

Recent digital economy policy developments and enforcement actions in Taiwan

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Introduction

The rise of digital technologies, notably e-commerce and algorithms, has brought increased attention to competitive challenges. Consequently, competition authorities across different jurisdictions have embarked on the task of developing policies to address these potential competition issues. In line with this collective effort to establish a regulatory framework, the Taiwan Fair Trade Commission (TFTC) released the White Paper on Competition Policy in the Digital Economy

on 20 December 2022 (the White Paper).¹ The White Paper starts with the TFTC's observation of the development and characteristics of the digital economy. It goes on to outline the TFTC's observations, considerations and concerns regarding competition with the digital economy. It suggests possible approaches to address these emerging competition issues, shedding light on the TFTC's enforcement position based on how it views the market reality in the digital economy.

This article aims to summarise the key competition issues highlighted in the White Paper, focusing on three major aspects – abuse of a dominant position, merger and concerted action – and offers insights on the TFTC's recent practices concerning the digital economy.

Abuse of dominant position

Within the White Paper, the TFTC discusses nine issues aimed at evaluating the effectiveness of existing and/or proposed Taiwan competition laws in controlling the abusive practices by online platforms. We provide a summary of five key issues as follows.

Self-preferencing and search bias

Self-preferencing occurs when online platforms favour their own services or products over those offered by competitors, potentially hindering fair competition in the market. The White Paper clearly states that self-preferencing and search bias are not *per se* illegal.² To assess whether a platform operator's self-preferencing and search bias practices are abusive, the TFTC considers it necessary to examine whether these actions fall within the framework of existing regulations outlined in the Taiwan Fair Trade Act (TFTA), such as tie-in sale, price discrimination and refusal to deal, among others.³

Specifically, the TFTC states that it is required to ascertain whether the platform operator qualifies as a monopolistic enterprise under the TFTA, and whether the platform, by means of manipulating algorithms, reaches biased search results aimed at preventing other enterprises from participating in fair competition.⁴ To facilitate this process, the TFTC outlines in the White Paper its commitment to enhancing its enforcement capabilities by gaining a deeper understanding of the

1 'White Paper on Competition Policy in the Digital Economy' (Taiwan Fair Trade Commission, 2022), see www.ftc.gov.tw/upload/e864a976-bba1-4433-aeb6-6ff8c0811977.pdf (in Chinese, accessed 16 October 2023); an English summary is available at www.ftc.gov.tw/upload/420797f3-a37e-41d2-a9b9-ab51d1c77b47.pdf (accessed 16 October 2023).

2 *Ibid*, 162–163.

3 *Ibid*, 163.

4 *Ibid*, 164.

technical and practical aspects of algorithmic processes, which will enable them to effectively evaluate cases involving self-preferencing and search bias.⁵

Most favoured nation clauses

Most favoured nation (MFN) clauses are contractual agreements in which one party commits to providing the other party with terms at least as favourable as those offered to any other counterpart. The TFTC maintains that the impact of MFN clauses is not inherently pro-competitive or anti-competitive.⁶ Rather, their practical consequences can vary depending on the specific nature of these clauses.⁷ As such, the TFTC advocates in the White Paper for a rule-of-reason analysis to assess the compliance of MFN clauses with the TFTA.⁸

Furthermore, the White Paper addresses the TFTA's approach to platform operators engaged in vertical agreements, taking into account that Article 14 of the TFTA exclusively prohibits horizontal concerted actions.⁹ The White Paper suggests that the TFTA may draw inspiration from US legislation (such as the Sherman Act) and EU legislation, and considers the possibility of extending the scope of Article 14 of the TFTA to encompass all parties involved in vertical concerted actions.¹⁰

Online sales channels

Dominant online platforms can employ various strategies to eliminate actual or potential competitors within the markets, which can raise concerns related to exclusive dealing or other similar vertical restraints.¹¹ In the White Paper, the TFTA emphasises that exclusive dealing arrangements or other similar vertical restraints may not solely serve the purpose of excluding competitors but can also aim to prevent other competitors from 'free riding', which can be beneficial to consumers.¹²

Despite this, the White Paper indicates that, even if a digital platform does not engage in exclusive dealing agreements with the majority of its counterparts in the relevant market, the sheer number of such agreements or the proportion of exclusive counterparts to all counterparts can still result in a significant impact on market foreclosure or impede the entry of new players.¹³ Therefore, when evaluating exclusive dealing arrangements or other similar vertical restraints, the

5 *Ibid*, 164.

