White Paper on Competition Policy in the Digital Economy (Summary)

Fair Trade Commission

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Preface

With the ushering in of the digital economy, the global economic system has faced unprecedented challenges and opportunities. In a world where mastering the art of data and technology means having an upper hand in competitions, how to ensure fairness and competitiveness in digital markets has become a major concern within the international community. As the competition authority in Taiwan, the Taiwan Fair Trade Commission (TFTC) is dedicated to maintaining the competitive order of the digital economy market and ensuring that the market operates fairly.

In order to comprehensively and thoroughly understand and conduct research into the competition issues arising from digital platform business models, the TFTC started to compile the "White Paper on Competition Policy in the Digital Economy" in March 2021. During the ensuing period, the TFTC convened many internal meetings, and completed the first draft of this White Paper in March 2022, after which it requested comments and feedback from the public. The TFTC also convened several seminars, inviting government agencies, experts, scholars, industrial representatives, research institutions, and professional associations to offer their opinions. After consolidating the opinions from various stakeholders, the White Paper was finally revised and received the approval of the Commission. The "White Paper on Competition Policy in the Digital Economy" was then officially released to the public on December 20th, 2022.

In the White Paper, the TFTC summarizes 14 competition issues in the digital economy and provides its position and guiding principles of enforcement for the reference of enterprises. These issues include challenges to conventional market definitions and the assessment and analysis of market power, the self-preferencing of platforms, tie-in sales, predatory pricing / inducement with low prices, price discrimination, most favored nation clauses (MFNs), resale price maintenance (RPM),

restrictions on online sales, data privacy and market competition, revenue sharing with news media, killer acquisitions, algorithms, and false online advertising.

Furthermore, the White Paper also provides suggestions regarding possible regulatory amendments, such as reviewing the guidelines for market definition to adapt to the market features of the digital economy, and revising the guidelines for online advertising so as to incorporate new advertising issues emerging from advertorial marketing by internet celebrities. In the future, the TFTC will progressively introduce information technology in the course of case analysis and improve its technological enforcement capability by employing digital tools. After accumulating considerable enforcement experience, the TFTC may further promulgate guidelines on competition issues concerning the digital economy.

In brief, the "White Paper on Competition Policy in the Digital Economy" brings together a multitude of professional and cross-disciplinary opinions, and delves into the diverse challenges brought by the digital economy. It integrates current international trends with the TFTC's practical experiences to propose policy recommendations with a view to promoting market competition, encouraging digital innovation, and ensuring the proper protection of consumer rights. In the coming year, the TFTC will continue to strengthen communication and cooperation with other regulatory authorities, industry sectors, and relevant stakeholders, so as to promote the implementation of digital economy competition policies, thereby ensuring that Taiwan can maintain a favorable competitive environment in the global wave of the digital economy, and allow the market to thrive and develop.

Chairperson May Lee

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Chapter I Introduction

With the coming of the digital economic era, the government of each country has established measures corresponding to competition policies in the aspect of digital economy. These include the US "Gigabit City Challenge" – the Biden administration's Executive Order on Promoting Competition in the American Economy, the EU "eGovernment Action Plan" – proposing the Digital Services Act (DSA) and the Digital Markets Act (DMA), the "Digital Strategy 2025" in Germany – amending the German competition law (Gesetz gegen Wettbewerbsbeschränkungen, GWB), Japan's "Declaration to be the World's Most Advanced IT Nation" – the Act on Improving Transparency and Fairness of Digital Platforms, China's "Outline of the National Informatization Development Strategy" – publishing "Anti-monopoly Guidelines for the Platform Economy", Korea's "Korea Information and Communication Technology (K-ICT) Strategy 2020" – the Act on Fair Intermediate Transactions on Online Platforms, and Australia's "Digital Economy Strategy 2030" – News Media and Digital Platforms Mandatory Bargaining Code.

The "Digital Nation & Innovative Economic Development Program (DIGI+) 2017-2025", which has long been planned in Taiwan, expressly indicates that a fair competition market is part of the establishment of an environment inclusive to digital innovation. As the Taiwan Fair Trade Commission (the "TFTC", or "we") is the competent authority of competition law, it is naturally one of the members of "Digital Innovation Environment Action Plan". It is necessary for the TFTC to explain to the public the possible impacts on market competition by each new form of business model and activities in the digital economy. This is why the TFTC prepared this White Paper. Nevertheless, as the form of competition in the digital

economy changes constantly, the contents of this White Paper only reveal the TFTC's positions at this stage, and we cannot exclude the possibility of different degrees of adjustments in response to future changes such as economic development and industrial transformation.

What is the digital economy? In simple terms, it generally refers to economic activities driven by the digital sector as well as innovative activities (new business models or new consumption types)[1] through digital technologies by non-digital sectors, with the following features[2]:

1. Usage of multi-sided business models: Using platforms as an intermediary to connect two different groups to interact with each other.
2. Reliance on data: Collecting users' data as an input to improve existing goods or services.
3. Volatility: Constantly launching new products by acquiring startups so as to maintain and "leverage" one's own dominant position to other markets.
4. Tendency toward monopoly or oligopoly: markets tend to become monopolies or oligopolies due to network effects.

Currently, lots of transactions in the digital economy are undertaken through platforms established by tech giants such as "The Four" – Google, Amazon, Facebook, and Apple (GAFA).

Tech giants not only provide convenience, but also establish platform ecosystems that can change the industrial structure and enterprises' global

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1 Digital Nation & Innovative Economic Development Program (2017-2025), the 3524th meeting of the Executive Yuan.

2 Cited from the OECD, "The digital economy, new business models and key features," *Addressing the Tax Challenges of the Digital Economy*, Chapter 4, 84-95 (2014). This article also mentioned two other features of mobility and network effects. The former refers to users on the platforms and the latter refers to the external effects of multi-sided platforms, which may be covered respectively by the features of "reliance on data" and "usage of multi-sided business models", and therefore are not listed in this White Paper.

commercial magnitude. In 2009, among the top 10 enterprises by market capitalization in the world, there were 3 oil companies and only 1 tech company. In 2021, the number of tech companies increased to 7 while only 1 oil company remained (as shown in Tables 1-1 and 1-2). The Four have possessed dominant positions in relevant global markets. Google's market share in the search engine market reached up to 91.94% (December 2021)[3]. Amazon had a market share of

Table 1-1 Top 10 enterprises in the world (2009)

Ranking	Enterprise	Industry	Country	Market capitalization (US$ billion)
1	Exxon Mobil	Oil	United States	337
2	PetroChina	Oil	China	287
3	Walmart	Consumer Services	United States	204
4	ICBC	Financial	China	188
5	China Mobile	Telecommunications	China	175
6	Microsoft	Technology	United States	163
7	AT&T	Telecommunications	United States	149
8	Johnson&Johnson	Healthcare	United States	145
9	Royal Dutch Shell	Oil	Netherlands	139
10	Procter & Gamble	Cleaning Supplies	United States	138

Source: PricewaterhouseCoopers, 2018, Global Top 100 Companies by Market Capitalization: 31 March 2018 Update (London)。

[3] Statcounter, Search Engine Market Share Worldwide August 2020 - August 2021, https://gs.statcounter.com/search-engine-market-share, last visited on January 24, 2022.

Table 1-2 Top 10 enterprises in the world (2021)

Ranking	Enterprise	Industry	Country	Market capitalization (US$ billion)
1	Apple	Technology	United States	2252
2	Microsoft	Technology	United States	1966
3	Saudi Arabian Oil Company	Oil	Saudi Arabia	1897
4	Amazon	Technology	United States	1711
5	Alphabet (Google)	Technology	United States	1538
6	Facebook	Technology	United States	870
7	Tencent	Technology	China	773
8	Tesla	Automobile	United States	710
9	Alibaba	Technology	China	657
10	Berkshire Hathaway	Financial	United States	624

Source: https://www.statista.com/statistics/263264/top-companies-in-the-world-by-market-capitalization/

90% in the markets of 5 products (2018 Q1)[4]. Facebook had a market share of 76.47% in the social media market (December 2021)[5]. Apple enjoyed 66% of the profits in the cellphone market with a market share of merely 12% (2019)[6].

In Taiwan, Google had a market share of 95.03% in the search engine market

[4] https://marketingland.com/amazon-owns-more-than-90-market-share-across-5-different-productcategories-report-241135, http://gs.statcounter.com/social-media-stats, last visited on August 28, 2021.

[5] Statcounter, Social Media Market Share Worldwide August 2020 - August 2021, https://gs.statcounter.com/social-media-stats, last visited on January 24, 2022.

[6] Wakephone, https://www.wakephone.com/2020/01/global-phone-profits-apple-66-samsung-17-everyone-else-unlucky-13/, last visited on August 28, 2021.

(December 2021)[7]. Although Amazon has not entered into the Taiwan market, the online sales revenue of Taiwan enterprises amounted to NTD 4.3363 trillion (2019)[8]. Facebook had a market share of 67.34% in the social media website market (December 2021)[9]. Apple had a market share of nearly 50% (49.84%) in the cellphone market (December 2021)[10].

The growing market influence of GAFA may compress the survival of small businesses, which is not favorable for market competition. Since 2017, the competition authorities in the two major jurisdictions of the EU and the U.S. have taken enforcement actions against activities with anti-competitive concerns involving GAFA (as shown in Table 1-3):

Table 1-3 The EU's and the U.S.'s enforcement actions against anti-competitive activities of GAFA

The EU			
Time	Target	Unlawful Acts	Latest Status
2017	Google	Preferred own services on search result pages.	Imposed a fine of €2.42 billion.
2018	Google	Forced Android cellphone manufacturers to set Google search engine and Chrome browser as default.	Imposed a fine of €4.34 billion.
2019	Google	Used its own online advertising platform (AdSense) to prevent other online search service providers in the market from placing their online search advertisements on third party websites.	Imposed a fine of €1.49 billion.

[7] Statcounter, Search Engine Market Share in Taiwan - August 2021, https://gs.statcounter.com/search-engine-market-share/all/taiwan, last visited on January 24, 2022.

[8] https://www.cna.com.tw/news/afe/202012290100.aspx, last visited on August 28, 2021.

[9] Statcounter, Social Media Market Share in Taiwan - August 2021,https://gs.statcounter.com/social-media-stats/all/taiwan, last visited on January 24, 2022.

[10] Statcounter, Mobile Vendor Market Share in Taiwan - August 2021, https://gs.statcounter.com/vendor-market-share/mobile/taiwan, last visited on January 24, 2022.

2020	Amazon	Adjusted its own sales strategies by using platform sellers' data, and thus preferred its own products.	Soon to be resolved.
2020	Apple	The built-in In-App-Purchase system prevented application developers from promoting plans and channels with lower cost than the built-in applications to users.	Under investigation.

The US			
Time	Target	Unlawful Acts	Latest Status
2020	Google	Unlawfully maintained its dominant position in markets such as search engine and search advertising by agreements.	The DOJ and 11 state Attorneys General filed lawsuits against Google.
2020	Google	Forced enterprises to adopt Google's search engine and placed competitors' search results in inconspicuous areas.	38 state Attorneys General filed lawsuits against Google.
2020	Facebook	Acquired potential competitors to maintain its monopoly position.	The FTC along with 46 state Attorneys General filed lawsuits.
2021	Apple	Restricted application vendors from incorporating links in their applications that will direct users to make payments on external sites.	The court of California prohibited Apple from imposing such restric-tions.

Source: TFTC's summary of reports of news media.

The TFTC has also addressed related cases, such as Google's search results lowering competitors' rankings in 2015 and Google restricting mobile device manufacturers from pre-downloading applications in 2021.

Platforms, data, extension (i.e., market expansion), and monopoly / oligopoly (i.e., concentration of market power) will inevitably become the development trends

in digital markets. In comparison with today's markets: intermediaries that connect both parties of a transaction are no longer physical stores but virtual platforms; production resources that enterprises compete for are no longer tangible resources such as oil but intangible data; the gateway to growth for enterprises is no longer adherence to their own business but market expansion operations; and the change in the ranking of the top 10 enterprises in the world over the past decade has evidenced that the result of market expansion will gradually lead to concentration of market power. In this White Paper Summary, other than Introduction of Chapter I, Chapter II will present potential competition issues respectively from four major aspects: "platforms are intermediaries for transactions", "data is a contested resource", "market expansion is the path to growth", and "concentration of market power is the trend of competition". The foreign and domestic experience of each competition issue and the concerns and challenges incurred, as well as the TFTC's possible enforcement positions and guiding principles will be explained and explored in Chapter III. Chapter IV sets out conclusions and suggestions focusing on law and regulations and enforcement principles.

Chapter II The Four Aspects of the Digital Economy

This chapter focuses on the competition issues that may arise from the four aspects of the digital economy, namely, "platforms are intermediaries for transactions", "data is a contested resource", "market expansion is the path to growth", and "concentration of market power is the trend of competition."

1. Platforms are Intermediaries for Transactions

Uber is the world's largest taxi company, but it doesn't own a single taxi. Airbnb is the world's largest accommodation provider, but it doesn't have a single room under its name[11].

In the past two decades, platform business models have proliferated and the platform economy has now become a strong economic force to be reckoned with. The rise of the platform economy has replaced the entire transaction model under the traditional economy. While traditional markets used to operate in a one-sided market, the platform economy is now a two-sided or even multi-sided market. Usually, a two-sided market has the following three features (Figure 2-1)[12]:

(1) Two groups of customers[13]

Different groups of customers (Customer 1, Customer 2) complete

[11] See Tom Goodwin, "The Battle is for the Customer Interface," available at https://techcrunch.com/2015/03/03/in-the-age-of-disintermediation-the-battle-is-all-for-the-customer-interface/, last visited on October 8, 2021.

[12] Kai Huschelrath, *Competition Policy Analysis: An Integrated Approach*, Physica-Verlag, 49 (2008).

[13] The original text uses the term "two groups of consumers", but the merchants on one side and the consumers on other side are both customers of the platform. Therefore, this White Paper uses "two groups of customers" instead to avoid misunderstanding.

transactions with each other through a platform (e.g. credit card), such as credit card holders and merchants.

(2) Indirect network effects across groups

One group of customers understands that the value of the platform increases as the number of customers of another group increases, reflecting network externalities. For example, the more cardholders a credit card company has, the more valuable the card is to merchants, and vice versa.

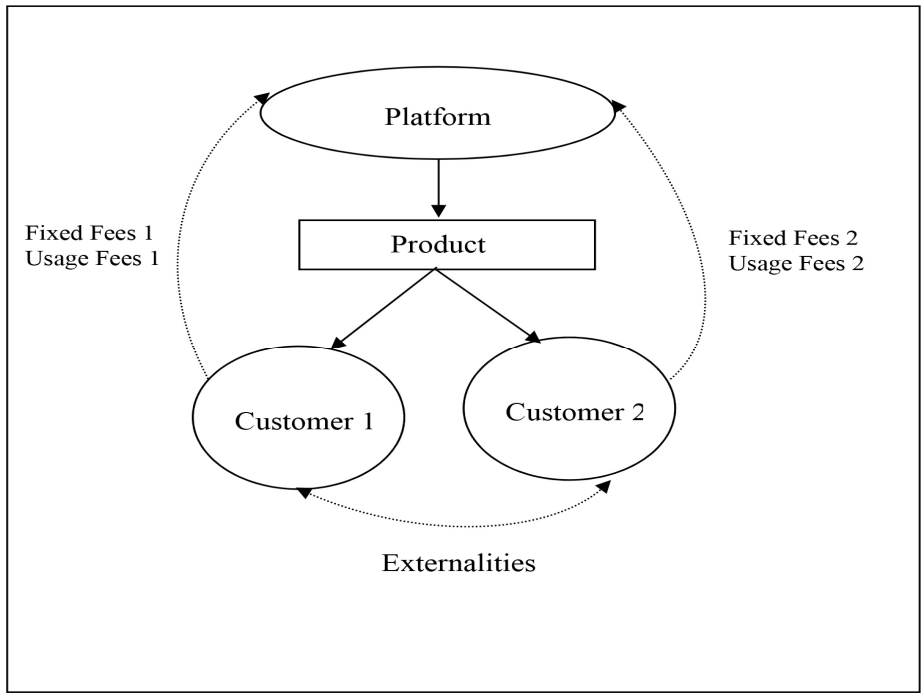
(3) Asymmetric price structure[14]

In order to increase the number of transactions on the platform, the operator will usually not set a single price, but charge different fees (fixed fees, usage fees) to different consumer groups. For example, consumers can hold credit cards for free, while merchants have to pay fees.

Google and Yahoo (search engines), Facebook and Twitter (social network websites), WhatsApp and LINE (instant messaging apps), as well as Amazon and Shopee (online shopping platforms) are typical examples of two-sided markets. Taking Google as an example, the reason why it is willing to provide search engine services for free is that it wants to attract consumers on board, then attract advertisers to pay for advertising on the platform. The more (or less) the people who use the search engine service, the more (or less) the advertisers will be willing to advertise on the platform, which feeds back into one another's interactions. These network externalities will be regenerated and repeated as a loop.

