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The Role of Innovation in Enforcement Cases – Note by Chinese Taipei

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More documents related to this discussion can be found at www.oecd.org/competition/the-relationship-between-competition-and-innovation.htm.

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1. This paper discusses relevant regulations that may apply to innovation issues in merger and other competition cases. It also provides case examples to illustrate how the Chinese Taipei Fair Trade Commission (hereinafter referred to as the 'CTFTC') evaluates effects of innovation on competition in its enforcement activities.

1. Innovation-related law and regulation

1.1. Merger Guidelines

2. With regards to the merger control regime, the CTFTC has published the 'Guidelines on Handling Merger Filings' (hereinafter referred to as the "Merger Guidelines"). Subparagraph 2, Paragraph 1 of Point 12 of the Merger Guidelines provides that CTFTC may consider 'the likelihood of technological advancement enabling the merging parties to engage in cross-industry operations' when reviewing conglomerate mergers. It is generally accepted that the term 'technological advancement' should be construed to encompass 'innovation'. In a case where technological advancement enables new use of existing products or services offered by merging parties, this may lead to potential cross-industry operations. In conglomerate merger cases, the CTFTC takes innovation into account as a key factor for assessing if potential competition may arise between the merger parties intending to engage in cross-industry operations.

3. In terms of horizontal and vertical mergers, innovation is not a factor explicitly stated in the Merger Guidelines. However, the CTFTC can include effects of innovation on competition in its assessment under the following catch-all provisions:

- Subparagraph 5 of Point 9 of the Merger Guidelines provides that the CTFTC may consider 'other factors that may influence competitive effects' in horizontal mergers subject to the general procedures of merger review.
- Subparagraph 6 of Point 11 of the Guidelines states that the CTFTC may take into consideration 'other factors that may lead to market foreclosure' when reviewing if a proposed vertical merger under the general procedures would likely result in any anti-competitive effect.
- Under Paragraph 1 of Point 13, the CTFTC further assesses overall economic benefits when a proposed merger may substantially lessen competition. Innovation can also be considered under Subparagraph 5 'other concrete evidence of overall economic benefits'.

4. The above rules may not be expressly noted in the CTFTC's decisions, but nevertheless, in practice, innovation has been included in various aspects of merger analysis. In some cases, the CTFTC considered if proposed mergers may decrease post-merger incentives to innovate in its horizontal competition analysis. The CTFTC might also consider, when it is appropriate and applicable, innovative effects proposed by merging parties as the overall economic benefits from the merger.

5. In response to emerging business models with the development of fintech, the CTFTC and the Financial Supervisory Commission (the 'FSC') jointly issued the 'Regulations for the Examination of Financial Holding Company Merger Cases'. In it,

Paragraph 3 of Article 5 states the impact of innovation on financial services will be taken into account in addition to the factors listed the Merger Guidelines.

1.2. Cartel exemption provisions

6. Subparagraph 2 and 8, Paragraph 1 of Article 15 of the Fair Trade Act (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 in the public interest, and the application with the competent authority for such concerted action has been approved: ... 2. joint research and development on goods, services or markets for the purpose of upgrading technology, improving quality, reducing costs, or increasing efficiency….8. joint acts required for the purpose of improving industrial development, technological innovation, or operational efficiency.' In other words, where businesses take joint action with the aim of innovation in technology, they can apply for a concerted action exemption. The CTFTC may approve the application if evidence shows that the concerted action is beneficial to the overall economy and the public interest.*

1.3. Guidelines on Technology Licensing Arrangements

7. Paragraph 2 of Point 4 under the 'Guidelines on Technology Licensing Arrangements' stresses that in reviewing technology licensing arrangements subject to the FTA, the CTFTC will not be bound by the form or terminologies of an arrangement. Instead, the CTFTC puts focus on the possible or actual anti-competitive effects of an arrangement in relevant markets. In this regard, an innovation market may be considered on a case-by-case basis. Under the Guidelines, an innovation market refers to a market where businesses conduct research and development (R&D) directed to a particular product.

2. Case examples

2.1. Mergers

2.1.1. Solar cells and modules market

8. In 2018 Neo Solar Power Energy Corp ('NSP') notified the CTFTC of a proposed merger with two other solar cell and module manufacturers, which together accounted for a total market share of 38.81%. Based on manufacturing technologies, solar cells could be generally classified as wafer-based and thin-film. Wafer-based solar cells represented the then-current mainstream in the product market due to the following desirable properties: high conversion efficiency, low degradation rates and a long lifespan. Solar cells could not be used as a standalone power source unless they were connected together to form a module.

9. Solar products including cells and modules had been commercially available for more than fifty years. There were hundreds of manufacturers producing compatible products, of which most were international businesses with their own patents in respective products. In contrast, businesses in Chinese Taipei mostly focused on production of solar cells, as they were constrained by economies of scale. At the time of notifying the merger, the solar cells and modules market had been experiencing a period of oversupply, which

led to intense price competition among businesses. The above situation in combination with a recent decline in global solar demand presented considerable pressure on relevant business operations. Some businesses even operated at a loss.