6 *Ibid*, 75–76.

7 *Ibid*, 68.

8 *Ibid*, 175–176.

9 *Ibid*, 178.

10 *Ibid*, 178.

11 *Ibid*, 85.

12 *Ibid*, 86.

13 *Ibid*, 90.

TFTC asserts the importance of considering several factors, including the scope of exclusive dealing arrangements, marketing strategies, and price changes.¹⁴ Moreover, the TFTC also notes that it is necessary to conduct a comprehensive assessment based on the specific circumstances of the case, in order to determine whether there is any infringement of the TFTA.¹⁵

Data privacy and market competition

One antitrust debate that has garnered international attention is the role of competition law in addressing privacy infringements by platform operators. In the White Paper, the TFTC emphasises that it will intervene in cases of platform operators' privacy infringements only when such actions unduly restrict competition.¹⁶

Regarding enforcement measures, the TFTC mainly looks at how platform operators' privacy protection measures might affect the demand for final products or services they offer, in order to gain a deeper understanding of the role of privacy in competition and its overall impact.¹⁷

The TFTC takes a cautious approach on addressing privacy issues involving platform operators. As detailed in the White Paper, they choose to intervene only when there are clear facts demonstrating that the privacy problem has a discernible impact on a particular market or seriously disrupts fair trade.¹⁸

Advertisement revenue sharing with news media

Within the White Paper, the TFTC also examines the regulatory framework concerning the digital advertising technology supply chain. This pertains to situations where digital platforms capture users' attention through content provided by news media and subsequently generate revenue by selling advertising space, prompting questions about whether this revenue should be shared with the content providers.¹⁹

The Executive Yuan, the highest executive body in Taiwan, has formed a cross-agency task force to address the development of domestic industries with large digital platforms. The TFTC participates in the task force and provides opinions on competition-related issues.²⁰

The TFTC's position, as outlined in the White Paper, addresses the scenario where new media companies find it necessary to engage in collective bargaining to

14 *Ibid*, 183–184.

15 *Ibid*, 183–184.

16 *Ibid*, 188.

17 *Ibid*, 188.

18 *Ibid*, 191.

19 *Ibid*, 103.

20 *Ibid*, 192.

strengthen their negotiating position, potentially constituting a concerted action within the industry.²¹ The White Paper emphasises that news media companies can seek TFTC's approval for such concerted actions in accordance with the TFTA. Additionally, if digital platforms refuse or delay negotiations during this process, the TFTC retains the authority to investigate whether such actions constitute an abuse of their dominant position.²²

Merger

In the White Paper, the TFTC also addresses the significant issue of 'killer acquisitions', where established companies acquire new businesses to pre-empt potential competition. The TFTC maintains a neutral stance on this matter, acknowledging that killer acquisitions can have both negative and positive impacts.²³ The discussion in the White Paper regarding killer acquisitions centres on several key themes. These include determining how competition authorities should assess whether a startup purchased by a tech giant could indeed become a future competitor, and how the TFTC should scrutinise acquisitions of startups by tech giants.²⁴

To assess whether a merged startup could be a potential competitor, the TFTC expresses that it will consider various perspectives, including those of other potential acquirers and impartial third parties.²⁵ Additionally, the commission will also gather up-to-date information to the best extent possible. In cases where concerns about competition restriction arise from a killer acquisition, the TFTC may impose remedies or conditions on the merger to mitigate these concerns.²⁶

When reviewing killer acquisitions, the TFTC states that it will investigate whether the level of killing potential competition in the local market is the same or similar to those in other countries, and whether it is truly necessary to restrict such behaviour by applying competition law as other countries have done.²⁷

21 *Ibid*, 192.

22 *Ibid*, 192–193.

23 *Ibid*, 111–112.

24 *Ibid*, 120–121.