A zero price on one side and a potentially high price on the other is a typical pricing model for enterprises in a two-sided market. The free services pose the following challenges to competition law enforcement:

[14] The original text uses the term “non-neutrality of the price structure”, and this White Paper considers that “asymmetric price structure” is a more accurate description of the pricing behavior of enterprises.



Source: See Footnote 12

Figure 2-1 Two-sided market

First, there is an issue of market definition and market power measurement. Since it is a "two-sided" market, how many "relevant markets" should be defined? Is there one market or two markets? Furthermore, under the principle of "no price, no (relevant) market", the traditional definition based on price variation may not be directly applicable. In addition, the Internet has made it possible for the geographical market boundaries no longer be limited to "city/county-wide" or "national". Do they therefore need to be expanded to include "intercontinental" or "global"? On top of this, when an enterprise provides free goods/services, the application of price-based assessments such as profit, sales, revenue, etc. would be no longer suitable, and would need to be "modified from the core". For example, one may consider measuring the time that users spend on a website, the number of active users, the traffic of website visitors, and other indicators that are not directly related to price.

The second is the possibility of predatory pricing/inducement with low price. Given that one service provided is "free", platform operators, especially new entrants, would seek to make the number of platform users reach a critical mass for rapid expansion of the operation in the shortest possible time. Therefore, "free" and "low price" services are often naturally adopted by operators, expecting them to be welcomed by consumers. However, when operators have gained a significant degree of market power, "free" and "low price" services may be a tool to exclude competitors. When the market position is further strengthened, "high price" services may be inevitable and may harm the interest of consumers.

Another issue related to zero price is the issue of "most-favored-nation clauses" (hereinafter referred to as MFNs). As long as a price is lower than that of competitors, the aim of attracting more users can be achieved. Therefore, it has become a common competitive practice in the digital economy market for platform operators to enter into MFNs with suppliers, where the price of goods/services provided by suppliers cannot be higher than those for other platform competitors. The positive effects of MFNs on market competition are that it can solve the problem of free-riding, reduce consumers' search costs, and eliminate the uncertainty of price changes. However, they can also lead to price rigidity and become a tool for upstream and downstream players to engage in concerted actions.

On the surface, consumers may seem to use the platform for free, but in fact, they may pay a "price" for using the platform with their personal data. Enterprises can use artificial intelligence (AI) technology to analyze the collected data through algorithms and use the analysis results to provide consumers with more precise products/services. "Data" has become a productive resource that companies are competing for in the digital economy.

2. Data is a Contested Resource

The Internet enables systems to generate a data trail for almost all activities and provides a constant source of fuel for large corporations such as GAFA. In 2012, Facebook bought Instagram (IG), which had only 16 employees, for USD 1 billion. In 2014, it acquired WhatsApp, which employed less than 60 people, for USD 20 billion. What are the reasons for such acquisitions? The "data" on more than hundreds of millions of users of these 2 companies was a significant consideration. However, this has also caused the competition authorities in various countries to reflect on the following issues.

The first issue is the merger notification thresholds. Today, the vast majority of competition regulators in the world adopt turnover thresholds (while in addition to turnover, there are also market share thresholds under the Taiwan Fair Trade Act). Nevertheless, most start-ups do not generate enough turnover to trigger the merger control thresholds, thus preventing them being reviewed by competition authorities prior to implementation of acquisitions they are involved in. With financial support from tech giants, acquisitions of start-up companies may give rise to effects of technological innovation as well as stimulation of entrepreneurship. On the other hand, acquisitions of start-up companies may also raise concerns over "killer acquisitions", which make potential competitors without sufficient resources disappear from the markets before they develop into viable competitors of tech giants. In light of this, proposals have come to use the transaction value as a notification threshold. Germany and Austria introduced transaction value-based thresholds in 2017. In March 2021, the European Commission ("EC") published guidance on the application of the referral mechanism for merger control[15], under

[15] Commission Guidance on the application of the referral mechanism set out in Article 22 of the Merger Regulation to certain categories of cases, https://ec.europa.eu/competition/consultations/2021_merger_control/guidance_article_22_referrals.pdf.

which competition authorities of the member states are encouraged to refer transactions where the turnover of one of the companies concerned does not reflect its actual or future competitive potential to the EC for review, even when the national notification thresholds are not met.

Another issue to be considered is privacy protection. By using technologies with deep analysis and machine learning, tech giants are able to accurately identify consumers' needs, which raises concerns about whether data is collected excessively and whether privacy is being infringed upon. The enforcement attitude of competition authorities in some countries has also changed, from "privacy does not fall within the scope of competition law analysis" to "data privacy is an important parameter for competition"[16]. In February 2019, the German competition authority, the Bundeskartellamt, unprecedentedly found Facebook's infringement of privacy in breach of the General Data Protection Regulation (GDPR) which constituted abuse of a dominant market position. Since the end of 2019, the TFTC has considered the privacy issue when reviewing three merger notifications relating to a proposed joint venture of online banking[17]. In these cases, the TFTC viewed personal data protection as non-price competition and treated "quality" of personal data protection as a competition parameter.

Furthermore, with the convenience of data collection, price discrimination in markets entered into by enterprises will become more common. Tech giants are able to accurately predict reservation prices of goods/services for each consumer, thereby applying personalized pricing where nearly each person is offered an individually tailored price. Such discussion, which is similar to that of the possibility of first-degree price discrimination in economics, mainly focuses on the relationship

[16] See Chapter III for details.

[17] See the 1467th Commissioners' Meeting dated December 18, 2019 and the 1486th Commissioners' Meeting dated April 29, 2020.

between companies and consumers. Since the effects on welfare resulted therefrom are uncertain, competition authorities are unable to draw conclusion about whether total welfare is rising or falling as a result, and thus must be cautious about it.

Lastly, investigation on a concerted action will become increasingly difficult. If enterprises can predict consumer behavior by leveraging AI and algorithms, they can easily monitor their competitors' market prices and sales conditions, and promptly respond to market changes. In other words, once there is any deviation from the market equilibrium among competitors, enterprises can immediately detect, counteract and impose punishment upon such action, which can effectively deter deviation of an agreement of a concerted action and maintain the stability of a cartel. The resulting concerted action is not only limited to a horizontal concerted action, but may also reflect a hub-and-spoke cartel—where the majority of downstream trading counterparties (i.e., spoke) follows the price set by upstream enterprises (i.e., hub).

With far-reaching effects of the Internet, it is unlikely companies will stick to one specific market in the traditional sense. Enterprises will tend to expand on existing market power through external effects of the Internet. "Market expansion" competition is flourishing in the digital era and, at the same time, has become a gateway to growth and prosperity for many enterprises.

3. Market Expansion is the Path to Growth

Amazon is not only a retailor, but also a distribution platform, logistics network, payment and credit institution, auctioneer, book publisher, television and movie producer, fashion designer, hardware manufacturer, and leader in cloud servers[18].

In the era of digital economy, the border between markets is no longer vivid.

[18] Lina M. Khan, "Amazon's Antitrust Paradox," *The Yale Law Journal*, Vol. 126, 710 (2017).

Tech giants would not "compete in the market" only. Instead, to compete for the market, they extend their market power in one market to another. This is the trend in the era of digital economy.

The first issue that should be clarified is what the impacts of extension of market power on competition are. It is both positive and negative for market competition when an enterprise extends to another market, and the effect on market competition will be amplified due to network externalities. As an example, Google requested that cellphone manufacturers pre-install services such as YouTube, Gmail and Google Maps. The EU Commission holds the view that this bundling by Google would lower the cellphone manufacturers' incentives of pre-installing competing search engines and web browsers and would restrict competitors' ability to effectively compete with Google. However, for the same conduct, the TFTC in May 2021 found that Google's requirement that cellphone manufacturers pre-install all of the "Google Apps" did not lessen the competition in the relevant markets and therefore did not violate the Taiwan Fair Trade Act. Clearly, the impacts of an extension of market power on market competition should be decided on a case-by-case basis.

Self-preferencing is one of the ways platform operators extend their market power, and is concerning to competition authorities in various jurisdictions. Self-preferencing uses specific algorithms to improve the ranking of one's own product and lower competitors' rankings. It does not allow competitors' products to be placed on the most eye-catching spots, as Google's own products that would increase the chance of them being noticed and purchased by consumers regardless of the quality of those products. This indirectly lowers enterprises' incentive to innovate[19]. As to self-preferencing by search engines and the competition law

[19] https://ec.europa.eu/commission/presscorner/detail/en/MEMO_15_4781.

consequences that should be borne, some scholars hold the view that they should be based on a premise that a search engine is an essential facility[20] for market competition[21]. There are also scholars who believe that self-preferencing will increase the costs for competitors (incurring additional costs to buy keywords to improve their search ranking)[22]. Some scholars assert that search engines should be deemed as platforms for implementing bundling[23].

Platform operators may also use search engines to extend their market power to the news market. This creates a problem of charging and profit sharing between news platforms and digital platforms. With respect to "Google News", Google is actually not the "creator" (i.e., third party news media) of the news content. At best, Google is a "reproducer". Tech giants such as Google and Facebook use third party news content to increase the traffic of their own websites, and then monetize the traffic via increased advertisement sales. This creates a paradox where the "creator" of the content can becomes unprofitable while the "reproducer" is profitable. Therefore, whether the latter should share profits with the former and whether the former should charge the latter, has gradually become concerning to the government of various jurisdictions. After Australia promulgated a statute to require mandatory price negotiation between the two in February 2021, other nations have followed similar steps. This dispute, however, concerns not only market competition, but also

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[20] This concept is from MCI Communications Corp. v. AT&T Co. (7th Cir. 1983). The appellate court in that case came up with 4 criteria for finding an essential facility: (i) control of the essential facility by a monopolist; (ii) a competitor's inability to practically or reasonably duplicate the essential facility; (iii) the denial of the use of the facility to a competitor; and (iv) the feasibility of providing the facility to competitors.

[21] Frank Pasquale, "Dominant Search Engines: An Essential Cultural & Political Facility," *The Next Digital Decade*, 401-402 (Edited by Berin Szoka & Adam Marcus, 2010).

[22] Amir Efrati, "Rivals Say Google Plays Favorites," https://www.wsj.com/articles/SB10001424052748704058704576015630188568972, last visited on October 8, 2021.

[23] Jeffrey Jarosch, "Novel Neutrality Claims Against Internet Platforms: A Reasonable Framework for Initial Scrutiny," *59 Cleveland State Law Review*, 537, 568 (2011).

the broader policy for the news industry, intellectual property issues, and the overall domestic cultural and digital policy. The Executive Yuan has already convened several meetings for consultation across ministries and departments of the government in the hope to achieve multi-win results from a broader perspective. Currently, the Ministry of Digital Affairs is responsible for planning and coordination of this issue. It will also conduct an in-depth investigation to understand the advertisement models of large-scale digital platforms and the volume of advertisements, and to explore the critical problems faced by the content industry, including news media. The Ministry of Digital Affairs intends to, together with the relevant ministries and departments, assist news operators engage in an open an equality-based dialogue with large-scale platforms.

By providing search engine services at no charge, platform operators are able to draw the attention of upstream users, and then generate profits by reselling this attention to downstream advertisers which pay money to post online advertisements[24]. Online advertisements enhance consumers' ability to obtain information on products/services. However, if enterprises use false advertisements to promote products/services, or employ an Internet water army to launch a negative advertising campaign against competitors' products, not only will consumers not be able to make transaction decisions based on correct information, but competitors would also face unfair competition. On this issue, the USFTC promulgated marketing principles[25] requiring that online advertisements tell the truth and not mislead consumers. In addition, the USFTC promulgated enforcement principles

[24] John M. Newman, "Antitrust in Attention Markets: Definition, Power, Harm," *University of Miami Legal Studies*, 7-9 (2020).

[25] FTC, "Advertising and Marketing on the Internet: Rules of the Road," https://www.ftc.gov/business-guidance/resources/advertising-marketing-internet-rules-road, last visited on August 2, 2021.

under Section 5 of the FTC Act[26] which regulates false advertisements for assessment of whether they have harmed competition or the process of competition. The TFTC also has promulgated handling guidelines[27] on online advertisements to reduce the occurrence of cases of false online advertisements.

The content of online advertisements not only shows the quality of products, but also involves price expressions. For example, the Guidelines on Vertical Restraints of the EU promulgated on June 1, 2022 in response to the rise of the platform economy provide that minimum advertised prices (MAP) is considered as a retail price maintenance conduct that constitutes a hardcore restriction[28]. In addition, these guidelines also provide that certain restraints on online sales channels are hardcore restrictions[29]. The operating costs of a virtual platform are lower than a physical store. As a result, prices on the Internet are usually lower than in physical stores for the same products, leading to discontent of physical stores and a hassle for suppliers. Moreover, suppliers, especially those of luxury goods, are also concerned that low prices on the Internet might lower the value of their brands to consumers. The emergence of retail price maintenance on the Internet or at physical stores and sales channel restrictions prohibiting online sales usually originate from the consideration of resolving or managing these concerns. Also, the rise of competition across markets causes anticompetitive effects to be more prominent.

Retail price maintenance has for a long time been deemed as “per se illegal.” The US did not adopt the “rule of reason” review standard until the Leegin case in

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[26] FTC, Statement of Enforcement Principles Regarding “Unfair Methods of Competition” Under Section 5 of the FTC Act, https://www.ftc.gov/public-statements/2015/08/statement-enforcement-principles-regarding-unfair-methods-competition, last visited on August 2, 2021.

[27] See “The Fair Trade Commission's Handling Guidelines on Online Advertisement Cases”.

[28] MAP means that the upstream supplier prohibits the downstream distributor from setting a price in advertisements that is lower than the level set by the supplier. See “Guidelines on Vertical Restraints”, para. 187.

[29] See “Guidelines on Vertical Restraints”, para. 206.

2007. The EU first treats retail price maintenance as a violation Article 101(1)(a) of the Treaty on Function of the European Union (TFEU) which constitutes a hardcore restriction that may not be exempted under the "Guidelines on Vertical Restraints," and then enterprises can submit supporting documents to show improvement of efficiency for the EU Commission to assess whether the conduct is in violation of the law[30]. Article 19 of the Taiwan Fair Trade Act is somewhat similar to the provisions under the TFEU. The TFTC would assess the legality of the conduct after the entity subject to the complaint submits defense arguments. However, the market power of the entity subject to the complaint has always been a non-factor for the TFTC in RPM cases. This may be worth further exploration in the future.

As to sales channel restrictions, some enterprises are not happy seeing their products being sold on the Internet, especially those luxury products or products with a high-quality image. Distributors often are restricted from selling on third party online platforms. For the purpose of preventing consumers from making cross-border purchases of the same products at lower prices on the Internet, some enterprises adopt a geo-blocking mechanism, redirecting consumers who visit a cross-border website for shopping to the local website, to achieve the goal of restricting distribution channels. This is a relatively rare phenomenon in the traditional economy.

The more data one has in hand and the broader the markets that it crosses, the

[30] "[RPM] are treated as a hardcore restriction. Including RPM in an agreement gives rise to the presumption that the agreement restricts competition and thus falls within Article 101(1). It also gives rise to the presumption that the agreement is unlikely to fulfil the conditions of Article 101(3), for which reason the block exemption does not apply. However, undertakings have the possibility to plead an efficiency defence under Article 101(3) in an individual case. It is incumbent on the parties to substantiate that likely efficiencies result from including RPM in their agreement and demonstrate that all the conditions of Article 101(3) are fulfilled." Commission Notice, Guidelines on Vertical Restraints, Paragraph 223; *see also* Bellamy & Child, *European Union Law of Competition*, 507-509 (8th ed. 2018).

more prominent the Internet synergy and feedback effects that are created. The phenomenon of "winner-takes-all" or "loser-loses-all" can occur more frequently and faster. This means that a plausible outcome of competition in the digital economy is a tendency to lead to market concentration.

4. Concentration of Market Power is the Trend of Competition

The development of the digital economy usually leads to a trend of higher concentration of market power, which may be even more intensified by network effects. The trend towards market concentration has triggered competition authorities' debates around their enforcement attitudes, namely the issue of "is bigness necessarily badness?"

"Bigness is badness" was the predominant enforcement mindset of competition authorities before the 1970s. It changed after the 1970s. According to economist Joseph Schumpeter's "Innovation Theory," monopoly leads to innovation, and thus each market structure (including monopolies) has its own value of existing in the market. Competition law therefore holds a different view on monopoly and oligopoly compared with the past. It is no longer against monopoly enterprises, but against the abuse of market power by monopoly enterprises. In other words, competition authorities cannot punish enterprises for merely being "too big", or otherwise it may lead to a misleading impression that an enterprise could be "too big to succeed"; however, competition authorities may intervene when enterprises become "too powerful."

