In terms of digital platforms, profitability refers to a business' ability to set separate prices for users on each side and generate profit above the level that would otherwise prevail under competition. Generally, the more highly concentrated a market is, the less competitive it is. There is a likelihood of a misuse of market power if a digital platform market becomes more concentrated with an overall increase in prices, yet quality of products or services have not been improved accordingly.
- Evaluating dynamic indicators of competition
Since digital market players exist in an ever-changing business landscape that is continually disrupted by innovation, the level of market power obtained by a digital platform can vary at any time. Static indicators commonly used for competition assessment will not be as reliable in digital markets as they are in other traditional markets. To conduct a comprehensive assessment of market power in a digital market, competition indicators designed for evaluating market dynamics are

required, for example, barriers to entry (the number of users and switching costs), diversity of connections to end users and innovation levels.

3. Case example – Restraints imposed by foodpanda in contravention of the Fair Trade Act

3.1. Investigation initiated by the CTFTC

8. Food delivery platforms, either globally or domestically, have experienced major growth in recent years. To gain a better understanding of whether any business practice engaged by domestic food delivery platform operators is subject to the provisions of anti-competitive and unfair competitive conduct under the FTA, the CTFTC launched a probe into the major businesses in online food delivery with the aim of protecting their partner restaurants and consumers.

9. Based on shareholding structures, food delivery platform operators can be classified into the following three types: (1) platforms owned by global food delivery platform businesses, for example, foodpanda under Delivery Hero Germany and Uber Eats under Uber Technologies, Inc.; (2) local startups including Foodomo, Cutaway and Yo-Woo; (3) ShopeeFood run by Shopee, a leading online shopping platform with diversified businesses.

3.2. Analysis on the market position and market power of foodpanda

3.2.1. Market Share

10. The CTFTC used data concerning a business' revenue, the number of orders and number/amount of credit card transactions to measure market share and market power of individual food delivery platform operators. In addition, for a more comprehensive assessment, the CTFTC considered the number of individual businesses' members and partner restaurants in calculation of their penetration rates.

3.2.2. Network effects

11. Food delivery platforms act as an intermediary role between restaurants and consumers, which is deemed as a typical two-sided platform (or a multi-sided platform on account of its relationships with food delivery riders and other participants). In terms of food delivery platforms, the more partner restaurants that join a food delivery platform, the more consumers are likely to download the platform's APP, visit its website and order food from its partners. With a growing number of consumers using the platform, a positive feedback loop occurs, which leads to a further increase in the number of partner restaurants. This can even lead to market tipping, suggesting that such market structure is therefore prone to monopolistic or oligopolistic characteristics.

12. Upon the CTFTC's investigation, it was found that the respective penetration rates of foodpanda and Uber Eats on each group of users (members and restaurants) were much higher than other competitors. Through indirect network effects, the two largest platform businesses were able to foster a competition advantage arising from economies of scale.

3.2.3. Barriers to entry

13. During the investigation (between 2019 and 2021), several food delivery platform operators exited from the domestic market while a few new ones entered. The CTFTC

enquired the new entrants' opinions on barriers to entry faced by them, and if such barriers are associated with foodpanda's competition strategies. The new entrants unequivocally pointed out that the biggest challenge for them is to attract both consumers and restaurants to join their platforms. In particular, many well-known/reputable restaurants had signed exclusive dealing agreements with existing platforms, which posed challenges for new entrants to solicit restaurants and expand delivery zones. Consequently, the scales of the entrants were not yet viable to effectively compete in terms of delivery zones, the number of orders and partner restaurants.

14. Challenges confronted by potential competitors who attempted to enter the market of food delivery platforms include development of platform systems, recruitment of delivery riders, building delivery capacity and increasing brand awareness. Moreover, there was a problem specific to two-sided markets, i.e. the chicken and egg paradox, which refers to a situation where consumers are not inclined to join those platforms with very few partner restaurants, while at the same time restaurants are also not willing to partner with those platforms with only limited number of members.

15. As noted above, in case where new entrants or smaller food delivery platform businesses are capable of attracting consumers and restaurants to join their platforms together with other platforms (i.e. multi-homing), the impact of barriers to entry and competitive disadvantages stemming from network effects can be moderated. For example, the impact of barriers to entry will be lower as the services offered by new entrants will successfully attract partner restaurants of foodpanda or Uber Eats to join their delivery platforms.

16. However, to enhance their dominant market positions, existing businesses are more likely to have an incentive to prevent their users from using other platforms. The aforementioned exclusive dealing agreement is one such practice that can impede interoperability between products or services or multihoming and thereby stop potential competitors or new entrants from being viable in the food-delivery-platform market, and even threatening incumbents' market positions. Responses from the new entrants to the CTFTC stressed that it has been difficult to build partnership with those restaurants who are subject to exclusive dealing agreements with other platforms and thus not able to join new platforms, although the new entrants offered lower commissions and more marketing resources in return.

3.2.4. Market power

17. In this case, the CTFTC concluded that foodpanda held substantial market power. The CTFTC found that among food delivery platforms foodpanda had a significant market share, though this was not a sole determinant of market power. The following factors were also considered by the CTFTC in its market power assessment:

- foodpanda had first-mover advantages resulting from its entering the market earlier than other competitors.
- foodpanda was able to charge commissions higher than other new platform operators.
- In comparison to new entrants, foodpanda's market coverage, brand awareness, marketing and operating resources, and the number of partner restaurants gave itself noticeable advantages.
- foodpanda benefited from indirect network effects due to the large number of users on each side of its platform it had.

- Except for Uber Eats, potential competitors and new entrants were in a disadvantageous position for competition, reducing their incentives to establish a business scale viable for growth to the point that they could impose a competitive threat on foodpanda.

18. The CTFTC found that foodpanda had exercised its market power to require partner restaurants to offer the same prices for customers ordering on the platform and those ordering in the restaurants, which prevented restaurants from reflecting costs of different sales channels. The platform also restricts restaurants from refusing customer's pick-up orders. Such practices with restaurants constituted vertical restraints that were likely to impede competition. The CTFTC therefore imposed a NT\$2 million fine on foodpanda and demanded that foodpanda ceased its illegal practices.

4. Future direction of competition enforcement

19. The platform economy brings new challenges to competition enforcement associated with innovative sources and types of market power. While fundamental principles and analytical frameworks under competition laws remain, challenges to methodologies and tools for market definition and market power assessment will inevitably call for adjustments in response to the industrial features of digital markets to enable the CTFTC to conduct more appropriate competition assessments.

20. The CTFTC also acknowledges that there is no single factor of determining market power because most factors in digital markets are interrelated, such as network effects, economies of scale and scope, or competitive advantages arising from possession of data or intellectual property. With the growth of business scales, businesses may also acquire further competitive advantages by offering diversified product portfolios or cross-service applications of data, which may gradually lead to a competition model among various ecosystems. In the future, this will require the CTFTC's continuous attention to how platforms' business practices and their ecosystems evolve and develop to inform the CTFTC of how to incorporate new insights into its current framework of competition enforcement.