25 Pursuant to Section 12 of the TFTC Merger Guidelines, when assessing the anti-competitive effects of a conglomerate combination, the TFTC considers whether there are important potential competition possibilities. Factors include (1) the possibility of change in laws and the impact thereof on the parties' conglomerate operation; (2) the possibility that technical advancements enable parties' conglomerate operation; (3) conglomerate operation plans that the parties already have; and (4) other factors that affect important potential competition possibilities.

26 White Paper, 195–196.

27 *Ibid*, 197.

Algorithms and concerted action

In the White Paper, the TFTC highlighted the risks associated with the use of data and computer algorithms, which can lead to new forms of collusion among enterprises. A key challenge identified by the TFTC is that, when businesses employ algorithms for pricing decisions, it becomes more challenging for enforcement authorities to gather evidence demonstrating the existence of collusion.²⁸

The TFTC outlines its commitment in the White Paper to enhance its market research and industry studies. Depending on the specific needs of individual cases, the TFTC may also seek the assistance of external technical experts to review the relevant code or commands used in the algorithms.²⁹

Furthermore, recognising that a correct understanding of market structure is crucial for accurate competition analysis in practice, there have been suggestions that the TFTC should be granted the power to conduct market inquiries. The TFTC indicates in the White Paper that it may seek to strengthen its investigative authority in future amendments to the TFTA.³⁰

The TFTC's practice regarding market definition – *Foodpanda*³¹

In September 2021, the TFTC issued a decision against Foodpanda for, among other things, imposing a requirement on its restaurant partners to charge the same price to consumers eating at restaurants and those ordering the same food through Foodpanda. The *Foodpanda* decision is noteworthy in the sense that it deals with many issues covered by the White Paper. We analyse these issues as follows.

*Market definition with two-sided platforms*³²

In *Foodpanda*, the TFTC found that when a delivery platform recruits more restaurants to join the platform, more consumers will be attracted to download the delivery platform's app, visit the delivery platform's website, and order food through the delivery platform, and more consumers joining the platform will attract more restaurants to join the platform, resulting in positive feedback. Since the demand for the platform from both sides is not only affected by the service and price provided by the platform itself, but also by the demand for the platform from the other end, it is important to consider the interaction of the demand

28 *Ibid*, 134.

29 *Ibid*, 201–202.

30 *Ibid*, 203.

31 TFTC Decision, Gong Chu Zi No. 110066 of 23 September 2021.

32 *Ibid*, 9–10.

from both ends of the platform in defining the market, which is different from the traditional unilateral market definition.

To determine whether to define the two sides of the delivery platform as separate markets, the TFTC distinguished between transaction platforms (where users on both ends of the platform engage in direct and simultaneous transactions through the platform, such as credit card systems connecting buyers and sellers) and non-transaction platforms (such as news media relying on support from advertisers). The TFTC observed that delivery platforms play the role of an intermediary between restaurants and consumers: consumers select restaurants through delivery platforms, place orders for meals, the orders are transmitted to the restaurants, and the meals are delivered to the consumers' designated places by delivery staff from the delivery platforms. Therefore, the definition of one 'platform market' can be adopted, and it is not necessary to define the market separately for each end of the platform.

*Scope of the product market*³³

The TFTC then proceeded to identify the scope of the product market. Effectively, the TFTC adopted the hypothetical monopolist test as it did in many cases. The process of defining a product market begins with the products or services provided by the business concerned that is relevant to the conduct under investigation, and progressively adds products or services that are reasonably substitutable for the product or service in question to the original provisional market scope, until products or services outside the market are unable to exert competitive pressure on the products or services within the market.

The TFTC started with delivery platforms, which, in addition to Foodpanda's platform, also included UberEats, Foodomo, Cutaway, etc. During the investigation, Foodpanda contended that, in addition to delivery platforms, consumers can order takeaway meals from restaurants through various channels for delivery or takeaway to places other than the restaurants – including direct engagement via the restaurant's website or by phone – or the consumers can also order the food from the restaurant for in-person takeaway. Foodpanda argued that the market for the product in question should cover all alternative options for enjoying meals at home, and should therefore be defined as the market for 'eating at home', or at least the market for ordering meals by phone or on the restaurant's own website: ie the market for 'remote ordering'.