Nevertheless, the whole climate seems to have changed, from liberalism to structuralism, after US president Joe Biden successively appointed Tim Wu, Lina Khan, and Jonathan Kanter, known for being against tech giants, to hold key positions in the competition authorities. Lina Khan, the incumbent Chair of the Fair

Trade Commission, stated in her article "Amazon's Antitrust Paradox" that Amazon's low pricing highlighted "that the current framework in antitrust-specifically its equating competition with 'consumer welfare,' typically measured through short-term effects on price and output-fails to capture the architecture of market power in the twenty-first century marketplace." [31] From this point of view, "enhancing consumer welfare", the only goal of competition law in Judge Robert Bork's thoughts[32], seems to have been shaken. On the other side of the Atlantic Ocean, the Digital Markets Act, claiming to establish contestable and fair markets in digital sections [33], imposes prescriptive and proscriptive liabilities on "big" enterprises (i.e., gatekeepers). This pushes what would otherwise be ex post enforcement (e.g., the DMA prohibiting gatekeepers from undertaking activities such as tie-in sale or self-preferencing) to ex ante controls and gives rise to controversy of whether it is appropriate for competition authorities to implement ex ante controls[34].

Netscape's Navigator disappeared due to Internet Explorer, which was later replaced by Chrome. The once unparalleled BlackBerry no longer exists in the market, and the dominants in the e-commerce market have changed from eBay to Amazon and Alibaba. However, Amazon also faces serious challenges from Walmart, Target, and Shopify in the e-commerce market, and even if it has gained great profits in the cloud computing market, such profits may be gradually eroded by Alphabet's, Microsoft's, and Oracle's efforts in this regard. With respect to Meta, not only has TikTok become its greatest competitor in social media, but its advertising

[31] Lina M. Khan, *supra* note 18, at 716.

[32] Bork, Robert H., *The Antitrust Paradox*, 2nd ed., New York : Free Press, 1(1993).

[33] https://ec.europa.eu/info/sites/default/files/proposal-regulation-single-market-digital-services-digital-services-act_en.pdf.

[34] *See* OECD, "Competition Enforcement and Regulatory Alternatives," OECD Competition Committee Discussion Paper (2021) ; OECD, "Ex Ante Regulation in Digital Markets – Background Note," DAF/COMP (2021).

revenue has also dropped drastically after Apple's new privacy rules allow its users to opt out of ad tracking, diminishing Facebook's value for advertisers, and leading to Meta's share price declining by 26% on February 3, 2022, a market value decrease of over USD 200 billion. These changes show that platform giants are suffering from external pressures, and that competition with each other is also becoming more rigorous. Since 2015, the sales ratio of the top five platforms GAFAM (i.e., Google, Amazon, Facebook, Apple, and Microsoft) in their overlapping markets has risen from 20% to 40%[35].

We can learn from the above cases that enterprises with dominant position may lose their dominating positions due to reasons such as high prices or a lack of innovation[36], which may be one of the reasons why competition law is not against "monopoly" enterprises.

To sum up, the assessment of competition effects and exploration of the lawfulness of platforms' interactions with upstream/downstream enterprises, competitors, third parties (e.g., news media), and consumers (as shown in Figure 2-2) in digital economy generally may be undertaken from four major aspects: the abuse of a dominant position (including self-preferencing, tie-in sale, price discrimination, resale price maintenance, restrictions on sales channels), merger, concerted action, and false online advertising. These are highlighted in Chapter III of this White Paper Summary.

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[35] *See* The Economist, "The meaning of Meta's tumble: Metamorphosis: Facebook and big-tech competition," https://www.economist.com/business/2022/02/04/metamorphosis-facebook-and-big-tech-competition, last visited on date: October 7, 2022.

[36] Richard A. Posner, "A Program for the Antitrust Division," *The U. of Chicago Law Review*, 529 (1971).

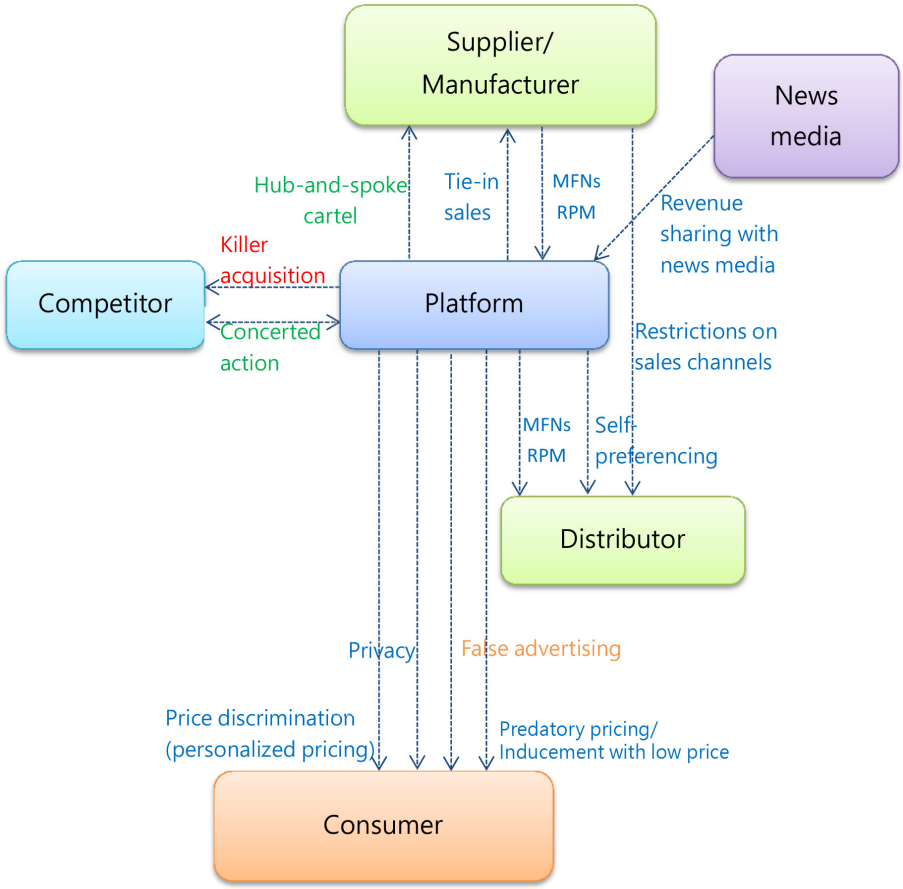

Figure 2-2 Interactions between platforms and related enterprises and consumers

Chapter III Competition Issues and the Position and Direction of the TFTC's Enforcement

This chapter analyzes and explains the TFTC's competition concerns and enforcement challenges with the digital economy with respect to four major issues, including the abuse of a dominant position, merger, concerted action and false online advertising. The chapter will also explain the current position of the TFTC's enforcement on issues for which corrections may be made within a short period of time or which could be used as the basis of analysis of cases. Separately, if the issues involve law amendments or require longer term assessment, this chapter also points out possible considerations for the TFTC's future enforcement directions.

As defining the "relevant market" is the most fundamental and key enforcement prerequisite to conduct an analysis on market competition[37], the first section of this chapter will introduce the possible means of defining relevant markets and assessing market power of enterprises. Sections 2 to 5 will then explain the relevant matters of the above four major issues.

Section 1 Market Definition and Assessment of Market Power

Market definition is the process used at the time of enforcement by a competition authority to define the scope of competition between enterprises. Through this process, the competition authority can better understand the competition restraints caused by the conduct of the enterprises subject to the investigation, estimate their market shares and market power, and conduct

[37] The OECD notes the importance of the "relevant market", stating that: "The starting point in any type of competition analysis is the definition of the 'relevant' market." See OECD "Glossary of Industrial Organisation Economics and Competition Law" 54 (1990).

competition assessments. As technology advances and the Internet develops, the means and considerations of competition analysis, market definition, and market power assessment can change due to network effects, two-sided markets, and industry ecosystems' supply of integrated products. In the digital economy, how one should choose and use a means of market definition and market power assessment and determine the number of relevant markets all pose important challenges.

1. Enforcement Experience of Foreign Jurisdictions

In its decision on American Express' anti-steering clause in 2018, the US Supreme Court indicated that the platform operated by American Express is a two-sided platform. American Express provided services to the two different groups on each sides of the platform (card holders and merchants). The interactions between the two groups are a type of "transaction." Thus, credit card services is a type of "transaction platform," and both sides of the platform should be taken as a whole when defining the relevant market.

In the Google Search (AdSEnse) case in 2019, the EU Commission concluded that the relevant product markets were the markets for online search advertising and for online search advertising intermediation. The market for online search advertising is a platform which provides matching of user queries with relevant search ads. The market for online search advertising intermediation is one in which websites sell their online search advertising spaces indirectly through one or more intermediaries. As to the market power assessment, in the European Economic Area, Google had market shares of over 50% and over 85% in the markets for online search advertising and for online search advertising intermediation, respectively. Google was therefore considered to have a certain level of market power.

2. The TFTC's Enforcement Experience

In a 2014 merger case concerning a bonus points market, the TFTC took characteristics of indirect network effects into consideration and concluded that the bonus points service market had the characteristics of a two-sided market. In this case, UUPON used the bonus points platform to match transactions between members and merchants. As the number of members and merchants increased, the bonus points service provided by UUPON became more valuable, which had a positive economic benefit from indirect network effects.

In addition, in the case concerning the restraint by Google from requiring enterprises to pre-install mobile apps, the TFTC concluded that the "mobile operating system market", the "mobile search service market", the "mobile browser market", and the "app store market" were two-sided markets. By providing free services to device suppliers and users, Google was able to create network traffic and turn network traffic into "cash" in the form of advertising revenue. This is the typical business model of a "two-sided market."

3. The Questions at Issue

The platform transaction model in the digital economy has indirect network effects. The products of the ecosystem formed are complementary to each other. Price is not the most crucial competition factor for business entities in this environment. Nor is lowering costs the only way to pursue higher profits. This creates numerous challenges for traditional approaches to market definition and market power assessment. The relevant problems include: the number of relevant markets, rethinking market definition, a lack of clarity in the scope of relevant markets, and changes in market power assessment indicators.

4. Enforcement Position

(1) Regarding "the number of relevant markets": In assessing the substitutability of relevant products[38], the TFTC may define the relevant market based on a product on one side of the platform, or consider products on the various sides of the platform and their interrelationships and mutual impacts[39] and thereby define 1, 2 or more relevant markets[40].

(2) Regarding "rethinking market definition": Transactions on a multi-sided platform are interdependent. In addition, business entities can provide "free" products or services (i.e., where the price denominated in a currency is zero) and often compete through non-price factors such as quality. Given this, there should be room to adjust the typical means used for market definition such as

[38] Factors such as the difference between the transaction models, i.e. online and offline transaction markets of online and physical stores, are factors which the TFTC would consider when assessing the demand substitutability of the relevant products. The TFTC could analyze whether the products are reasonably substitutable in terms of their functions, features, uses and prices for consumers when they face the different transaction models of online stores and physical stores. For example, the TFTC may rely on the statistics on consumers' online and offline purchases provided by the Ministry of Economic Affairs or other governmental agencies, or through an investigation on consumers' comments on the substitutability between online shopping and physical channels, to survey the purchase preferences and switching activities of consumers between online and offline channels to conduct an analysis on whether there is reasonable substitutability.

[39] It is not easy to evaluate indirect effects. Actual facts of the specific case can be used, and scholars have published several evaluation methods that can assist. The TFTC may refer to papers such as Harikesh Nair, Pradeep Chintagunta & Jean-Pierre Dubé, "Empirical Analysis of Indirect Network Effects in the Market for Personal Digital Assistants," *Quantitative Marketing and Economics*, Vol. 2, 23–58 (2004), Andrew Chen, "The Cold Start Problem: How to Start and Scale Network Effects," *Harper Business* (2021).

[40] According to the decision in Ohio v. American Express, where the 2 sides of the platform have no direct transaction relationship, it is called a "two-sided non-transaction platform" and 2 relevant markets can be defined; where there is a direct transaction relationship between the 2 sides of the platform, it is called a "two-sided transaction platform" and 1 relevant market can be defined.

the SSNIP test[41]. Some feasible means of adjustment are as follows:

i. using the adjusted SSNIP test to incorporate the indirect network effect or making corrections based on the different types of two-sided markets;

ii. using the SSNDQ test and setting quality as the main competition parameter to survey the changes in the overall profit of the business entity brought by a reduction in quality; and

iii. using the SSNIC test and setting costs as the primary competition parameter to survey the changes in product substitutability and profits brought by increases in information costs and attention costs.

(3) Regarding "a lack of clarity in the scope of relevant markets": In the era of digital economy, product innovation and changes in technology affect product relatedness. Therefore, when defining the market scope the TFTC should have a solid understanding of market changes and consider the overall impact of the digital economy on the substitutability between geographical areas and switching between products in different areas.

(4) Regarding "changes in market power assessment indicators": When investigating the transaction model of a platform, one needs to understand and analyze it based on the ecosystem concept, the technical aspect and commercial model from a holistic perspective. This includes:

i. prudently evaluating the market shares of the various sides of the platform and consider the nature and evidence related to the various sides of the platform from a holistic perspective;

ii. considering impacts of factors of the digital economy, such as indirect network effects, single-homing and multi-homing, and observing changes

[41] This means that one would assume that there is a hypothetical monopolist and test the changes in profits before and after the hypothetical monopolist imposes a small but significant non-transitory increase in price (SSNIP).

in the profit-generating and revenue-generating ability; and

iii. taking the competition indices of market dynamics into consideration, which include critical mass, switching cost, entry barrier, diversity of channels to reach end users, and innovation, to conduct a complete assessment of market power in a digital market.

5. Guiding Principles of Enforcement

(1) To understand and properly use the latest theories and case experiences and incorporate them into the process of study and analysis for the TFTC's review of cases related to the digital economy;

(2) Gather data of the factors related to the digital economy such as network traffic, search volume, number of users on the various sides of the platform, and the level of changes in demand on the various sides of the platform; and

(3) Properly consider relevant domestic and foreign theories and academic papers and enforcement practices and review and evaluate the TFTC's guiding principles on market definition.

Section 2 Abuse of Dominant Market Position

The Internet has become an indispensable instrument for e-commerce. Therefore, the TFTC focuses on whether digital platforms and related enterprises have engaged in anti-competitive conduct such as "exclusion" or "collusion" through data and algorithms to restrict market competition. This conduct may include preventing competitors from obtaining data necessary to compete, giving exclusive advantages to their own services through manipulating search results, or conducting price fixing through algorithms.

A "dominant" position refers to the ability to act mostly independently from competitors, customers, and suppliers, which includes setting prices significantly

higher than costs to achieve substantial profits, limiting the emergence of substitute products, or creating barriers to market entry[42]. Conceptually, a dominant position includes not only the term "monopoly" referred to in Article 7 of the Taiwan Fair Trade Act, but also the market position of enterprises stipulated by Article 19 and Article 20 of the Taiwan Fair Trade Act. When determining whether a platform operator has a dominant position, factors such as offline distributors, the upstream operator's website, other online platforms, and constraints from potential entrants or innovative technologies are considerations that can be taken into account[43].

1. Self-preferencing and Search Bias

The self-preferencing of platform operators can also be called search bias, as it stems from search engine services. The major concern is that after vertical integration, platforms may favor their own vertically integrated businesses in the downstream market and provide them with the best trading terms while other competitors cannot be favored by the same terms. This can weaken the competitiveness of their competitors and allow the integrated platform to extend their upstream market power to the downstream market.

(1) Enforcement Experience of Foreign Jurisdictions

Taking Google for example, in June 2017, the EU considered Google's preference for its own Google Shopping service on its search result page to be abuse of its dominant position and accordingly fined Google €2.4 billion[44]. The EU also demanded that Google ensure that there would be no preference for Google Shopping on the ranking of search result pages and all competing shopping

[42] OECD, "Economic Analysis and Evidence in Abuse Cases – Background note," Global Forum on Competition, 10 (2021).

[43] See "Common Issues Relating to the Digital Economy and Competition," Report of the International Developments and Comments Task Force on Positions Expressed by the ABA Antitrust Law Section between 2017 and 2019, 32 (2020).

[44] Case AT.39740-Google Search (Shopping), (EC) 1/2003, para.754.

comparison websites would be treated equally[45]. Some believe that although this case does not mention the essential facilities doctrine, the remedial measures imposed are equivalent to those for cases regarding the essential facilities doctrine[46].

(2) The TFTC's Enforcement Experience

The TFTC has also conducted an investigation on whether Google has abused its dominant position in search engine services by giving priority to the content of its extended services (such as Google Maps) in search results[47]. We believe that Google's search service has a high market share and usage rate, and its market position has a self-reinforcing effect based on learning effects and two-sided market characteristics. However, Google's search service is not the only and necessary way to obtain mapping information services, and there is no evidence to show that Google's behavior has sacrificed short-term profits and is not in line with economic rationality. Therefore, we believe Google's conduct to be a reasonable and proper business judgment, rather than an anti-competitive refusal to deal.

(3) The Questions at Issue and Enforcement Position

i. Is platform operator's conduct of self-preferencing and search bias *per se* illegal?

Even if the operator has the incentive of self-preferencing, according to the opinion of the European Court of Justice, it is still necessary to further clarify whether the platform operator can be classified as indispensable or as an essential facility.

The TFTC's view on this issue is that it is important to find out whether

[45] *Id.*, para. 699.