10. The CTFTC concluded that the Commission would not object to this proposed merger given that it would enhance NSP's fundraising capacity and facilitate further investment in technical R&D and innovation for the production of more efficient and high-quality solar cells and modules. This would improve business profitability, allowing NSP to prioritize the supply of its self-made solar cells to meet its inhouse demands for manufacturing solar modules, and then develop its own-brand modules. More broadly, this could help NSP establish a self-sustaining industry value chain, which might also stimulate development of the supply chain, from upstream to downstream.

2.1.2. Electric vehicle (EV) charging services

11. Four companies including eTreego Co., Ltd (an EV charging equipment manufacturer), Hotai Motor Co., Ltd (a distributor of well-known auto brands for individual and commercial use), He Jun Energy Co., Ltd (a solar photovoltaic energy company) and Shilin Electric Co., Ltd (a manufacturer of mechanical equipment, power generation/distribution and vehicle parts) filed a merger notification to the CTFTC in 2022. The four companies planned to jointly establish a new company, i.e., Gochabar Co., Ltd.

12. EV charging piles could be generally classified into two types – fast chargers and slow chargers. Fast charging piles are normally located in public sites such as shopping centers, tourist attractions and major arterial roads, in order to deliver rapid charging services to EV drivers. They have often been installed through collaboration between motor vehicle dealers and charging operators, and through public procurement processes for state-owned infrastructure, for example, freeways. Slow charging piles have primarily been installed in or adjacent to residential buildings and in hotels/Bed & Breakfasts. These piles have usually been operated by small operators with a focus on consumers accepting longer charging time. In the EV charging market, existing EV charging operators targeted large-scale businesses. The proposed merger aimed at small-scale operators who might be less familiar with the relevant market and provided them with required services including planning and maintenance of charging equipment.

13. The investigation showed that technologies for EV charging were still evolving in Chinese Taipei. The Government was expected to support participation of more new entrants and prevent excessive regulation in this emerging industry. Following growth in the number of electric cars in the future, it was expected that the demand for charging services would increase, and the market for EV charging infrastructure operation and services would further expand. The CTFTC found that the four companies involved in the proposed merger might have market power in their respective product markets, but their influences did not extend to EV related sectors. Gochabar was a new entrant in the EV charging market. The CTFTC was of view that the proposed merger was unlikely to substantially lessen competition by misusing market power, forming a cartel, excluding competitors from the market and enhancing barriers to entry. The CTFTC also looked into positive effects of the proposed merger on customers and end consumers in the domestic EV sector, and as a result it did not object to the proposed merger.

2.1.3. Online-only banks

14. In recent years, the government launched project 'Bank 3.0: building a digital financial environment' and subsequently relaxed the regulatory barriers for the establishment of online-only banks in 2018. The introduction of this new type of bank

aimed to encourage established incumbents in financial sectors to adopt innovative businesses models and services while keeping up with new technologies. This, in turn, would lead to an expanded range of services available for customers. The following three high-profile mergers were notified to the CTFTC under the FTA: the 2019 joint venture of Next Bank by nine companies including Chunghwa Telecom, the 2019 joint venture of Line Bank by Line Financial and seven other companies, and the 2020 joint venture of Rakuten Bank involving three companies including Japanese Rakuten Bank Ltd.

15. Online-only banks offer many of the same banking services as traditional commercial banks. The main difference is that they do not build physical branches for their service delivery. Recently more online-only banking businesses have been approved in other countries. In western countries with high degrees of financial inclusion, advantages of online-only banks seem to be their competitive pricing strategies for financial services and their abilities to optimize customer experiences. In Asia, in addition to these advantages, online-only banks are often considered as an approach to create a business ecosystem. Online-only banks have often been established through joint investment from shareholders with diverse backgrounds, for example e-commerce, telecommunication, instant messaging, retailers or financial holding companies. As a result, online-only banks have been able to integrate their product, finance and information flows into a single ecosystem and leverage them with shareholders' customer bases and distribution channels to rapidly grow business and generate profits.

16. As online-only banking allowed entry of non-financial businesses with specialty IT backgrounds into the banking market, it was expected to facilitate novel business models and cutting-edge technologies. This would provide strong incentives for traditional banks to accelerate their efforts in digital transformation and financial innovation, minimizing the risk of being forced to exit the market. The CTFTC therefore concluded that the Commission would not object to all three mergers.

2.1.4. Mobile payment services

17. To align with the development of financial sectors and fintech trends, the Act Governing Electronic Payment Institutions was amended in 2021. The 2021 amendments expanded the scope of e-payment services by revising core businesses and introducing ancillary and derivative businesses where e-payment institutions could operate. The purpose of the amendments was to attract collaborations between distributors and financial businesses in order to foster new services across distribution channels and retailers, ultimately forming ecosystems driven by e-payment institutions.