Among the alternatives cited by Foodpanda, the closest alternative to the delivery platform's function would be for the consumer to order food through the restaurant's website or by phone, and for the restaurant to deliver the food to the

³³ *Ibid*, 10–12.

consumer's designated premises. However, this option is not a reasonable substitute for ordering food through the delivery platform for both consumers and restaurants for the following reasons. From the consumers' perspective, consumers ordering food through a restaurant's website or by phone can only choose a single type of cuisine and a single restaurant's serving of food, whereas consumers ordering food through the delivery platform's app or website can choose different types of cuisine and different restaurants' servings of food, both of which provide choices. In addition, many restaurants have a minimum order quantity for delivery service, and consumers who order less than the delivery threshold cannot use the delivery service provided by the restaurant. For restaurants, maintaining a delivery service requires a fixed cost for delivery vehicles and the salaries of delivery staff to reach a significant level of operational scale to be cost-effective, but using a delivery platform to provide delivered meals can overcome the problem of not reaching economic scale. Many restaurant chains that provide their own online ordering and delivery services have also joined delivery platforms, such as McDonald's and Pizza Hut, indicating that the relationship between a restaurant's own online ordering and delivery services and delivery platforms is one of complementarity rather than substitution.

As for Foodpanda's argument of substitution by in-person takeaway, the TFTC stated that consumers have to pay a delivery service fee for ordering food through delivery platforms, and consumers prefer delivery platforms to picking up the food at the restaurant in person, precisely because of the consumer preference for not having to go out of the house: this was even more obvious during the pandemic. Even if there is a potential for substitution by in-person takeaway, this potential for competition is rendered ineffective by the fact that Foodpanda has required restaurants to match their prices on Foodpanda's platform with in-store prices, as discussed below.

For the foregoing reasons, the TFTC defined the product market in this case as the market for 'food and beverage delivery platform'.

*Geographic market*³⁴

The TFTC also adopted the hypothetical monopolist approach in defining the geographic market. The service area provided by Foodpanda's delivery platform covers all counties and cities in Taiwan, and the service area provided by its main competitor, UberEats, is roughly the same as that of Foodpanda's. The service coverage of other new delivery platforms focuses on metropolitan areas with higher population densities and a higher concentration of shops. Despite the spatially limited nature of delivery services, and the pressure on Foodpanda to compete in

³⁴ *Ibid*, 12.

different regions due to the different service coverage of the delivery platforms, the geographic market in this case does not need to be subdivided into regions or counties and cities because:

- Foodpanda does not charge consumers different rates for delivery services according to the regions or counties and cities;
- Foodpanda's free shipping offer is mainly a nationwide promotion; and
- the advertisements produced by Foodpanda are nationwide advertisements.

For these reasons, the TFTC defined the geographical market as national.

Observations

In deciding how many markets to define, the TFTC's practice in *Foodpanda* is generally consistent with its enforcement position in the White Paper: considering the relationships and impacts of the various sides of the delivery platform, the TFTC distinguishes between transaction and non-transaction platforms. In the digital economy context, this would support the definition of one platform market for other platforms through which the two ends deal, eg transportation platforms such as Uber.

In deciding the scope of the relevant market, the availability of multiple restaurants on the delivery platform played an important role when the TFTC refused to broadly define the market as the market for 'eating at home'. In the TFTC's view, such convenience offered by the delivery platform renders the substitutability of direct engagement (ie, directly ordering with the restaurants) so low that the latter would not be able to exert competitive pressure. As it is the general nature of a transaction platform that multiple users on one end are simultaneously available to users on the other, it is important to note that the TFTC may be reluctant to define a broader market that includes direct engagement.

The geographic market in *Foodpanda* was defined as national largely due to the uniformity of Foodpanda's business practices across Taiwan. It is noteworthy that the spatial limitation of delivery services did not cause the TFTC to define a narrower geographic market (eg, by city), which reflects the importance of platforms' business practices across Taiwan.