[46] Graef, Inge, "Rethinking the Essential Facilities Doctrine for the EU Digital Economy," TILEC Discussion Paper No. DP2019-028, 15 (2019).

[47] The 1237th Commissioners' Meeting of the TFTC on July 22, 2015. The article "Analyzing the Illegality of Google's Vertical Search Service from the Perspective of a Monopolistic Enterprise" has further explained the relevant factual background of this case and the basis of the TFTC's decision. See the TFTC's Fair Trade Newsletter No. 66, November 2015.

the platform operator is a monopolistic enterprise defined by the Taiwan Fair Trade Act. If the platform is an essential facility, then the refusal to deal with its competitors or the failure to provide equal access to downstream enterprises warrants the TFTC's attention. On the other hand, the object of the conduct should be further evaluated to determine whether short-term interests are being sacrificed in order to obtain future exclusive benefits.

ii. What is "not" self-preferencing and search bias?

Even if the search platform has a preference for its own products or services, since search engine services are unlike paid advertising services, where rankings can be determined by an advertiser's bid price, what ranking is a "non-biased" search result? Can it be considered an unbiased search result simply if a platform operator does not place its own products or services as the top ranked search result?

In this regard, the TFTC believes that since self-preferencing and search bias are not *per se* illegal, their legality should be subject to the rule of reason, which means that the conduct shall be analyzed with the existing framework under the Taiwan Fair Trade Act, such as tie-in sale, price discrimination, or refusal to deal, taking each framework's constitutive elements and considerations into account.

iii. How should the implementation of corrective measures be monitored?

The process of understanding platform operators' self-preferencing or search bias may involve the algorithm behind search engine results. From the EU's experience, behavioral remedies as well as performance evaluation both come short to be used for monitoring whether the algorithms of platform operators are neutral and unbiased. This poses a challenge to the TFTC's enforcement.

In this regard, the TFTC believes that although different search engines

adopt different ranking methods, what the competition authority should prevent is the deliberate manipulation of search results, which involves the post-facto supervision of algorithms behind search engines. In the current environment, it is more feasible for the TFTC to engage external technical experts to assist in such monitoring.

(4) Guiding Principles of Enforcement

i. Continue to understand the business model and operation of the industry related to the online search platform

As stated above, under the Taiwan Fair Trade Act, self-preferencing and search bias are not *per se* illegal, so it is necessary to understand the market position of the enterprise and the overall operation of the relevant market. In view of the rapid development of the digital economy market and the frequent introduction of new services, it is necessary to continue to track the development of relevant practices in order to correctly evaluate the possible impact of the conduct of enterprises on the relevant market.

ii. Continue to strengthen the enforcement ability to determine conduct of self-preferencing and search bias

If applying Subparagraph 1 of Article 9 of the Taiwan Fair Trade Act to deal with conduct of self-preferencing and search bias, it is necessary to determine whether the search platform has reached a biased search result to prevent other enterprises from participating in competition by means of manipulating algorithms. The examination and analysis of algorithms are generally not the expertise of competition authorities, and the setting and supervision of corrective measures are inevitable issues to be monitored going forward. Therefore, whether the TFTC can determine if a platform's search results have deviated from the natural algorithm by understanding the process of algorithms, or infer that there may be a self-preferencing or bias in

the algorithm by observing the results directly from the algorithm, or to determine these independently and separately, is dependent on the TFTC's understanding of the technical and practical aspects of the matter. To assist, future foreign cases dealing with similar situation can be taken into account to develop a framework of competition law that can be properly implemented in our country.

2. Tie-in Sale

"Tie-in sale" refers to the situation where two or more products that can be purchased independently are required by the seller to be purchased together, or are otherwise not available for sale. Due to characteristics of the digital platform market, such as multi-sided markets and network effects, when a platform operator engages in tie-in sale practices, it may have anti-competitive effects by "foreclosing – excluding" competitors, preventing competitors from entering the market, or increasing competitors' costs. However, it may also have certain pro-competitive effects by encouraging innovation. Therefore, when discussing the extension of a platform's market power, the transaction characteristics of the digital platform market need to be considered and an overall assessment of the pro-competitive and anti-competitive effects of the transaction behavior should be conducted.

(1) Enforcement Experience of Foreign Jurisdictions

In 2018, the European Commission decided to fine Google €4.34 billion for illegally tying Google's search and browser apps since 2011, forcing smartphone manufacturers with the Android operating system to use Google's search engine and Chrome browser by default. Normally, consumers will continue to use the Google apps since they have been pre-installed on their mobile devices, creating a so-called "status quo bias" or "user habit", which further strengthens Google's exclusive position in the search engine market.

(2) The TFTC's Enforcement Experience

The TFTC has similarly dealt with a case of "Google's Requirement of Pre-installation of Mobile Device Apps." According to the TFTC investigation, there is no significant "status quo bias" or "user habit" among Taiwan consumers after the pre-installation of Google-related apps on mobile devices. Most device manufacturers indicated that pre-installing the Google App Suite can shorten the time of app development and system integration, which is beneficial to sales of devices. According to the relevant survey data, the competitive advantages of Google Search and Google Chrome in Taiwan cannot be fully attributed to the "pre-installation" factor. Therefore, the TFTC considered that although Google has market power and also adopts a tie-in sale practice, such behavior has reasonable justification and does not restrict competition in the relevant market, and so it does not violate the tie-in sale provisions of the Taiwan Fair Trade Act.

(3) The Questions at Issue

The factors considered by the TFTC in tie-in sale cases may give rise to many issues under the relative characteristics of the digital market:

i. It is difficult to assess whether there are two or more products.
ii. The extent of compatibility between the tied products and competitor's products.
iii. It is difficult to determine anti-competitive effects and justifications.

(4) Enforcement Position

i. Regarding the difficulty of assessing whether there are two or more products:

The TFTC will conduct a consumer survey to understand the functions, potential complementarity (relative substitutability) and consumer usage of the tied products or services, and how the tied products or services are sold to customers. It will consider whether customers would buy either alone, or whether either could be offered independently by other enterprises in the

market, to determine whether there is a demand for the particular products or services without them being tied for sale.

ii. Regarding the extent of compatibility between the tied products and competitor's products, the following three factors will be considered:
   (i) Whether there ever was compatibility with another enterprise's complementary product? If so, investigating whether the enterprise made a clear decision to discontinue compatibility.
   (ii) Investigating whether the enterprise's product is compatible with competitors' complementary products, and whether the enterprise intends to eliminate competition from competitors' products through tie-in sale.
   (iii) Investigating the internal documents of the enterprise to confirm whether the compatibility issue is simply a technical issue, or if the enterprise is trying to eliminate competitors through tie-in sale and compatibility barriers.

iii. Regarding the difficulty of determining "anti-competitive effects" and "justifications", the threshold for the TFTC to initiate an investigation on a potentially illegal tie-in sale and the guiding principle of enforcement:
   (i) It may be illegal only when the market power of the main product extends to the market of the "tied product" and there is concern about restricting competition.
   (ii) An enterprise that has acquired a lock-in effect does not necessarily have a dominant market position and is not *per se* illegal. Further analysis is required by analyzing the source and impacts of the lock-in effect.
   (iii) To examine the extension of market power or lock-in effect to confirm the impact on market competition efficiency and the rationality of adopting the tie-in sale.

(5) Guiding Principles of Enforcement

When investigating and dealing with tie-in sale cases in the future, the TFTC will continue to consider how to improve the breadth and quality of relevant evidence gathered around three aspects: "product relationship and the nature of the tie-in sale," "network effects and economies of scale" and "impacts on consumers". This will assist to further optimize the quality of the analysis and opinions informing case studies.

3. Predatory Pricing / Inducement with Low Price

Predatory pricing under the definition of competition law usually means that in order to drive out competitors, an enterprise with a dominant position sells products at a price below cost, and after driving out competitors with equal or more efficiency from the market or deterring potential competitors from entering the market, the enterprise starts carrying out monopolistic pricing[48]. In addition, the issue of inducement with a low price is often examined alongside predatory pricing. Both of these may trigger Subparagraph 2 of Article 9 or Subparagraph 3 of Article 20 of the Taiwan Fair Trade Act, and are collectively referred to as predatory pricing below.

(1) Examination Method and Considerations

Traditionally, assessing the legality of predatory pricing under competition law is conducted through the following two tests:

i. Price-cost test: Whether the predatory enterprise undertakes sales at a price lower than its cost.
ii. Compensation test: Whether the predatory enterprise has the ability to compensate its losses by raising prices above competitive levels (possibly monopolistic prices) in the post predatory pricing period after eliminating

[48] Herbert J. Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice*, St. Paul, 6th ed., MN: West Publishing Co., Chapter 8, (2015).

competitors. If recovery or compensation is not possible, then predatory pricing is not only irrational but also harmless to consumers.

In terms of the sequence of tests, it is necessary to take the compensation test only after the conduct at issue has passed the price-cost test, i.e., if price is below its cost. Only if the conduct passes both tests will it be considered predatory pricing.

The pricing patterns of platform operators is often a form of cross-subsidization, i.e., potentially trading at a loss on one side and for a profit on the other side, which in itself should not be considered predatory pricing. As the US Federal Supreme Court stated in the *American Express* case: "two-sided platforms charge one side a price that is below or above cost reflects differences in the two sides' demand elasticity, not market power or anticompetitive pricing."[49] In the French case of Bottin Cartographes and Google France[50], a complaint was made against Google for providing free services to users in an electronic mapping application programming interface ("API") in order to drive competitors out of the market and subsequently raise prices. However, the court eventually ruled that Google's electronic mapping API service is only one part of its broad advertising sales model and is by its nature a multisided market. Thus, taking the test of revenue and cost from only one-side of the market (the API service) could lead to an inaccurate conclusion of predatory pricing, where the "free services" in such a market are compensated from an advertising side of a multisided market. Therefore, a determination of predatory pricing in a two-sided market may require a review of whether the sum of prices on both sides is less than the

[49] Ohio v. American Express Co. 138 S. Ct. 2274, 2285-2286 (2018).

[50] OECD, "Abuse of Dominance in Digital Markets," 33 (2020) https://www.oecd.org/daf/competition/abuse-of-dominance-in-digital-markets-2020.pdf, last visited on October 8, 2021.

operating costs on both sides, and whether there is a high probability that price will be raised above the competitive level in the future to compensate for previous losses. However, considering the dynamic equilibrium nature of the platform economy, if a platform operator sells below cost in order to quickly build a customer base and generate network effects, the probability that such behavior be considered a reasonable management strategy of the enterprise increases. Therefore, even if the entire platform is operating at a loss, it is not necessarily that the business is engaging in predatory pricing[51].

(2) The TFTC's Enforcement Experience

As cross-border e-commerce platforms provide buyers and sellers with "no listing fee", "no processing fee" and "no shipping fee," among other promotions, this gives rise to doubts about whether predatory pricing is involved in preventing competition. Therefore, the TFTC has intervened to address the concerns under the Taiwan Fair Trade Act such as predatory pricing.

The following factors are taken into consideration by the TFTC:

i. Industry development cycle: New entrants commonly offer "no shipping fee" among other promotions at the early stage of entering the Taiwan market, which is often a penetration pricing strategy to enter a new market.

ii. Two-sided market: New entrants may subsidize both buyers and sellers to increase their membership base, which can accelerate their economic scale and reduce fixed costs shared by each member, not necessarily for the purpose of excluding competitors. The platform operator's adoption of lower-than-cost pricing can also help to internalize cross-platform network externalities for their competition advantage[52].

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[51] Saattvic, "An Antitrust Practitioner's Guide to Platform Markets," 20 (2018) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3157537, last visited on October 8, 2021.

[52] Julien Wright, "One-Side Logic in Two-sided Market," *Review of Network Economics*, 3(1): 44-64 (2004).

iii. Barriers to entry: There are no obvious barriers to enter the e-commerce platform market in Taiwan. Users of e-commerce platforms usually use multiple platforms at the same time to list or trade products without switching costs. Also, the market provides ease of entry and exit, so there are no lock-in effects on counterparties. Therefore, in terms of market conditions of cross-border e-commerce platforms, objectively speaking, they are less likely to create market monopolies due to low pricing.

(3) The Questions at Issue

i. Whether the timing of a company's entry into the market affects the assessment of the reasonableness of its marketing strategy.

ii. The characteristics of two-sided markets make it difficult to accurately assess the relationship between a platform operators' conduct such as lower-than-cost pricing and its losses.

(4) Enforcement Position

i. Evaluation of Reasonableness of Marketing Strategy:

(i) The enterprise must have a monopolistic position or substantial market power: New entrants (or new products or new business models) may lack market power in the stage of expanding their business scale, which leads to higher incentives to compete with lower prices. In contrast, a developed enterprise with a foothold in the market or a dominant position is less likely to have to apply low prices to expand.

(ii) Non-temporal: The promotional prices of an enterprise in the early stages of market entry, new product launch, "loss leader" strategies to attract customers, end-of-season sale, gradually expiring products or refurbished products are typically short-term, temporary lower pricing practices, which are common in normal competitive markets. If an enterprise sells at prices below cost on a regular and continuous basis,

there may be concerns about its intention to restrain competition.

(iii) Whether justification exists: If lower-than-cost pricing is due to (A) external uncontrollable market conditions (e.g., when market demand declines, or to maintain relationships with channels and customers to avoid sales interruptions, and therefore selling at a lower price); or (B) economic efficiency (e.g., product production with economies of scale, learning curve), etc., it can be considered justified to sell below cost.

ii. Evaluating the relationship between pricing and losses: Due to characteristics of two-sided markets, if a loss on one side from below-cost pricing can be compensated by the revenue from the other side of the market, it may not represent below-cost pricing. This is because it may be used to increase users on one side, which in turn stimulates the increase in the number of users on the other side, and can accelerate the attainment of a critical mass and reduce the fixed costs shared by each member. This conduct may not necessarily be undertaken for the purpose of excluding competitors. Therefore, the TFTC's enforcement approach should not only focus on the side of losses, but also weigh up the total profit and loss of the platform to determine the potential for any predatory pricing conduct.

iii. Possibility to harm market competition: When determining the legality of predatory pricing, the TFTC will not only examine the market power of the platform operator, but also observe the market share of competitors and the barriers to market entry. If the existing competitors have substantial scales, which can survive the lower-price competition and the cut-throat competition, and even have the ability to counterbalance it, they will not exit the market. Hence, the possibility to harm market competition by lower-price competitors is unlikely to be high. Moreover, if there are no barriers to enter the e-commerce platform market, once a lower-price competitor tries to set

an exclusive price to recover its losses, it will attract potential competitors to enter the market and may not be able to achieve a purpose of excluding competitors and raising prices.

(5) Guiding Principles of Enforcement

i. Whether "a compensable loss" needs to be proven: The Subcommittee on Antitrust, Commercial and Administrative Law under the US House Committee on the Judiciary's "Investigation of Competition in Digital Markets" recommends that the past practice of predatory pricing cases should be reexamined going forward, meaning that "the predator will be compensated in the future" does not necessarily need to be proven for the conduct to be illegal. The TFTC will continue to closely observe and evaluate whether this enforcement standard can be appropriately applied to digital platforms.

ii. Intervention in innovative business models: In the future, the TFTC will use the market structure and the market position of individual enterprises as initial determination factors to avoid excessive interference in the daily business decisions of enterprises, or hinder them from entering the market.

4. Price Discrimination

Price discrimination refers to selling identical goods which have the same costs at different prices to different customers. It can generally be classified into the following three types:

1. First-degree price discrimination (perfect price discrimination): Enterprises set the price for each unit of goods or services based on each consumer's "maximum willingness-to-pay." With the use of technologies such as AI and algorithms and the accumulation of considerable user data, platform operators are able to calculate the "maximum willingness-to-pay" of each consumer and set

personalized pricing for individual consumers.

2. Second-degree price discrimination: Enterprises set different prices based on different purchase quantities. For example, customers whose purchases exceed a certain quantity may be rewarded with special "loyalty rebates."
3. Third-degree price discrimination: Enterprises charge different prices to consumers with different characteristics or in different markets. For example, a theater may offer discounts on movie tickets to students.

As defined by the UK Office of Fair Trading (OFT)[53], personalized pricing refers to the practice where businesses may use and collect information that is observed, volunteered or inferred about individuals' conduct or characteristics to set different prices to different consumers (whether on an individual or group basis), based on what the business thinks they are willing to pay. In order to implement a personalized pricing strategy, enterprises seek to be able to assess the "maximum willingness-to-pay" of consumers, prevent price arbitrage by consumers, and should possess a certain degree of market power.

When a business replaces a standardized price with a personalized price, consumers with higher willingness to pay will purchase the goods at a price above than the standardized price, and the resulting consumer surplus will be derived by the producer. On the other hand, consumers with lower willingness to pay may be able to purchase the goods at a price below the standardized price due to personalized pricing implemented by enterprises to increase the chance of completing transactions. In conclusion, personalized pricing can create more transactions, reduce unnecessary loss in total social welfare, and increase incentives for innovation and differentiation[54].

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[53] Office of Fair Trading, "Personalised Pricing - Increasing Transparency to Improve Trust," http://webarchive.nationalarchives.gov.uk/20140402142426/http:/www.oft.gov.uk/shared_oft/markets-work/personalised-pricing/oft1489.pdf, last visited on date: August 5, 2021.