18. In 2021 FamilyMart Co., Ltd, E.Sun Commercial Bank and Pi Mobile Technology Inc. filed a notification to the CTFTC that they intended to jointly establish a new e-payment institution. FamilyMart is a convenience store chain. E.Sun operates as a commercial bank offering business banking, consumer banking and credit card services. Pi Mobile is a third-party payment processor.

19. In this conglomerate merger, the CTFTC assessed whether innovation would enable the merging parties to engage in cross-industry operations. Firstly, the main barrier to entry into the banking market was regulatory requirements in relation to banking services rather than technological barriers. Second, technical thresholds for convenience store chains and mobile payment operators including e-payment institutions were not regarded as significant. In this context, while technological changes might lead to new payment methods or more integrated services, such changes would not substantially enhance the likelihood of the merging parties engaging in cross-industry operations. The CTFTC determined that it would not object to the proposed merger.

2.1.5. Acquisitions involving financial holding companies

20. Fubon Financial Holding Company filed a notification to the CTFTC in 2020 for a proposed takeover of JihSun Financial Holding Company between December 2020 and March 2021, planning to buy more than 50% of its common shares. Fubon FHC consisted of subsidiaries in banking and insurance sectors whilst JihSun FHC focused on securities and banking businesses.

21. During the merger review process, JihSun FHC raised customers' concerns with the CTFTC. Customers inquired whether the takeover would have an impact on existing fintech services provided by JihSun, and whether it would lead to an elimination of certain competitors in the 'fintech-related innovation market'. Fubon FHC explained that after the takeover they would incorporate JihSun's fintech services where it considered appropriate, and develop future operational plans for digital services. Fubon FHC emphasized that it would make the best use of fintech to reinforce digital capabilities for the purpose of improving customer experience and strengthening customer relationships.

22. The CTFTC acknowledged that financial holding companies were expected to be active in the field of R&D and innovation and that fintech development was in alignment with the Government's current policy objectives. Competitive pressure on financial businesses to innovate would further drive subsidiaries under financial holding companies to continue to invest resources in R&D activities to support fintech innovation. The CTFTC thus concluded that it would not object to the proposed takeover since it was unlikely to eliminate competition in the 'fintech-related innovation market', and lead to less commitment to innovate.

2.2. Approval of an application for concerted action exemption

23. Eight state-controlled banks including First Commercial bank submitted an application to the CTFTC in 2011 for exemption of a proposed concerted action. They intended to form a 'Pan-Public Bank Credit Card Alliance' as a resource sharing platform to disseminate information around discount codes, bonus offers, and free gifts provided by participating merchants.

24. In this proposed alliance, each applicant would negotiate promotion terms and conditions with different merchants, which would then be available for all applicants. Any individual who held a credit card issued by any of the applicants would be entitled to special offers. The concerted action was considered as a 'joint research and development on goods, services and markets' with the aim of 'upgrading technology, improving quality, reducing costs or increasing efficiency' under Subparagraph 2, Paragraph 1 of Article 14 of the FTA (prior to the 2015 amendments).

25. While innovation was not explicitly noted in the application, the CTFTC found that the proposed alliance was likely to spur innovation in credit card development. The concerted action did not impose restrictions on participating merchants to choose issuing banks other than the applicants, which was expected to bring more special offers for card holders. When facing more competitive offers in the market, competitive issuing institutions had to take more proactive measures to maintain competitiveness with more innovative ideas and appealing offers. The CTFTC therefore concluded that the proposed alliance would not impair competition among issuing institutions but would rather inject new momentum in the credit card market, facilitating effective competition.

3. Future directions in competition law enforcement

26. The digital economy has been a key priority sector in terms of competition law enforcement and policy implementation. Innovation enables formerly siloed product and service systems to be connected by forming a digital platform ecosystem. In an ecosystem, products can be seen complementary to each other as a result of technological compatibility. In this context, the scope of relevant markets has become more blurred as competition between platform operators will extend beyond products and include ecosystems and applied technologies, for example, competition between Apple iOS and Google Android. In addition to evaluating the impact of innovation on product markets, technology markets composed of substitutable technologies for innovation and innovation markets where relevant R&D activities occur should also be taken into account when investigating and dealing with innovation related cases.

27. Furthermore, whilst innovation and invention may give rise to economic benefits from technological advancement, it may also lead to adverse effects on market competition through anti-competitive licensing agreements. Market participants may misuse market power under the guise of ‘innovation’ or ‘new products’, by engaging in practices in violation of competition law, such as resale price maintenance, excessive pricing and tying. To ensure appropriate assessment on innovation effects on competition, competition agencies will be required to assess the ‘net’ effects in individual cases.

28. With the development of the digital economy emerging competition issues that have come to the CTFTC’s attention include big data, algorithms, artificial intelligence and killer acquisitions. Despite limited enforcement experiences, particularly in merger cases, and the application of the ‘potential competition’ in its competitive assessment of the post-merger markets, the CTFTC continues to observe international trends and refine considerations and guiding principles for its enforcement actions in the highly dynamic digital economy. This will seek to achieve a balanced outcome by taking into consideration both positive and negative effects of innovation.