The TFTC's practice regarding market power – *Foodpanda*

*Network effect*³⁵

According to the TFTC, due to the nature of 'two-sided market' and 'indirect network effect', when a delivery platform recruits more restaurants to join the

³⁵ *Ibid*, 13.

platform, more consumers will be attracted to the delivery platform, which in turn will attract more restaurants to join the platform, resulting in positive feedback, or even leading to market tipping. In light of the considerable number of Foodpanda's users on both ends of the platform, and through the indirect network effect between the two ends of the delivery platform, the competitive advantage brought by the economy of scale is further strengthened.

*Entry barrier*³⁶

Potential competitors wishing to enter the delivery platform market will have to overcome the challenges of developing a platform system, organising a delivery fleet or obtaining delivery energy, and building brand awareness. They will also face a deadlock: no consumer will be willing to use a delivery platform with a small number of restaurants, and no restaurant will be willing to join a delivery platform with a small number of consumers. How competing platforms can attract both consumers and restaurants to their delivery platforms is a major barrier to entry.

*Conclusion on market power of Foodpanda*³⁷

In summary, the TFTC found Foodpanda's market share substantial (though it redacted the actual figure in its publicised decision), has a large customer base at both the consumer and restaurant ends, and has a competitive advantage brought about by the indirect network effect. In addition, due to the impact of the pandemic, the delivery platform has become the most important sales channel for restaurants. Therefore, the TFTC recognised that Foodpanda has substantial market power.

Observations

In *Foodpanda*, the TFTC started conventionally with market shares when evaluating Foodpanda's market power, and went on to consider two characteristics of platforms that contributed to market power.

In the view of the TFTC, the network effect caused by the interaction of the two sides of the delivery platform may result in market tipping, and supported the finding of market power when the platform already has a substantial market share. As network effect is a common feature of platforms, the implication here is that market share may play a more important role when assessing the market power of a platform than it would when assessing the market power of a non-platform undertaking.

³⁶ *Ibid*, 14.

³⁷ *Ibid*.

Implicitly, network effects also created entry barriers in *Foodpanda*. The TFTC's assessment of entry barriers implies that Foodpanda's competitive advantage yielded by network effects corresponds to the disadvantage faced by its (potential) competitors. Again, as network effect is a common feature of platforms, entry barriers are likely to enlarge the anti-competitive effect of high market shares.

One important feature of platforms mentioned in the White Paper was, nonetheless, not explored in *Foodpanda* – multi-homing. Conceivably, a consumer may install multiple delivery apps on their mobile device, which means that multi-homing does not seem to be a factor that can be precluded (that said, to assess multi-homing in *Foodpanda*, one arguably has to consider the number of restaurants that signed the contract with Foodpanda before Foodpanda's competitors started operation in Taiwan, ie when the effect of multi-homing was weaker). The role of multi-homing in the TFTC assessment of market power remains a point worthy of continued observation.

The TFTC's practice regarding abuse of market power — most favoured customer clause (MFCC) in *Foodpanda*

In *Foodpanda*, complaints to the TFTC concerned Foodpanda's practices:

- to require prices listed by restaurants on the Foodpanda platform to match the restaurants' in-store prices (in-store price matching), and
- to prohibit restaurants from rejecting customers' pick-up orders, whereby customers order through the Foodpanda app and subsequently pick up the order at the restaurants (compulsory acceptance of pick-up orders).

The TFTC found that these practices infringed Article 20(5) of the TFTA, which prohibits imposing improper restrictions on counterparties' business activity as part of the requirements for trade engagement.

In-store price matching

CONTENT OF THE INFRINGEMENT³⁸

The TFTC found that Foodpanda's January 2020 contract with restaurants contains clauses that (1) required restaurants' prices on the Foodpanda platform to match in-store prices, and (2) provided for a penalty for non-compliance. Although Foodpanda contended that a later version of the contract removed these clauses, the TFTC found that the practice persisted based on the feedback from its interviews during investigation.

38 *Ibid*, 14–17.

ANTI-COMPETITIVE EFFECT³⁹

The TFTC found in-store price matching to be anti-competitive for the following reasons.

First, the restaurant will not be able to set different prices for customers who use the Foodpanda platform, including those pick up their takeaway in person, those who order the restaurant's delivery, and those who order food through Foodpanda, and restaurants will not be able to carry out selective promotions in accordance with its own business strategy.