[54] OECD, *Personalised Pricing in the Digital Era*, DAF/COMP(2018)13 (2018).

Although the personalized pricing discussed above mainly focuses on business-to-consumer (B2C) relationships, we cannot preclude the possibility that personalized pricing may be imposed towards business-to-business (B2B) relationships. That is, the "person" referred to under personalized pricing may include both individual persons and enterprises.

(1) Enforcement Experience of Foreign Jurisdictions[55]

Personalized pricing-related cases are rare in other countries at this stage, partly because personalized pricing mostly involves business-to-consumer relationships, while antitrust rules regulate competitive behavior among firms. In addition, companies may be concerned that the implementation of personalized pricing will lead to negative consumer reactions and thereby cause damage to their reputation[56], which can result in difficulties in detecting the occurrence of such cases.

(2) The TFTC's Enforcement Experience

The TFTC has not had any relevant cases involving personalized pricing imposed by platform operators. There has been one TFTC case in which Trade-Van Information Services Co., an online platform providing customs filing services for importers and exporters, was found offering loyalty discount schemes (i.e., second-degree price discrimination) to indirectly impede other enterprises from competing[57].

(3) The Questions at Issue

i. Considering that personalized pricing imposed by platform operators (that may restrict competition) is aimed at end consumers, there is a question of

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[55] *Id.*

[56] Kalinda Ukanwa & Roland T. Rust, "Algorithmic Discrimination in Service," USC Marshall School of Business Research Paper, available at SSRN: https://ssrn.com/abstract=3654943. This research demonstrates that biased algorithms can be less profitable to online platforms in the long run due to market competition and consumer word-of-mouth that may cause damages to their reputation.

[57] See TFTC's decision Gong-Chu-Zhi No. 094017.

whether the current legal framework and enforcement of the Taiwan Fair Trade Act are adequate and future-ready to address personalized pricing issues involving B2C relationships rather than B2B relationships.

ii. What is the impact on market competition in the digital economy era if platform operators use "loyalty discount schemes" as a form of price discrimination, coupled with other factors such as indirect network effects?

(4) Enforcement Position

i. Existing rules that deal with personalized pricing practices under the Taiwan Fair Trade Act

Article 9 and Subparagraph 3 of Article 20 of the Taiwan Fair Trade Act may be applicable to a situation where platform operators offer lower prices as incentive to consumers to restrict other firms from competing. The TFTC currently does not consider encompassing B2C relationships into the scope of Article 20 of the Taiwan Fair Trade Act, as there have been no cases to date in which an enterprise has imposed a personalized pricing strategy towards individual consumers.

ii. Impacts of "loyalty discount schemes" and other related factors on market competition

When handling cases involving "loyalty discount schemes", the TFTC should consider not only the market position of the platform but also whether the platform is an essential facility, so as to prevent personalized pricing practices in combination with other conditions, from causing a more serious restrictive effect on competition.

(5) Guiding Principles of Enforcement

i. Gaining a more accurate understanding on the personalized pricing schemes of platform operators

Considering that it is difficult to detect personalized pricing schemes,

and that big data has become an important input for the operation of digital platforms, the TFTC should strengthen its capabilities to understand the way in which platform operators collect big data and its sources, as well as the information on algorithms and data analysis-related technologies. This can assist in understanding the actual operational mechanisms underpinning personalized pricing.

ii. Duly updating the operation-related information of platform operators

Considering the multi-sided nature of digital platforms and characteristics of cross subsidization, and that the operation of platforms requires input of intangible resources such as user information and relevant data, the TFTC should duly update its knowledge base. This includes understanding the cost structure of personalized pricing as well as the business models of online platforms, confirm the costs and economic values of goods or services, learn more about platforms' business-related information, and compare them with other similar platforms.

5. Most Favored Nation (MFN) Clauses

MFN clauses are arrangements pursuant to which one party requests another party to guarantee that it will offer the best price or terms for its products or services. In the era of digital economy, if online platforms could be guaranteed by suppliers through MFN clauses, they should be able to attract a large number of consumers to use the trading services provided by their platforms. With indirect network effects, this should attract more suppliers to join the platform.[58]

[58] Competition Blog, "The 'Most Favored Nation Clauses (MFNS)' under the Digital Economy-A Discussion of the Blind Spot in the Application of the Fair Trade Act", https://competitionblog.blogspot.com/2021/06/mfns.html?view=sidebar, last visited on July 19, 2021.

(1)Two Common Types of MFN Clauses in Digital Platform Economy

Different types of MFN clauses can lead to different competitive effects. Common types of MFN clauses in the digital platform economy are as follows.

i. "Wholesale model" or "retail model": Under the "wholesale model", upstream suppliers sell goods or services to platform operators at wholesale prices, and each platform operator can determine the final retail price at its own discretion. Under the "retail model", a platform operator requires that the retail price offered by the supplier to other competing platforms shall not be lower than that offered to it.

ii. "Agency model": The platform operator acts as an intermediary between upstream and downstream firms and does not purchase directly from suppliers but receives commissions from suppliers for each transaction. Under this model, suppliers are prohibited by platform operators from selling via other platforms or channels at a lower price or on more favorable terms. As the commission is based on the transaction price, the supplier is unable to attract platforms by reducing prices to increase its sales volumes. There is no incentive for platforms to lower the commission, thereby suppliers are unable to lower the prices, and thus leading to potentially fixed prices among the suppliers.[59]

iii. "Wide model" or "narrow model": The "wide model" refers to an agreement between a platform operator and a supplier that prevents the supplier from offering a better deal on another online platform, which restricts competition among online platforms. The "narrow model" prevents a supplier from offering a better deal on its own direct-to-consumer website. There are no restrictions on prices offered to other platforms.

[59] *Id.*

(2) Enforcement Experience of Foreign Jurisdictions

i. United States v. Apple Inc., 952 F. Supp. 2d 638 (S.D.N.Y. 2013)[60]

Apple signed e-book sales agreements with five major US publishers that included agency model MFNs. Under the MFN clauses, if the publishers offer e-books to other sellers at a lower price, the publishers would need to reduce the retail prices offered at Apple's iBookstore. This was the first case in the US in which the court ruled that an MFN clause violated antitrust law. The main point of this case was not simply the use of agency model MFNs, but the agreement through which Apple used MFNs as a tool to collude with the five major publishers on e-book prices, so that other online bookstores did not compete on price, which led to a significant increase in prices of e-books in the US in 2010.[61]

ii. Booking.com BV v. Bundeskartellamt, VI-Kart 2/16 (V) OCL 256 (DE 2019)[62]

The online hotel booking platform operator Booking.com requested that the room price offered by hotels to a platform should not be higher than the price offered on other hotel booking websites (i.e., wide model MFN clauses). Booking.com then deleted the wide MFN clauses from the agreements but reserved a clause which required that the room prices indicated on hotels' own websites should not be lower than that offered to the platform (i.e., narrow model MFN clauses). Nevertheless, the German Bundeskartellamt retained a view that such narrow MFN clauses infringed on the freedom of hotels to determine their own room prices and hindered their entry to the online hotel booking market. However, the French, Swedish and

60 *United States v. Apple Inc., 952 F. Supp. 2d 638* (S.D.N.Y. 2013).

61 *Id.*

62 *Booking.com BV v. Bundeskartellamt, VI-Kart* 2/16 (V) OCL 256 (DE 2019).

Italian national competition authorities all accepted the revised clauses implemented by Booking.com.

(3) The TFTC's Enforcement Experience

i. Cases regarding online shopping platforms

In 2016, the TFTC initiated an investigation on whether the relevant domestic platform operators had engaged in restricting their suppliers from offering more favorable prices or trading terms to other competitors through MFN clauses. The investigation showed that although the contracts between the relevant platform operators and suppliers contained MFN clauses, the operators do not violate the Taiwan Fair Trade Act, because the suppliers were not held liable for breaches of provisions in their contracts.[63]

ii. A case of an online food delivery platform's restrictions on competition

In 2019, the TFTC initiated an investigation on whether foodpanda, a food delivery platform operator, had engaged in anti-competitive practices that harmed the interests of partner restaurants and consumers. The investigation showed that foodpanda had significant market power in the e "food delivery platform" market. Its platform's practice of restricting partner restaurants from posting prices on the platform that were consistent with in-store prices represented a "narrow model" MFN clause, which was likely to restrict competition and violated Subparagraph 5, Article 20 of the Taiwan Fair Trade Act.[64]

(4) The Questions at Issue

i. Should online platforms and physical markets be defined as the same relevant market? What should be the approach to define geographic markets?

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[63] The 1357th TFTC Commissioners Meeting dated November 8, 2017 and the 1370th TFTC Commissioners Meeting dated February 7, 2018.

[64] The TFTC decision Gong-Chu-Zhi No. 110066 and the press release.

Is it sufficient to conclude that there will be concern regarding a platform operator restricting competition if its market share reaches a threshold for vertical restraints set by the TFTC?

ii. What types of MFN clause are adopted by platform operators, what are the binding effect of such clauses, and the antitrust concern involved? Can a platform operator's arguments for promoting business and economic efficiency be justified?

iii. The MFN clauses signed between platform operators and their suppliers result in horizontal price agreements between suppliers. However, Article 14 of the Taiwan Fair Trade Act only prohibits horizontal concerted actions. How should the TFTC approach platform operators that engage in vertical agreements at this stage?

(5) Enforcement Position

i. Substitution between online platforms and physical channels and identification of illegality of vertical restraints

Given the asymmetric substitution between online platforms and physical channels, market research of users (including consumers) may be a suitable way to determine the appropriate product market or geographic market. MFN clauses, like other types of vertical restraints, can have a positive effect of promoting competition. In the current environment, the TFTC should determine whether a platform operator violates Subparagraph 5, Article 20 of the Taiwan Fair Trade Act based on the "rule of reason" in accordance with Article 28 of the Enforcement Rules of the Taiwan Fair Trade Act.

ii. Competition concerns arising from various types of clauses

Different types of MFN clauses cause different competitive effects. For example, the "retail model" likely raises more serious competition concerns

than the "wholesale model". The "agency model" has the potential to fix prices among suppliers. The "wide model" mainly restricts competition among platform operators, while the "narrow model" has the risk of preventing suppliers from setting their own prices.

iii. Relevant rules on cases involving horizontal competition restrictions under the Taiwan Fair Trade Act

If a platform operator abuses its market power to require upstream suppliers to sign MFN clauses under the "agency model" so that prices of goods among suppliers will be consistent, the "horizontal" concerted actions between suppliers may be dealt with in accordance with Article 14 of the Taiwan Fair Trade Act. As for the platform operator that abuses its market power, it could be punished under Subparagraph 4, Article 20 of the Taiwan Fair Trade Act.

(6) Guiding Principles of Enforcement

i. Adjusting the criteria for identifying the likelihood of restricting competition under Article 20 of the Taiwan Fair Trade Act

Currently, the TFTC uses a criteria of whether the enterprise has a market share of over 15% in the relevant market or has a "superior bargaining position" (if its market share does not reach 15%) to determine whether a vertical non-price restraint has the "likelihood of restricting competition".[65] However, the "superior bargaining position" circumstance relates only to a particular trading relationship and not to the overall

[65] According to the decision of the TFTC 1267th Commissioner Meeting dated February 17, 2016, for the calculation of market share thresholds for cases involving vertical non-price restrictions, …(2) in addition, given the market practice, if the market share of the enterprise does not reach 15% but its counterparty is not likely to deviate from the enterprise, it should be considered that there is interdependence between the enterprises, and the enterprise holds the superior bargaining position and its restrictions on competition can still be regulated under Article 20 of the Fair Trade Act .

competitive situation in the relevant market. As such, damage to competitors will not equal the damage to market competition. Therefore, for enterprises whose market shares do not meet the 15% threshold but have a superior bargaining position, the TFTC may consider directly regulating their anti-competitive behavior in accordance with Article 25 of the Taiwan Fair Trade Act.

ii. Appropriateness of the concerted action clause

Regarding horizontal price fixing among suppliers, set by platform operators, the concerted action between suppliers can currently be regulated under Article 14 of the Taiwan Fair Trade Act, and platform operators may be regulated under Subparagraph 4, Article 20 of the Taiwan Fair Trade Act. However, it is possible that the penalty imposed on the ringleader (i.e., platform operator) will be lower than that imposed on the cooperating parties (i.e., the suppliers). Therefore, the TFTC may refer to US legislation (e.g., the Sherman Act) and the EU legislation and consider the possibility of encompassing all parties involving in a vertical concerted action into the scope of Article 14 of the Taiwan Fair Trade Act.

6. Resale Price Maintenance

Resale price maintenance (RPM) refers to a transaction arrangement where an enterprise and a counterparty agree to fix a certain price for selling commodities to third parties, or for the third parties to resell the commodities. In the event of a breach of contract, financial sanctions are typically imposed on the counterparty.[66] Types of RPM include restrictions on minimum resale prices, maximum resale prices, resale price range and even recommended retail prices. Restrictions on minimum resale prices have the greatest impact on market competition, which is the

[66] Yuan-He Lai, New Fair Trade Act, 89, Yuan Zhao (2005).

main focus of this section. In the digital economic era, a possible change in the prevalence of RPM is that upstream manufacturers may make use of AI and algorithms to more easily monitor downstream distributors for compliance with RPM. In addition, there may be the ability for internet retailers to free-ride on physical retail stores by saving the cost of maintaining physical storefronts and charge lower prices, potentially creating an unlevel playing field.

(1) Enforcement Experience of Foreign Jurisdictions

Historically, RPM agreements were *per se* illegal under US law. However, since the U.S. Supreme Court's *Leegin* decision in 2007, it has adopted a more lenient "rule of reason" standard for analyzing RPM agreements.

According to Article 101 (1) of the TFEU of the European Union, RPM agreements between upstream and downstream enterprises are prohibited in principle. Any agreement in breach of this provision is void in accordance with Article 101 (2) of the TFEU. Nonetheless, enterprises still have the opportunity to claim an efficiency defence under Paragraph 3 of the same article. That is, enterprises would need to prove that the RPM agreement may bring about efficiencies and satisfy all conditions set out in Article 101 (3) of the TFEU.

(2) The TFTC's Enforcement Experience

i. The case of Wacom Taiwan's restriction on the prices of the Wacom digital drawing tablet: Wacom Taiwan asked the whistleblower not to lower the prices of the company's digital drawing tablets and stopped supplying the product to the whistleblower. The TFTC held that Wacom Taiwan violated the Taiwan Fair Trade Act by imposing restrictions on downstream enterprises in terms of resale prices.

ii. The case of Seeds Taiwan's restriction on the prices of canned dog and cat food: Seeds Taiwan created a "Retail Price List" for 14 canned cat and dog products, including "Premium Golden Cat Can" and "Golden Cat Can",

which contained a “lowest price per can” and “price for the whole box”. When the company received a report about an online supplier selling the products at prices lower than the “lowest price per can” or the “price for the whole box”, the company sent its staff to communicate with the supplier seeking adjustments in the online price, and if the supplier did not cooperate, the company would stop providing the products. The TFTC held that Seeds Taiwan’s “Retail Price List” imposed restrictions on the freedom of downstream online sellers to set the retail price of products and thus violated the Taiwan Fair Trade Act.

(3) The questions at issue

i. Recent theory suggests that only vertical restraints that involve significant market power are likely to have a restrictive effect on competition. As such, the issue is whether the TFTC, when considering cases of RPM agreements, should take the market power of enterprises involved into consideration.

ii. In addition to observing the effect of RPM agreements on intra-brand competition, the impact of RPM agreements on inter-brand competition should also be considered. Does a RPM agreement have a positive effect of enhancing inter-brand competition, even while limiting the freedom of distributors to determine prices?

iii. Free-riding issues can arise when discount stores or online stores intentionally reduce consumer services and use the relevant cost savings to lower their fee quotes, thereby attracting customers from other professional in-store distributors. Although RPM agreements restrict distributors’ freedom to determine prices, does RPM have positive effects of preventing free-riding, maintaining brand identity and enhancing product quality?

(4) Enforcement Position

i. Any vertical restraint (including RPM) will enhance inter-brand competition

but, at the same time, reduce intra-brand competition. Therefore, competition authorities should not only focus on the effect of intra-brand competition, but should also consider the impact on inter-brand competition as a criterion in a comprehensive competitive analysis. In this regard, market structure analysis will play an important role, because market structure is an important indicator to determine the strength of inter-brand competition. Market power is the best proxy variable for market structure.

ii. In order to provide pre-sale services, physical wholesalers and distributors should increase investments in physical stores and personnel training. Online wholesalers and retailers have fewer of these investments, resulting in lower operating costs and therefore lower selling prices. Upstream suppliers can increase the willingness of downstream enterprises to invest in physical stores and staff training through RPM agreements. As a result, the characteristics of the goods or services are a key factor to evaluate whether the implementation of RPM has the effect of encouraging downstream enterprises to improve the efficiency or quality of pre-sales services.

(5) Guiding Principles of Enforcement

When considering RPM cases, the market power of the enterprise involved in the relevant market should be taken into account. The reason is that only vertical restraints involving significant market power have the potential to restrict competition. When an enterprise without significant market power implements RPM, counterparties that are unwilling to be bound by RPM agreements still have the opportunity to do business with other alternative enterprises that do not implement RPM. Thus, market competition will not be affected. On the contrary, imposing a strict RPM policy on firms with no market power will deter these firms from adopting such market strategies that strengthen their brands in order to avoid potential costs of litigation and penalties.

7. Online Sales Channels

Platforms may take advantage of their dominant position in distribution to block competitors from making contact with customers or critical production elements. Similarly, manufacturers may also selectively exclude online platforms from their distribution channels, which may raise issues of exclusive dealing or selective distribution under competition law. Exclusive dealing may be further categorized into exclusive buying (where the seller requests buyers to purchase goods only from it and not from any other sellers) and exclusive selling (where the buyer requests sellers to sell goods only to it and not to any other buyers). Selective distribution refers to the selection of distributors by manufacturers based on conditions of certain “quantity” or “quality.”

(1) Enforcement Experience of Foreign Jurisdictions

The US adopts “the rule of reason” approach to review restrictions on online sales such as exclusive dealing, under which the effect on market competition will be determined based on the facts of the case and market structure. The interactive effect of online and offline stores on sales volumes will also be taken into account when assessing effects on competition.

In the EU, restrictions on online sales are regulated by Articles 101 and 102 of the TFEU. In addition, the EU Vertical Block Exemption Regulation (VBER) provides that a block exemption may apply as long as both suppliers and buyers have a market share of less than 30%, and the VBER lists the level and period of restrictions in exclusive dealing as important considerations. Geo-blocking is often deemed as a malicious restriction on competition. In order to achieve the goal of the EU digital single market strategy, the EU promulgated Regulation (EU) 2018/302 in 2018 to eliminate barriers and geographical restrictions on cross-border e-commerce in the EU.

(2) The TFTC's Enforcement Experience

i. A digital platform was restricting its counterparty's business activities by an exclusive dealing clause, and upon the TFTC's investigation, it was found that a certain percentage of the stores on the platform's online mall were still subject to the clause. As offline stores do not have to pay considerable costs to open stores online, and other platform competitors may also attract stores that have already operated online to switch platforms on which they operate, or develop stores that have not established online stores but are willing to join online platforms, this practice would be unlikely to violate the Taiwan Fair Trade Act based on currently available evidence.

ii. Merida Industry Co., Ltd. informed distributors in writing not to sell its bikes online as it would violate its management rules and it would terminate the distributorship. Upon the TFTC's investigation on Merida Industry Co., Ltd.'s distributors, most of them indicated that Merida Industry Co., Ltd. had held meetings or orally informed its distributors not to sell its products online, and violators faced consequences such as being issued warnings, termination of distributorship, or refusal of supply. As such, the TFTC determined that Merida Industry Co., Ltd. had violated the Taiwan Fair Trade Act. In addition, Giant Manufacturing Co., Ltd. went further to expressly set out in the distributorship agreement that distributors are generally not allowed to display or sell its bikes online. Such agreements also contained a general default clause, which the TFTC also considered to violate the Taiwan Fair Trade Act.

(3) The Questions at Issue

i. The purpose of an exclusive dealing arrangement may not be solely to exclude competitors, but also to prevent other competitors from "free riding" and to urge a counterparty to focus on the existing business relationship and

incentivize both parties to constantly invest exclusively for their business relationship, potentially with the effect of promoting competition. As such, for cases involving digital platforms, it is increasingly difficult to objectively determine whether exclusive dealing between enterprises is lawful or not.

ii. Even if a digital platform does not enter into exclusive dealing agreements with most of its counterparties in the relevant market, the number of the agreements or the ratio of its exclusive counterparties to all counterparties may have already led to a substantial effect of market foreclosure or prevention of market entry for new entrants. Therefore, how to assess network effects will definitely become an essential issue for the TFTC.

iii. In the early stage of platforms' emergence and industry development, it is more justifiable for platforms to engage in exclusive dealing and other similar vertical restraints. Less intervention from the authorities at this stage can be beneficial to market competition and industry development, and therefore how to determine which stage the various platforms are at is another complex question.

iv. While there are still enterprises imposing online sales channel restrictions such as "geo-blocking" or "regional lockout," how may the TFTC discover whether there still exist online sales channel restrictions of "geo-blocking" in Taiwan's online sales market.

(4) Enforcement Position

i. Exclusive dealing: After collecting relevant evidence such as business relationship and purchasing patterns, analyzing network effects and economies of scale, and effects on consumers, as well as undertaking a holistic assessment based on the facts of the case, the TFTC can determine whether there is any infringement of the Taiwan Fair Trade Act.

ii. Selective distribution: The relationship between selective distribution and

prevention of free-riding, as well as the business justifications such as brand image protection and the effectiveness of promotion of competition should be reviewed under the rule of reason approach.

iii. Geo-blocking: The positive and negative impacts on market competition from geo-blocking in the traditional economy may also apply in the digital economy.

(5) Guiding Principles of Enforcement

i. Exclusive dealing: Economic theories have not reached a considerable degree of consensus on the overall impacts of vertical restraints on market competition. Moreover, after introducing e-commerce and digital technology into modern business models, how to examine the effects of network externalities is a critical issue when dealing with vertical restraint agreements in the digital economy. Subject to the accessibility of data, there remain considerable challenges for quantitative analysis of vertical market structures, and in practice, it is not easy to distinguish whether an enterprise is merely actively engaging in competition or intending to abuse a dominant position.

ii. Selective distribution: By referencing the US and the EU enforcement experiences, the "market position (power)" should be specifically listed as a threshold to trigger an investigation. Yet, even if an enterprise meets the market power threshold, it does not mean that it has violated the Taiwan Fair Trade Act. Whether there is any business justification and effect of promotion of competition should be reviewed under the rule of reason approach. Especially when the enterprise under investigation raises the defense of justification, the reasonableness and necessity of such defense should be examined.

iii. Geo-blocking: In addition to the population distribution and business model

in relevant geographic market/s of a case, in order to effectively discover other types of online sales channel restriction cases such as “geo-blocking,” the TFTC will study other features in digital ecosystems. These include competitors in multiple relevant industries involved in the online sales market, relevant products, suppliers, and the collaborative relationships and complementary relationships formed by and among the relevant industries.

8. Data Privacy and Market Competition

Mastering data has become a key factor for platform operators to engage in competition. The more users a platform operator has, the more data it gathers. A key issue that arises is how laws should be applied to the data collection behaviors of platform operators. If a platform operator, through its collection of considerable data, achieves market dominance but abuse its market power to conduct anti-competitive behavior, thereby invading the public interest of competition, authorities can intervene to an appropriate extent in accordance with the applicable competition and other laws. Nonetheless, the main focus of this section is: whether, in addition to privacy regulations, competition law should be used to tackle platform operators’ practices that infringe on an individual’s right to privacy, such as collecting personal data without obtaining consent from the data subject, or using data for the purpose that is beyond the scope agreed by the data subject, and what the interrelation between privacy and competition is.

When a platform operator uses the user’s information or personal data without his/her consent and infringes on his/her privacy, it does not necessarily mean that such an infringement should be dealt with in accordance with competition law. The goal of competition law is to protect the public interest by maintaining competition, unlike the goal of the right to privacy, which is to protect an individual’s right. Moreover, in the course of data collection, it is difficult to determine whether a

platform operator's collection of certain user data constitutes a privacy violation. The large amount of data collected does not become useful information until it has been analyzed. Hence, it is quite difficult and contestable to determine any causal links between privacy infringement and restriction of competition.

On the other hand, from the viewpoint that competition law should protect privacy, some argue that the lack of competition is a reason behind privacy infringement, as a dominant platform has higher incentives and capabilities to misuse data of users who rely on that platform. In these circumstances, there exists a positive correlation between protecting privacy and maintaining competition. As such, a specific approach is to treat privacy protection as a "non-price" or "quality" competition parameter among platforms, which indirectly provides some oversight over the claim that platforms can abuse user data to gain competitive advantages in the market.

(1) Enforcement Experience of Foreign Jurisdictions

Based on overseas enforcement experiences, in general there are three enforcement positions on whether competition law should be used to protect privacy. The first approach is not to regulate privacy issues through competition law (and to rely on other rules instead). For example, in 2019, the French Data Protection Authority (Commission Nationale Informatique et Liberté) imposed penalties on Google for infringing the GDPR. The second approach is to apply the theory of abuse of a dominant position. For example, in 2019, the German Bundeskartellamt determined that Facebook abused its dominant position. The third approach is to tackle privacy issues through the theory of abuse of a superior bargaining position. For example, in 2019, the Japan Fair Trade Commission (JFTC) promulgated the "Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information".

(2) The TFTC's Concerns and Challenges about Privacy Enforcement

To date, the TFTC has not addressed any cases where the Fair Trade Act has been used to tackle infringements on privacy by platform operators who collect or use personal data. From the foreign experience, the theory of abuse of dominant position as adopted by the German Bundeskartellamt is similar to Article 9 of the Fair Trade Act in nature. However, under this approach, a key issue is the definition of the "relevant market". Moreover, considering that it is difficult to quantify privacy, if the TFTC relies too much on qualitative discourses to define the market, it may easily lead to a criticism of excessive subjective claims and even a suspicion of the TFTC claiming itself as the privacy regulator. The theory of abuse of a superior bargaining position as adopted by the JFTC is closer to Article 25 of the Fair Trade Act in nature. However, under this approach, in addition to controversy around determining the "superior bargaining position", one challenging issue that leads to lack of specific cases under Japanese practice is that it is difficult to establish a correlation between an infringement of privacy and an infringement of competition law.

(3) Enforcement Position

The TFTC, as a competition authority, has different duty from the privacy regulator. As such, the TFTC shall intervene on privacy infringements by platform operators only under the situation where competition is unduly restricted. In terms of enforcement action, the TFTC may, from the perspective of maintaining quality competition, observe the impact of platform operators' privacy protection measures on the demand for final products or services. That is, whether there is any change in the demand for final products or services in the market should platform operators try to lower the quality of their products or services. In doing so, the TFTC may further determine the importance of privacy to competition and the extent to which it will have an impact on competition.

When a platform operator claims that it prohibits another platform operator from accessing its own data in order to strengthen privacy protection, it does increase the level of privacy protection for users from the perspective of their right to privacy. However, this situation may be considered to affect competition. It is also possible to require platform operators to open up information to competitors in order to enhance competition, which may reduce the level of privacy protection of platform operators. This shows that the Fair Trade Act has a more indirect effect than the Personal Data Protection Act or the Consumer Protection Act has for issues around protecting privacy.

(4) Guiding Principles of Enforcement

In summary, from the experience of overseas enforcement agencies, there are two feasible models: "abuse of a dominant position" and "abuse of a superior bargaining position," but each has limitations in application. The "abuse of a dominant position" is similar to the content of Article 9 of the Fair Trade Act. However, one challenging issue under this approach, is "in which market" does the platform operator hold a dominant position. Alternatively, if the TFTC tackles privacy issues with a theory of "abuse of a superior bargaining position", the main applicable provision would be Article 25 of the Fair Trade Act. Nonetheless, such a general clause should be used carefully in law enforcement. In addition to controversies that may arise from a determination of "possibility of deviation" and "dependency," it would be challenging to link a platform operators' infringement on privacy arising from excessive collection and use of user data to impact on the trading order.

Unless there are specific facts in a case that can be used to define the scope of the market affected by a privacy infringement or to determine whether there is a possibility of undue influence on the trading order and the extent to which the trading order is affected, the TFTC should be cautious about dealing with platform

operators' privacy infringement in accordance with the Fair Trade Act. The TFTC will continue following the discussions and development of this issue both domestically and internationally. In addition, in light of the establishment of the Ministry of Digital Development, the TFTC will also pay close attention to whether going forward there will be a clearer division of authority and duty with respect to the issue of privacy infringement.

9. Advertisement revenue sharing with news media

When digital platforms attract users' attention with the content generated by news media, and then "monetize" the internet traffic through advertising sales, should the revenue be shared with the content creators? Under the current legal framework, should such decisions be made through commercial negotiations between the parties, or should the government intervene to balance disparity in bargain power between the parties, like the Australian model? There are many issues to be discussed.

(1) Enforcement Experience of Foreign Jurisdictions

i. The Copyright Model: The EU's "Directive on Copyright in the Digital Single Market" requires digital platforms to obtain licenses from the news media industry for the distribution of news content through website links. France incorporates the concept of neighboring rights into its Copyright Act. Germany has amended its Copyright Act and Act on the Management of Copyright and Related Rights by Collecting Societies to balance the conflict of interests between platform operators and news publishers. Korea includes a new provision: "Internet service providers are required to pay related fees to news content creators or disseminators" in a bill to amend its Copyright Law and Press Act.

ii. The Network Governance Model: The House of Lords' investigation report

of the UK Parliament recommended the inclusion of mandatory bargaining in the draft "Online Safety Bill" enforced by the Office of Communications. The Japan Ministry of Economy, Trade and Industry announced that enterprises such as Yahoo, Amazon, Google and Apple are designated as being subject to the "Act on Improvement of Transparency and Fairness of Digital Platforms" and are obliged to disclose information such as the contract terms with their clients and the reasons thereof, and to notify changes in contract terms in advance.

iii. The Bargaining Model: Australia enacted the "News Media and Digital Platforms Mandatory Bargaining Code", which establishes specific principles to regulate substantive and procedural issues regarding negotiation, conditions, and how to deal with negotiation deadlocks. The Department of Canadian Heritage has proposed a bill titled "Online News Act", which would require major global digital platforms and Canadian news publishers to reach an agreement on fair profit sharing and compensation for the use of news content by platform operators.

(2) The TFTC's Enforcement Experience

In view of the fact that the issue of profit sharing between digital platforms and news media involves a broad range of policies, from news industry policies, market competition, intellectual property rights to overall national digital policies. The TFTC invited government officials, scholars and industry representatives to a hearing on April 12, 2021. The TFTC also held another public hearings to seek comments on the preliminary draft of the "White Paper on Competition Policy in the Digital Economy" in March 2022 to hear from scholars, experts and the industry, and to discuss appropriate policies to fit the national conditions and market environment in Taiwan.

(3) The Questions at Issue

There are different views on whether Taiwan should enact a special law, set up a mutual fund or take other steps. The establishment of a co-prosperous environment for the development of large-scale digital platforms and the domestic industry is important for democratic values and freedom of the press. This involves policy issues such as the development of cultural and creative industries and news media, fair competition, taxation, protection of intellectual property rights, and the establishment of an overall digital development environment. It also involves inter-agency responsibilities. Currently, the Executive Yuan has set up an inter-agency "Coordination Group for the Co-Prosperous Development of Domestic Industries and Large-scale Digital Platforms" with cooperation among the Ministry of Digital Development, the National Communications Commission, the Ministry of Culture, and the TFTC.

Under the inter-agency framework, how should the TFTC perform its function to maintain the market order of the news media and digital platform industries under its authority?

(4) Enforcement Position

The TFTC will actively participate in the "Coordination Group for the Co-Prosperous Development of Domestic Industries and Large-scale Digital Platforms" to provide advice on competition issues. If news media companies need to engage in collective bargaining to aggregate their bargaining power, it may involve a concerted action among industry players. This approach can not only balance the scale and bargaining power of news media and large digital platforms, but also limit transaction costs. News media companies can apply to the TFTC for approval of such concerted actions according to the Proviso of Subparagraph 1 of Article 15 of the Taiwan Fair Trade Act. The TFTC also welcomes and encourages the digital platform industry to actively negotiate with the domestic news media

industry on matters such as licensing and payment for news content based on good faith around information transparency, neutrality and non-discrimination.

(5) Guiding Principles of Enforcement

Assistance that can be provided by the TFTC to facilitate negotiations includes, prior to the negotiation, where news media is able to apply for approval of a concerted action. During the negotiation, the TFTC may investigate whether digital platforms have abused their dominance if they refuse or delay negotiations.

Section 3 Merger

Start-ups usually have characteristics of stimulating markets with new ideas, developing new products, disruptive innovations and unique business models, which not only help to break up concentration in a market, but also urge less efficient companies to improve or exit the market. This maintains competition and innovation in a market, which is beneficial to consumers and overall social welfare, and therefore plays an important role in the competitive markets[67]. However, in the digital economy, it is common that start-ups encounter "killer acquisition" when these businesses are still in their infancy and before they can cause "significant destruction" to the tech giants.

As mentioned in Chapter II, Facebook acquired Instagram and WhatsApp in order to obtain data from their users. After the merger, Facebook tracked users' geographic location through Instagram without users' consent and shared the information with Facebook's relevant services for more accurate advertising. This raises controversy on whether competition authorities should consider privacy as a factor to decide whether or not to grant clearance during merger reviews.

Accordingly, "killer acquisitions" and the attitude towards privacy in merger

[67] Ming-Hsien Wu, "Issues Concerning Merger of Start-ups in the Digital Economy", Taiwan FTC Newsletter, Vol. 94, July 2020.

reviews are the two main subjects in this section.