Second, restaurants will not be able to adjust the cost difference between different sales channels, such that consumers who do not use the delivery service of Foodpanda's platform have to pay the same price as those who use Foodpanda's platform, which is tantamount to sharing the commission charged by Foodpanda, resulting in a price distortion.

Third, the commission charged by Foodpanda to the restaurant is averaged through the price of the meal. Since the commission is spread evenly among all restaurant consumers through the price of meals, Foodpanda does not need to worry that an increase in the commission will cause consumers to switch to in-restaurant or take-out restaurants, because the price of eating at restaurants or ordering takeaway will not be lower. Therefore, Foodpanda has a greater incentive and ability to increase the commission.

Fourth, the price of the restaurant's in-restaurant or take-out restaurants, and other direct sales channels, is usually the price floor of the various sales channels. In-store price matching indirectly guaranteed that the price posted by the restaurant on other delivery platforms would not be lower than the price posted on Foodpanda's platform, which resulted in an effect similar to that of an 'across-platform parity agreement', whereby even if another delivery platform charged a lower commission, the restaurant would not lower the price thereon. In other words, other delivery platforms will not be able to obtain more orders by charging a lower commission because consumers will not be able to enjoy the benefits of the lower commission reflected in the price of the meal. Consequently, the most rational choice for consumers is to continue to use the delivery platform with a larger number of restaurants and enjoy the benefits of the network effect, which will indirectly weaken the incentives and ability of other delivery platforms to compete with Foodpanda.

39 *Ibid*, 17–20.

*Compulsory acceptance of pick-up orders*CONTENT OF THE INFRINGEMENT⁴⁰

In August 2019, the Foodpanda platform launched the ‘customer pick-up’ function, which allows consumers to order food through the platform and then pick up the food from the restaurant. The function is enabled by default and cannot be disabled by the restaurant itself. According to the results of the TFTC’s questionnaire survey, almost all the restaurants interviewed indicated that they had been forced by Foodpanda to turn on the ‘customer pick-up’ service.

ANTI-COMPETITIVE EFFECT⁴¹

In addition to Foodpanda’s substantial market share, through the indirect network effect between the two ends of the delivery platform, Foodpanda has been able to further strengthen its competitive advantage brought about by the economy of scale and has gained a certain degree of market power. Foodpanda’s compulsory acceptance of pick-up orders will force restaurants to compete with themselves. Since most of the customers who order through ‘customer pick-up’ are the restaurant’s original customers, by accepting ‘customer pick-up’ orders, the restaurant not only fails to expand its market or develop new customers, but also has to pay Foodpanda an additional commission. The use of the commission received from the restaurants to subsidise and encourage the use of ‘customer pick-up’ will result in the restaurant’s original customers switching to ‘customer pick-up’ ordering on Foodpanda’s platform, and will have the effect of restricting competition as Foodpanda will be able to receive a higher commission.

Observations

Two findings of the TFTC are noteworthy here.

First, substitution between platforms and direct engagement was asymmetric: direct engagement did not exert enough competitive pressure on platforms for them to be defined as the same market (and alternatively, in-store price matching had disabled any competitive function of direct engagement), but a platform’s practice could exclude ‘competition from direct engagement’, as is the case with both in-store price matching and compulsory acceptance of pick-up orders in *Foodpanda*. These imply that the TFTC may define a narrow market for platforms but find anti-competitive effect on ‘competitors that are not in the market’. However, while the TFTC found that in-store price matching would enable Foodpanda to

⁴⁰ *Ibid.*, 20.

⁴¹ *Ibid.*, 20–21.

raise commissions because it would not lose consumers to direct engagement, it is not entirely clear whether such finding is consistent with the TFTC's finding in market definition that direct engagement did not exert sufficient competitive pressure on platforms, especially considering the TFTC's enforcement position in the White Paper that market research of demanders (including consumers) may be a good way to determine the appropriate product market. As to the TFTC's finding that in-store price matching had disabled any competitive function of direct engagement, it remains a question whether market definition should be affected by finding of infringement, and whether there were restaurants not subject to the infringement that may still compete with platforms.