1. Killer Acquisitions

Killer acquisitions conducted by tech giants towards premature start-ups may have negative impacts such as affecting the launch of new products, reducing the innovation spirit of entrepreneurs, making it difficult for entrepreneurs to obtain financing and discourage entrepreneurial motivation. On the other hand, there is potential for benefits such as facilitating continued research and establishment of further start-ups, accelerating activities in the capital market and facilitating venture capital investment.

(1) Enforcement Experience of Foreign Jurisdictions

i. The USFTC requested five tech giants, including Alphabet (Google's parent company), Amazon, Apple, Facebook and Microsoft, to provide information on their transactions that were not notified with the USFTC or the USDOJ between January 1, 2010 and December 31, 2019, so that the USFTC could further understand these merger activities. The US House of Representatives Judiciary Committee's proposal of the "Ending Platform Monopoly Act" prohibits a dominant platform operator from acquiring potential competitive businesses, and also prohibits platform operators from expanding or strengthening its market power through merger. The Act further requires that all platform operators' mergers shall be notified and such cases will be "generally prohibited and only some exceptions allowed." The platform operators shall bear the burden of proof that the target company is not its competitor and the transaction will not expand or strengthen the platform operator's market power.

ii. The European Commission's "Principles on the application of Article 22 of the Business Combination Directive to certain types of referral mechanisms"

points out that if the sales revenue of at least one of the participating parties in a merger cannot reflect its actual or future "competition potentiality," member countries are encouraged to refer the case to the European Commission pursuant to Article 22. Competition potentiality includes (1) where start-ups or new entrants with significant competition potentiality have not yet developed or implemented a business model that generates significant revenue (or are still in the initial stages of implementation); (2) a significant innovator is in the middle of potentially important research; (3) having actual or potentially significant competitive ability; (4) having rights to access significant assets with competitive advantages (such as raw materials, infrastructure, data or intellectual property); and (5) providing other key inputs or components to the industry.

(2) The TFTC's Enforcement Experience

A case example is the establishment of a joint venture company, LINE Bank Taiwan Limited ("LINE Bank"), by seven companies including LINE Financial Taiwan Limited ("LINE Financial"). As there were neither horizontal nor vertical relationships among the newly established joint venture company and the companies participating in the merger, it is classified as a conglomerate merger. According to the investigation, although LINE is the most used instant messaging software among Taiwan consumers, there is other instant messaging software available such as Facebook messenger, WhatsApp and others in the market. Also, mobile device users tend to use multiple types of instant messaging software, so rival internet banking service competitors may choose to cooperate with other instant messaging software companies to provide access to internet banking through instant messaging software. Further, the TFTC was also of the opinion that although LINE Bank may use LINE instant messaging software's data to collect customer's needs and provide services appropriate for them, such a database could be substitutable. Competitors may also

collect users' data by cooperating with other relevant data companies including messaging software companies, social media, search engines and online shopping websites. Therefore, it was difficult to conclude that the data held by LINE Financial and its affiliates represents a competitive advantage that could not be replicated or competed against.

(3) The Questions at Issue

i. How should competition authorities decide whether a start-up acquired by a tech giant would actually be a future competitor?

ii. As the digital economy continues to evolve, how should potential competition theory be applied in reviews of acquisitions of a start-up by a tech giant?

iii. Whether the competition around technology innovation will be harmed if competition authorities prohibit acquisitions of a start-up by a tech giant?

(4) Enforcement Position

Although the TFTC does not have experience of reviewing a "killer acquisition" case, it has accumulated considerable experience reviewing conglomerate merger cases from the perspective of "potential competition", which is the core issue that agencies consider most when dealing with killer acquisitions. Regarding mergers that have already obtained clearance, there may be a question around whether the TFTC has the authority to grant an order such as the case where the USFTC required Facebook to sell Instagram and WhatsApp several years after granting merger clearance. Considering that such an order may cause significant impacts under the regime of Taiwanese law and the protection of the merging parties' interests, the TFTC should carefully consider the legal limitations if it were to follow the USFTC's practice.

(5) Guiding Principle of Enforcement

i. The basis on deciding whether a merged start-up is a potential competitor of

a tech giant should include: (i) knowing other potential acquirers' viewpoints on the merger; (ii) collecting up to date information to the extent possible instead of relying on documents or information that rationalized the merger; (iii) considering the opinions of neutral and interested parties. Other economic mechanisms may also be used to recognize which start-ups to be merged may pose a competitive threat to the acquirer. The TFTC cannot only impose remedies or conditions on a merger which is relevant to a "killer acquisition" in order to minimize the concern of restricting competition after the merger, but can also adjust the relevant determining factors and principles in a timely matter by continuing to pay attention to international trends going forward.

ii. Regarding a "killer acquisition" in Taiwan, the TFTC will be careful to see whether the level of killing potential competition in the market is the same or similar to those in other countries, and whether it is truly necessary to restrict such behavior by applying competition law as other countries have done when reviewing merger cases by applying the "potential competition" theory. Also, although the TFTC has listed factors for its review regarding whether "potential competition" will be restricted, such as "the possibility that regulations will be changed", "improvement of technology" and "intention of developing cross-industry business" in the TFTC's Guidelines on Handling Merger Filings, the TFTC still needs to pay attention to the rapidly changing competition landscape if applying the "potential competition" theory in the highly dynamic digital economy.

iii. Start-ups' motivations to innovate generally come from an expectation of gaining profits through merger, and this perspective should not be ignored. The merged company's assets, technologies, human resources, and/or intellectual properties will be merged into the ecosystem of the acquiring

company, and would likely continue to be used to improve the acquiring company's products and technologies, which also support the merged firm's further innovation. These are highly relevant to the positive interests from innovating technology and the TFTC shall also consider such when deciding how to deal with a "killer acquisition" issue.

2. The Role of Privacy in Merger Review

Regarding whether to consider privacy protection through merger reviews, there are two conceptual approaches. First, privacy issues should be resolved by privacy or other regulations. Competition and privacy are different objectives, so it is not necessary to consider privacy issues in merger reviews. Second, privacy protection provided by platform operators is a non-pricing quality competition factor. That is, to treat privacy protection provided by platform operators as a non-pricing quality competition factor, and examine the level of the impact on such non-pricing competition brought by the merger and the advantages/disadvantages that may relate to competition. However, whether it is possible for the competition authorities to define a relevant market similar to "privacy protection service" and evaluate the "unilateral effect" and "coordinated effect" in a merger is challenging in practice. Therefore, even if competition authorities consider the issue of privacy protection in a merger review, its impact is likely to be assessed only with qualitative analysis methods at this stage.

(1) Enforcement Experience of Foreign Jurisdictions

In the past, merger review cases have tended to treat competition and privacy as different areas, such as the Google/DoubleClick case in 2008 and the Facebook/ WhatsApp case in 2014. However, several recent cases have revealed that there may be certain relationships between competition and privacy protection. For example, in the Microsoft/LinkedIn case in 2016, the European Commission granted clearance

with conditions including authorizing their competitors to use the data saved in Microsoft Cloud, and mentioning that data privacy is an important factor for competition. In the Apple/Shazam case in 2018, the European Commission mentioned that data is a key element of the digital economy and therefore it shall be reviewed carefully as part of the case. In the Google/Fitbit case in 2020, the European Commission granted clearance with condition on the parties' commitment to privacy protection.

(2) The TFTC's Enforcement Experience

The TFTC discussed privacy protection in merger filings regarding establishing internet only banks from the end of 2019 to April 2020. These included the merger filing to establish a new joint venture company to operate internet only banking by Rakuten Bank, Ltd. and others. In this case, the TFTC discussed whether the merging parties faced non-pricing quality competition before the merger. If the answer was yes, then the TFTC would further discuss the possible advantages and disadvantages post-merger. Such an approach is similar to the European Commission's discussion of privacy in its merger review.

(3) The Questions at Issue

If the TFTC decides to consider privacy protection in a merger review, the TFTC will take the position to treat privacy protection as a non-pricing competition factor and analyze the possible advantages and disadvantages post-merger through its competition analysis. Such an approach seems closer to the role of other competition authorities. However, it is difficult to evaluate such factors based on quantity, and a discussion that is excessively based on arguments of quality may weaken the persuasiveness of the TFTC's decision. This is a challenge that the TFTC needs to overcome when dealing with privacy protection issues through merger reviews.

(4) Enforcement Position

Regarding privacy protection, the TFTC will gradually refer to the trends of foreign enforcement cases and consider the discussion and development of foreign competition authorities, international competition organizations and academic institutions both in Taiwan and abroad as the basis of merger review in the future.

Traditionally, the TFTC has not considered privacy protection in its analysis when reviewing merger filing cases, but has recently tried to take privacy protection into account as part of the quality factors affecting competition and will consider whether and how to discuss this issue in merger review going forward.

(5) Guiding Principles of Enforcement

If the TFTC is to discuss privacy protection through merger reviews, it would first need to determine whether there is privacy protection-based competition, and then discuss privacy issues when there are companies competing with each other by using privacy protection to keep or attract users. This means, when treating privacy protection as quality competition factor, the TFTC needs to consider the disadvantages of reducing privacy protection after merger. In the future the TFTC may further consider whether strengthening post-merger privacy protection, for example, prohibiting other companies from accessing data may lead to negative impacts on competition. It is difficult to judge the level and necessity of privacy protection. In the short term, the TFTC will consult with the privacy and consumer protection authorities in order to strengthen the reasonableness of its theory and make its analysis more comprehensive. In addition, the TFTC will also pay attention to the development of academic studies in foreign jurisdictions on how to establish a more objective quantitative analysis, so as to expand its enforcement considerations in the future.

Section 4 Algorithm and Concerted Action

According to the definition of concerted action under Article 14 of the Taiwan Fair Trade Act, an agreement among enterprises need not be in a formal written form or expression. Nor does it need to be legally binding. However, to solidify the operation of a concerted action, there may be the design of a variety of facilitating mechanisms to help members reach a mutual understanding or detect or punish deviation by members. In the digital economy era, algorithms can be used to enforce facilitating mechanisms and be a tool for enforcing agreements between the conspirators, i.e., influencing competing enterprises to reach a mutual agreement in the early stages and then use algorithms as a tool for subsequent enforcement and supervision.

Algorithms are a neutral tool by nature. Using algorithms for decision-making of commercial transactions can increase market transparency to make it easier for consumers to compare prices and quality. The cost of search and transactions are lowered as a result, which is pro-competitive. However, if enterprises use algorithms as a tool for concerted action, it may lead to algorithmic collusion and result in lessening of competition.

The OECD has indicated that there are 4 types of algorithms which serve to achieve collusion: monitoring algorithms, parallel algorithms, signaling algorithms, and self-learning algorithms. Recent academic papers have mainly focused on the first 2 types of algorithms[68]:

1. Monitoring algorithms

Algorithms are used to collect competitors' decision-making information, monitor potential deviation data, and design faster punishments. In such a way, unnecessary price competition can be avoided and collusion among members would

[68] ABA Antitrust Law Section, *supra* note 43, at 46-47.

be more stable, which would lead to the conspiracy agreement remaining in place for longer.

2. Parallel algorithms

As some facilitating mechanisms have the potential to be discovered, members of concerted actions may change to other alternative mechanisms, e.g. enterprises together may use the same pricing algorithm, or they may use data supplied by a third party to avoid the risk of being discovered and penalized. In such a case, the third party supplier becomes the “hub” which guides the “spokes” which originally are in competition with each other, to form a so-called hub and spoke cartel.

1. Enforcement Experience of Foreign Jurisdictions

The handful of cases in the EU and the US in which algorithms were used for collusion involve horizontal price agreement between platform operators, collusion between online sales operators and hub and spoke cartels. The products or services involved include hotel booking systems, e-book platforms, and consumer electronics.

2. The TFTC’s Enforcement Experience

The TFTC has not yet discovered cases of enterprises’ using algorithms to collude with each other or to monitor and restrain other’s business activities.

3. The Questions at Issue

When enterprises use algorithms to collude, the main issue and challenge the TFTC may face is that pricing by algorithm makes it more difficult for enforcement authorities to adduce evidence to prove the existence of collusion, especially to determine that the enterprises had reached an agreement.

4. Guiding Principles of Enforcement

(1) The TFTC will enhance its market research and industry studies. Depending on the needs of specific cases, when appropriate the TFTC may engage outside technical experts to help review the relevant codes or commands of algorithms.

A concerted action achieved through algorithms is still premised on the existence of an agreement between two enterprises. Therefore, the key of enforcement is how to obtain evidence of the communication and consensus. In the future, the TFTC can enhance its market research and industry studies to more fully understand which markets have a higher propensity to use pricing algorithms and market environments that are more prone to collude. Depending on the needs of a specific case, the TFTC can engage outside technical experts to help review the codes behind pricing algorithms to determine whether enterprises have the intent of collusion.

(2) Law amendments to strengthen the TFTC's investigation power

Although the TFTC may conduct an investigation on violations of the law pursuant to Article 27 of the Taiwan Fair Trade Act, and may impose an administrative fine on enterprises that refuse to cooperate pursuant to Article 44 of the Taiwan Fair Trade Act, there have been disputes as to whether Article 27 is also applicable to the TFTC's industry studies and studies by scholars engaged by the TFTC. Considering that correctly understanding market structure is the cornerstone of correct competition analysis in practice, and there are people who have voiced opinions that the TFTC should be given market investigation power[69], the TFTC's investigation

[69] When attending the TFTC's forum and exchanging comments on the first draft of "White Paper On Competition Policy In The Digital Economy," Professor Li-dar Wang stressed that "Industry

power may be strengthened in future amendments of the Taiwan Fair Trade Act.

Section 5 False Online Advertising

Online advertising (digital advertising) helps to enhance consumers' capability of obtaining information on goods and services, expands enterprises' opportunities to enter new markets and decreases enterprises' operation costs. But if enterprises promote using false and misleading advertising for the purpose of achieving selling goods or services, consumers are not able to make transaction decisions based on correct information, and it may also result in unfair playing field for law-abiding competitors.

Trends in the development of online advertising show significant growth in the ratio of mobile device advertising and micro-targeting through data collection and algorithms. The types of advertisements are diversified, such as social media advertising, online streams (live-stream advertising), one-page advertising, search engine advertising, portal advertising, video platform advertising and word-of-mouth marketing (endorsement advertising). In addition, bloggers and internet celebrities (including influencers on Facebook / Instagram or YouTubers) may also become targets that vendors (advertisers) seek to cooperate with for advertorials, thus making them part of the emerging online advertising trend.

1. Enforcement Experience of Foreign Jurisdictions

In 2019, from the standpoint of consumer protection in e-commerce, the OECD promulgated suggestions and guidelines focusing on four common online advertising areas to assist in consumer protection. These included Misleading

study and market research should be conducted. However, the TFTC does not have the general power to conduct mandatory industry study. Are there relevant supporting measures? Or should we suggest that law amendments be made given that the existing legal tool is insufficient?"

Marketing Practices, AD Identification, Endorsements, and Protection of Children or Vulnerable Consumers[70].

In the US, untruthful advertising is regulated under laws including Section 5(a)(1) of the FTC Act. Sections 12-15 of the same Act have special regulations focusing on advertisement for specific goods such as foods, drugs, and alcohol. Section 43(a) of the Lanham Act also regulates false and misleading advertising[71]. Moreover, the FTC has also promulgated its "Guide Concerning the Use of Endorsements and Testimonials Advertising[72]", "Statement of Policy Regarding Advertising Substantiation", "Advertising and Marketing on the Internet: Rules of the Road[73]", and ".com Disclosure: How to Make Effective Disclosure in Digital Advertising[74]" documents as relevant regulations.

2. The TFTC's Enforcement Experience

False and misleading advertising is regulated by the TFTC under Article 21 of the Taiwan Fair Trade Act, which covers the liabilities and obligations of advertisers, persons engaging in selling, transportation, exportation or importation, advertising agencies, advertising media, and endorsers. The TFTC's handling guidelines on cases of Article 25 of the Taiwan Fair Trade Act[75] also explicitly regulate Pay-

[70] OECD, "Good Practice Guide on Online Advertising. Protecting Consumers in E-commerce," Directorate for Science, Technology and Innovation Committee on Consumer Policy, (2019).

[71] The Lanham (Trademark) Act (Pub.L. 79–489, 60 Stat. 427, enacted July 5, 1946, codified at 15 U.S.C. § 1051 et seq. (15 U.S.C. ch. 22), Art. 43(a).

[72] FTC, Guide Concerning the Use of Endorsements and Testimonials Advertising, 16 CFR§255.0~§255.5.

[73] FTC, Advertising and Marketing on the Internet: Rules of the Road, Bureau of Consumer Protection, September 2000.

[74] FTC, .com Disclosure: How to Make Effective Disclosure in Digital Advertising（2013）, https://www.ftc.gov/tips-advice/business-center/guidance/com-disclosures-how-make-effective-disclosures-digital, last visited on 2021/8/2.

[75] TFTC, "The Fair Trade Commission's Handling Guidelines on Cases of Article 25 of the Taiwan Fair Trade Act", https://www.ftc.gov.tw/internet/main/doc/docDetail.aspx?uid=167&docid

Per-Click (PPC) practices. In view of the growth in the number of cases of online false and misleading advertising in Taiwan in recent years, in order to effectively regulate this advertising, the TFTC has promulgated "The Fair Trade Commission's Handling Guidelines on Online Advertisement Cases" and "The Fair Trade Commission's Explanations on Endorsement Regulations" as reference for its enforcement.

3. The Questions at Issue

(1) As new forms of online advertising move towards customization and micro-targeting "a large number of specified persons", are the prevailing Taiwan Fair Trade Act and related principles inclusive and applicable?

(2) What are the potential legal liabilities under the Taiwan Fair Trade Act for internet celebrities marketing goods (and services) through online advertising?

(3) How should the TFTC assess under the Taiwan Fair Trade Act when dispute arise from new types of activities that enterprises adopt, such as search engine optimization (SEO) techniques to increase website exposure?

(4) How to curb unlawful activities around one-page advertising? What actions have the TFTC and relevant authorities taken?

4. Enforcement Position

(1) Under Article 21 of the Taiwan Fair Trade Act, the reference to "any other way made known to the public" refers to the communication of messages that can be directly or indirectly seen or heard by a large number of specified persons, or non-specified general or relevant public through network or physical channels. As such, new forms of online advertising that target "a

=266&mid=37, last visited on August 2, 2021.

large number of specified persons" are covered by Article 21 of the Taiwan Fair Trade Act.

(2) The TFTC has listed the inspection of online untruthful advertising as one of its main enforcement priorities in recent years and will invite experts and scholars to study relevant issues at appropriate times to enhance its enforcement effectiveness. For example, with respect to online gaming advertisement, the TFTC held a forum inviting relevant authorities, enterprises, and experts and scholars to discuss verification issues of advertising of the winning odds for purchasing won-by-chance goods (or services) in October 2022.

(3) Regarding online fraud such as one-page advertising, the Executive Yuan has promulgated "The Action Plan and Strategy for Combatting Fraud in New Generation" in July 2022, under which authorities such as the Ministry of the Interior, the National Communications Commission, the Financial Supervisory Commission, and the Ministry of Justice will cooperate and collaborate to combat fraud. Should the TFTC receive complaints from the public with common features of one-page advertising fraud, the TFTC may transfer such cases to the National Police Agency of the Ministry of the Interior, based on the relevant facts and evidence surrounding criminal liability of fraud.

5. Guiding Principles of Enforcement

(1) The TFTC will improve its enforcement and investigation capability around inspection of online untruthful advertising and new forms of activities as well as pay close attention to topical (e.g., internet celebrity marketing) and the latest online advertising and related trends. This may include considering whether to add issues around internet celebrities' advertorial marketing and

advertising into the TFTC's handling guidelines on online advertisement cases and list the circumstances where internet celebrities will be deemed as advertisers and liabilities to be aware of when engaging in endorsements.

(2) The TFTC will constantly communicate with other authorities on the determination of controversies and responses to issues such as new forms of online advertising. It will also coordinate with other agency to improve the effectiveness of regulations on untruthful advertising in respective areas (such as raising the maximum amount of administrative fines for false and misleading advertising), and to regulate the market order jointly with competent authorities with different viewpoints.

(3) The TFTC will promote one-page advertising issues jointly with the National Police Agency of the Ministry of the Interior and consumer protection agencies, hoping that the occurrence of one-page advertising fraud can be curbed through the integration and synergy of inter-agency action.

Chapter IV Conclusions and Suggestions

This White Paper explores competition issues that may be triggered by tech giants from four major aspects of "platforms are intermediaries for transactions", "data is a contested resource", "Market expansion is the path to growth", and "concentration of market power is the trend in digital markets". The paper not only grasps foreign authorities' enforcement experience, but also identifies issues by comparing relevant cases handled by the TFTC and further reveals the TFTC's possible positions and guiding principles of enforcement. These are summarized below in Table 4-1).

Table 4-1 Highlights of the TFTC's positions / guiding principles

	Competition issues	Position / Guiding principle of enforcement
1	Market definition / assessment of market power	1. The substitutability of relevant products should be analyzed; the relevant markets can be defined based on the product on one side of the platform or the products on multiple sides, and the correlation and impact on the markets of the various sides should be considered. 2. Relevant markets should be defined using the reasonable substitutability test, and where appropriate, the adjusted SSNIP test should be used. 3. Geographic markets should be defined based on a holistic review of factors including language, local culture, social relationships, and after-sale services. 4. The TFTC should first use the static index to assess market power, and then, taking into account impacts of factors such as indirect network effects in the digital economy, incorporate the market dynamic index according to circumstances in each specific case. 5. The TFTC should revisit and review its handling

	Competition issues	Position / Guiding principle of enforcement
		guidelines on market definition.
2	Self-preferencing and search bias	1. Focus on whether platform operators are monopolistic and whether the goods or services they provide are essential facilities. If so, the illegality of this conduct would be relatively higher. 2. Effects of self-preferencing and search bias can be tested under the following frameworks: tie-in sale, price discrimination, refusal to deal and whether these behaviors increase competitors' costs.
3	Tie-in sale	1. Tie-in sale practices may constitute a violation of law only when the main product has market power and that power extends to the market of the "tied product" and poses a potential threat to restrict competition. 2. The lock-in effect does not necessarily mean that the relevant enterprise is dominant in the market. It is necessary to analyze the source and effect of the lock-in effect. 3. The TFTC will examine the conduct involving the extension of market power or lock-in effect to determine the impact on competition and the reasonableness of grounds for a tie-in sale.
4	Predatory pricing and inducement with a low price	1. An enterprise that conducts predatory pricing must have substantial market power and sell at prices that are regularly and consistently below cost without justifiable reasons. 2. When assessing the overall profit and loss of a platform, the profit or loss of only one side will not be used to determine the legality of the conduct. 3. Whether lower prices in the short term will be successfully compensated by higher prices in the long term will be taken into account.
5	Price discrimination	1. The TFTC has not had a case in which an enterprise has used personalized pricing in B2C relationships. At this stage, the TFTC does not consider including B2C relationships into the scope of Article 20 of the Fair

	Competition issues	Position / Guiding principle of enforcement
		Trade Act. 2. In assessing whether there are any anti-competitive effects arising from "loyalty discount schemes", the TFTC will consider factors including market position of an enterprise, network effects and the key infrastructure involved.
6	Most favored nation clauses	1. Different types of MFN clauses cause different competitive effects. Accordingly, the TFTC should define the type of clause involved in each case. 2. When dealing with cases involving an element of "having the possibility of restricting competition" as set forth in Article 20 of the Fair Trade Act, the factor of "a superior bargaining position" should not be taken into consideration. 3. Since the "agency model" involves vertical collusive relationship as well as the effect of horizontal price fixing cannot be dealt with in accordance with Article 14 of the Fair Trade Act, it is proposed to amend the laws to include vertical collusion into the scope of this article.
7	Resale price maintenance	1. The TFTC will take the applicable enterprise's market power in the relevant market into consideration. 2. The TFTC will analyze the positive effects (e.g., promoting inter-brand competition, preventing free-riding, etc.) and negative effects (e.g., facilitating collusion of retail prices) of the structural relationships between upstream and downstream enterprises and overall market competition.
8	Online sales channels	1. The TFTC will refer to the EU and the U.S. experience and list "market position (power)" under Article 28 of the Enforcement Rules of the Taiwan Fair Trade Act as the threshold for initiation of an investigation. 2. Whether an exclusive dealing is unlawful or not will be determined based on business relationships and purchasing patterns, network effects and economies of

	Competition issues	Position / Guiding principle of enforcement
		scale, and effects on consumers. 3. Whether the avoidance of free-riding is reasonable grounds for selective distribution will be determined by considering the distribution ratio of extreme consumers that opt for "high price with pre-sale services" and "low price without pre-sale services."
9	Data privacy and market competition	1. The TFTC should intervene in privacy infringement cases by platform operators only if competition is unduly restricted. 2. The TFTC will consider "privacy protection" as a factor of "quality" that affects the demand for final products or services. 3. Considering that the link between privacy and competition issues is in development, the TFTC will continue to follow relevant discussions and developments both domestically and internationally.
10	Advertisement revenue sharing with news media	1. The TFTC will actively cooperate with the coordination task force of the Executive Yuan to provide related opinions on competition issues. 2. If news media companies need to unify their bargaining power through collective bargaining, which may involve a concerted action of the industry, they may apply for concerted action exemption in accordance with the Article 15 (1) of the Taiwan Fair Trade Act. 3. The TFTC will facilitate negotiations between the news media and digital platforms within the powers of competition law authority.
11	Merger – Killer acquisitions	1 The TFTC will judge whether a start-up to be acquired by a tech giant is a potential competitor of the tech giant. 2. The TFTC will be cautious on whether to raise an objection to a merger that has already obtained the TFTC's clearance. 3. The TFTC will consider the advantages of the merger

	Competition issues	Position / Guiding principle of enforcement
		from the perspective of innovation.
12	The role of privacy in merger review	1. The TFTC has already tried to take into account the protection of privacy as part of quality competition factors. 2. The TFTC will judge whether there is competition based on the protection of privacy first, then discuss privacy issues. 3. The TFTC will seek opinions from authorities regarding privacy and consumer protection in order to review the merger from various aspects.
13	Algorithms and concerted action	1. The TFTC will enhance its market research and industry studies. Depending on the needs of specific cases, when appropriate the TFTC may engage outside technical experts to help review the relevant codes or commands of algorithms. 2. The law should be amended to strengthen the TFTC's market investigation power.
14	False online advertising	1. The TFTC will actively enforce laws on, and regulate by way of amending legislation and relevant regulations, new types of online advertising. 2. The TFTC will cooperate with other authorities to promote and strengthen the public's understanding of law and regulations. 3. Regarding one-page fraud advertisement, the TFTC has promoted one-page advertising issues jointly with the National Police Agency and consumer protection agencies, hoping that the occurrence of one-page advertising fraud may be suppressed through the integration and synergy of inter-agency action. 4. The TFTC will communicate and coordinate with relevant authorities to improve the effectiveness of regulation.

Conclusions and suggestions:

1. From the Perspectvie of Law and Regulations

Approaches that may be adopted in the short-term include:

(1) "Superior bargaining position" will not be listed as a factor to be considered when determining "likely to restrain competition" under Article 20 of the Taiwan Fair Trade Act.

(2) In cases where enterprises implement RPM, the TFTC will take the involved enterprises' market power in a relevant market into account.

(3) The TFTC will revisit and review its handling guidelines on defining relevant markets.

Laws to be amended or to face continuous promotion in the long-term are:

(1) Including vertical conspiracy into the scope of provision under Article 14 (concerted actions).

(2) Amending the law to provide the TFTC with market investigation power.

(3) After accumulating relevant enforcement experience, the TFTC will promulgate handling guidelines related to the digital economy.

(4) The TFTC will review and revise its handling guidelines on advertisement and include the issues of internet celebrities' advertorial marketing and advertising into the TFTC's handling guidelines on online advertisement.

2. From the Perspective of Enforcement Principles

Enforcement attitudes:

(1) The local nexus is more important than reproduction of others' experience

While many major countries around world simultaneously enhanced their regulatory power towards tech giants, their standpoints and purposes have not been entirely from the perspective of "competition law." Some have been influenced by

the protection of interest of domestic enterprises, some used as bargaining chips for trading, and some could be associated with the consideration of political power.

Even with the above differences in motivation, a common feature is that these "major countries" are also so-called "large economies." Although Taiwan, as a "small economy", would typically take experience of those large economies as a reference, it should at times act more in line with local circumstances.

Therefore, when referring to other countries' experience in the future, it is necessary to explore the reasons behind it and the discrepancies between each other's systems. In other words, any transplantation of foreign precedents or regulations must be adapted with Taiwan's unique economic circumstances in mind, and transplantation must be undertaken carefully and with more local empirical analysis[76].

(2) The TFTC will commit to establish the contestability of digital market

For markets where only one or two enterprises exist, , competition authorities should of course pay close attention to high market shares, yet they should not hold a predetermined view that such markets lack sufficient competition or that "bigness is badness". In addition, not only will network effects promote concentration in digital markets, but effective operation or high market entry barriers may also lead to a monopoly or oligopoly market. A multitude of competitors is merely a sufficient but not necessary condition to competitive pricing. In a digital market, what matters is not whether the market is concentrated, but whether it is contestable. Namely the authorities should lay emphasis on how to eliminate all kinds of entry barriers that would hinder the contestability or harm competition efficiency as well as make it possible for potential competitors outside the market to constrain "unlawful intention" of enterprises in the market at any time. This could influence competitive

[76] Cited from written suggestions on this White Paper from Prof. Sokol at the University of Southern California and Prof. Hsing Kenneth Cheng at the University of Florida.

prices even when there is only one enterprise in the market.

(3) The necessity of ex ante control and the role the TFTC plays will be assessed carefully

Whether the government should adopt ex ante or ex post control on a tech giant's operation should be determined by which approach incurs lower social costs and whether the government would like to play the role of "steering" or "rowing" the boat in the digital economy market. If ex ante control is adopted, whether competition authorities play the role of competent authority must be explored from the original intent of enforcement of competition law. With respect to competition law, although it is a form of government intervention, its intent is neither to supersede nor surpass the market – rather, it is to restore or facilitate mechanisms of market competition by way of breaking competition restraints. As for ex ante control, its purpose is to resolve the problem of market failure through replacing the "market" with the "government", which is clearly different from the original intent of competition law. Therefore, it should be prudently assessed if competition authorities would like to play the role of ex ante control, where competition authorities may help incorporate the goal of competitiveness into policies of ex ante control and regulators may further understand the value of competition.

As the digital economy features frequent innovation, short life cycles, and noticeable dynamic competition, the best enforcement principle at this stage is "issue-driven". This includes resolving problems based on each case, absorbing new knowledge under existing analysis structure, studying new analysis tools, and refining the standards of lawfulness for each kind of potential anti-competitive activity.

(4) International cooperation and domestic collaboration

No country or area can distance itself from every move of tech giants, nor can a single country or area properly address disputes arising from them. The best and

only resolution to achieve the desired goal is through two-sided, plural-sided, or multi-sided international cooperation, which needs to be supported by the importance of collaboration among domestic agencies. This is because a feature of the digital economy, i.e., cross-marketing operations, will make the extent of disputes no longer limited to "competition". Competition will be one part of disputes, making it impossible for single authorities to address all issues. To resolve issues as well as the underlying root causes, relevant domestic agencies are required to collaborate. The collaboration required under news media revenue-sharing is a key example.

The establishment of enforcement capability:

(1) Revisit the nature of competition and refine the capability of analysis

In the environment of the digital economy, competition among enterprises no longer reflects competition between each product, but competition across the ecosystem as a whole. For example, competition between Apple's iOS system and Google's Android system. The reasons for this are as follows:

- Due to several services at a "zero price", price competition is not as important as it used to be. The focus of competition has turned to non-price aspects, such as the diversity of products, the quality of products and services, and choices for consumers.
- Due to competition driven by innovation, those enterprises not able to keep up are easily replaced by new competitors with "disruptive innovation", and the new enterprises may be able to obtain excessive profits because of its innovation. Therefore, we do not absolutely hold negative attitudes towards excessive profits, even if such profits are incurred from a monopoly market structure, since the digital economy is so "dynamic" and this phenomenon is likely only temporary. A strict view towards excessive profits will only lead to innovation being hampered.

- Due to cross-market competition, uni-direction has occurred in competition. Those who beat an enterprise are often not the enterprise's own direct competitors but enterprises from another different area. Just like Kodak was not defeated by Nikon but by cellphone enterprises.

Competition in the digital economy market is no longer the same as in the traditional economy, and it can hardly be assessed by simply following the traditional analysis methods and mindsets. Law enforcers should view market competition from a more macro-viewpoint and relevant analysis abilities should be strengthened to do so.

(2) Strengthen digital enforcement capability by introducing information technology and talents

Business models under the digital economy are getting more diversified and more complex. This is especially so as technologies such as artificial intelligence, big data, block chain, and algorithms have been commonly adopted by enterprises. It is particularly important for competition authorities to leverage the above technical enforcement technologies to enhance their capabilities around investigation, analysis, and rectifying anti-competitive activity.

Therefore, a priority should be to enhance TFTC colleagues' knowledge in digital technology and to train cross-area talents in laws, economics, and information. Although the TFTC is less likely to directly establish relevant positions or departments for information technology in short-term (like foreign authorities have), we may cooperate with and ask professional comments from external technology experts on specific cases, from which we may improve digital enforcement capability.

Moreover, the TFTC should also undertake education and training on digital technology enforcement, train professional talents across the areas of economies, laws and digital technology, and cooperate with external technology experts to

establish complete technology enforcement tools and capability, so as to respond to the rapidly changing technologies and environment in the digital economy.

The TFTC's positions and guiding principles of enforcement will evolve, and appropriate responses and adjustments will be made from time to time in response to the development and transformation in the economy and industries.

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