Second, the indirect effect of the MFCC in this case causing price matching across platforms was found to be anti-competitive because the network effect on Foodpanda's platform would cause consumers to prefer Foodpanda's platform, to the detriment of competing platforms. This implies that even where a platform does not restrict user's behaviour on other platforms, the TFTC may still find indirect effect to the competitive disadvantage of competing platforms based on the network effect that may attract users to a platform already having a certain market position.

The TFTC's practice in merger control

Background – the rise of online banking

After the Taiwanese financial regulator (the Financial Supervisory Commission) granted the licences to establish pure online banks, the establishment of three online banks as joint ventures was proposed. These are, respectively:

- LINE Bank, a joint venture of a fintech company (LINE Financial, a member of the LINE group, which also operates LINE, one of the most popular instant communication apps in Taiwan), banks (Union Bank, China Trust, Standard Chartered) and telecommunication companies (Taiwan Mobile and Far East Tone);
- Rakuten Bank, a joint venture of a bank (Rakuten Bank), a credit card company (Rakuten Card) and a financial holding company (IBF Financial Holdings); and
- NEXT Bank, a joint venture of a telecommunication company (Chunghwa Telecom), banks (Mega Bank, Shin Kong Bank, KGI Bank), an insurance company (Shin Kong Life), a retailer (PX Mart), a trade and custom clearing company (Trade-Van Information Services), a security company (Shin Kong Security), and a natural gas company (Taipei Gas).

Eventually, the TFTC cleared all three transactions. In its review, the TFTC discussed the competitive advantage conferred by data, and whether privacy had become a competitive concern.

*LINE Bank*⁴²

Considering that none of the parties to this transaction potentially compete with banks, the TFTC found no overlap.

In LINE Bank, the TFTC considered whether the link from the LINE app to LINE Bank services would create bundling concerns. However, the TFTC found that LINE app users could decide whether to open a LINE Bank account, and that the LINE app does not hinder the access to LINE users of competing online banks. LINE Bank's competitors could still cooperate with other app developers or develop its own app to access LINE app users. Thus, the TFTC did not find this to be a hurdle to competition.

The TFTC also considered whether the data accumulated by the LINE group would create competition concerns. In the TFTC's view, although LINE Bank could use data accumulated by the LINE group to discover customer needs and provide suitable services, such data could be gathered from other sources or replaced by other data. Competitors could still obtain user data by collaborating with other providers of communication apps, social networks, search engines or shopping websites. Thus, LINE group's data did not provide LINE Bank with competitive advantage that could not be overcome by its competitors.

As to privacy and data protection, taking into account that the parties' industries were instant communication, banks, and telecommunications, the TFTC found no indicium that the LINE app or LINE group were competing with other parties on data protection. Hence, the TFTC found that this transaction would not eliminate competitive pressure on data protection.

*Rakuten Bank*⁴³

This merger concerns a joint venture (JV) between the Rakuten group and the IBF group. Finding that Rakuten group did not compete with the IBF group, the TFTC considered whether the link between services of Rakuten Bank, the JV, and the Rakuten group would create competitive concerns. The TFTC found that the respective services of the Rakuten group had limited market share in Taiwan and faced fierce competition, and thus that there would be limited effect

42 *LINE Bank*, TFTC Decision of 18 December 2019, reported in TFTC Electronic News Letter No. 146, available at www.ftc.gov.tw/upload/1090506-2.pdf (in Chinese; accessed 16 October 2023).

43 *Rakuten Bank*, TFTC Decision of 29 April 2020, reported in TFTC Electronic News Letter No. 153, available at www.ftc.gov.tw/upload/1090819-2-1.pdf (in Chinese; accessed 16 October 2023).

of extension of market power. Furthermore, the IBF group's existing clients were mostly corporate clients or high net value individuals, whereas online banks mostly target potential clients that had not been engaged by traditional banks (eg those who did not have a bank account, or those who did not have credit records), or clients whose needs were not met by services of traditional banks (eg those who don't need the services of physical banks, but instead require access to financial services via mobile devices). Considering the differences in target customers, the TFTC had little concern around bundling of online banking services.

The TFTC also considered whether the data accumulated by the parties would create competition concerns. In the TFTC's view, although Rakuten Bank could use data of clients of the Rakuten group and IBF Financial Holdings to discover customer needs and provide suitable services, such data could be gathered from other sources or replaced by other data. Competitors could still obtain user data by collaborating with other providers of communication apps, social networks, search engines or shopping websites. Thus, the parties' data did not provide Rakuten Bank with competitive advantage that could not be overcome by its competitors.

As to privacy and data protection, the TFTC found no indicium that the parties competed on data protection pre-merger. Hence, the TFTC found that this transaction would not eliminate competitive pressure on data protection.

*NEXT Bank*⁴⁴

Although the parties to this merger include several traditional banks, their market shares in deposits, loans, credit cards, etc were not substantial. In addition, they did not plan to transfer existing businesses to NEXT Bank, had already devoted resources to develop digital financial services, and did not have overlapping customers with NEXT Bank. Thus, the TFTC did not find it likely that post-merger, the JV partners would cease their existing digital financial services, or have lower incentives to innovate on digitalisation, and would not lead to reduction of competition or foreclosure.

In light of financial regulations restricting non-financial undertakings to enter the financial services market, the merger would not eliminate competition between financial and non-financial parties. Although NEXT Bank sought to create a daily consumption ecosystem, the parties were open toward new collaborating partners, and to increase the number of users, the parties are unlikely to limit their collaboration to NEXT Bank. On these grounds, the TFTC found no hindrance of competitors' collaboration with NEXT Bank.

⁴⁴ *NEXT Bank*, TFTC Decision of 18 December 2019, reported in TFTC Electronic News Letter No. 145, available at www.ftc.gov.tw/upload/1090415-2.pdf (in Chinese; accessed 16 October 2023).

The TFTC also considered online banks' advantage in its access to massive client data that would support its loan assessment or cross marketing. In the TFTC's view, although NEXT Bank could use data of the parties' clients to discover customer needs and provide suitable services, such data could be gathered from other sources. Thus, the parties' data did not provide Rakuten Bank with competitive advantage that could not be overcome by its competitors.

As to privacy and data protection, the TFTC found no indicium that the parties competed on data protection pre-merger. Hence, the TFTC found that this transaction would not eliminate competitive pressure on data protection.

Observations

In the White Paper, the TFTC has recognised the competitive advantage that data could confer. In all three cases above, the TFTC found that data was not an entry barrier because it could be gathered from different sources to which competitors had access. This implies that accessibility of data is a factor in determining whether data constitutes an entry barrier, in particular in cases where data is an important element for market competition of the industry. Notably, the TFTC did not require the parties' competitors to 'already possess the data' or 'be able to generate the data on their own', but rather found that competitors could obtain data through collaboration with other undertakings. This position is especially reflected in *LINE Bank*, where LINE Bank would have access to data generated by an instant messaging service, a resource not generally accessible to competing banks.

The issue of data protection was also discussed, albeit not explored in detail. In all three cases, the TFTC found that the parties did not compete on data protection, so logically the mergers could not restrict competition on data protection. However, the TFTC has acknowledged that data protection can be a competition parameter, which is in line with its enforcement position in the White Paper. In future mergers, if there is evidence that the parties have competed on data protection (eg advertisement of their advantages in data protection), the TFTC may recognise competition on data protection, and then further assess whether the merger would eliminate such competition. Meanwhile, though not an issue in the online bank mergers, if a merger can facilitate data protection, it is still possible to argue that this constitutes benefit to the economy (which does not have to be benefit to competition, but could include broader economic aspects such as industrial development) to be weighed against anti-competitive effects.

Conclusion

The TFTC's enforcement position has been made clearer by the picture of the TFTC's observation, considerations, concerns and possible approaches regarding competition with the digital economy in the White Paper. From its recent enforcement actions, it seems that the TFTC has not expressly created new competition rules that apply exclusively to the digital economy. That said, the characteristics of the digital economy played an important role in the TFTC's formation of its enforcement decisions, of which undertakings can make use in future TFTC investigative or merger proceedings.