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HEARING ON ACROSS PLATFORM PARITY AGREEMENTS

-- Note by Chinese Taipei --

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More documents related to this discussion can be found at www.oecd.org/daf/competition/competition-crossplatform-parity.htm

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-- Chinese Taipei --

1. Vertical Restrictions in Across Platform Parity Agreements in e-Commerce

1. The e-commerce market is growing increasingly prosperous. As the market entry threshold is lower than that for brick-and-mortar retailers, online businesses are numerous and price competition is fierce. Meanwhile, as access to the Internet and smartphones become more and more prevalent, product information is readily available and transparent, making it easy for consumers to search for products and compare prices on online platforms at the lowest cost. However, price competition between online stores also has an effect on the profitability of horizontal competitors. For this reason, vertical restrictions imposed through so-called across platform agreements have appeared, such as upstream suppliers (including manufacturers and agents) imposing restrictions on the prices of online retailers or price competition between horizontal competitors online.

2. The cases involving across platform parity agreements that the Fair Trade Commission (FTC) has processed can be categorized into three types of practices: 1) restricting retailers' resale prices on online platforms, 2) informing online platform operators of competitors' infringement of intellectual property rights and then sending suggested retail prices to coerce such competitors into adopting suggested prices to prevent price-undercutting competition, and 3) using contract stipulations to restrict retailers' online sales activities to achieve the purpose of price monitoring.

2. Use of Contract Stipulations to Restrict Retailers' Resale Prices on Online Platforms

3. As set forth in Paragraph 1 of Article 19¹ of the Fair Trade Act (FTA) of Chinese Taipei, "An enterprise shall not impose restrictions on resale prices of the goods supplied to its trading counterpart for resale to a third party or to such third party for making further resale. However, those with justifiable reasons are not subject to this limitation." If enterprises set the resale prices of goods they supply and at the same time adopt certain measures to ensure that their trading counterparts adhere to such prices, it will be impossible for sellers to determine their prices in accordance with the competition they face and their cost structures. As a consequence, intra-brand price competition between different sales channels or retailers will be weakened. Therefore, in principle, resale price maintenance (RPM) is prohibited in the FTA.

4. Although RPM may reduce "intra-brand competition," it can also make it easier for upstream suppliers to achieve the purpose of ensuring the results of horizontal agreements and hamper "inter-brand competition." However, under certain exceptional circumstances, RPM may be more likely to promote competition than by letting sellers decide their prices at will. This is why the proviso in Paragraph 1 of Article 19 of the FTA specifies that "those with justifiable reasons are not subject to this limitation."

5. As for the recognition of "justifiable reasons," this is set forth in Article 25 of the Enforcement Rules of the Fair Trade Act:

"The just cause stated in the proviso clause of Paragraph 1 of Article 19 of the Act shall be determined by the competent authority on the basis of the evidence presented by participating enterprises taking into account the following factors:

¹ Before the amendment on February 4, 2015, it was Article 18: "Where an enterprise supplies goods to its trading counterpart for resale to a third party or such a third party to make further resale, the trading counterpart and the third party shall be allowed to decide their resale prices freely; any agreement contrary to this provision shall be void."

1. *Encouragement of downstream enterprises to enhance efficiency or quality of pre-sale service;*
2. *Prevention of free-riding effects;*
3. *Promotion of entries of new businesses or brands;*
4. *Stimulation of competition between brands; and*
5. *Other reasonable economic grounds concerning competition.”*

6. Hence, it is for participating parties to contest whether the net effect of an RPM case is restraining or promoting market competition or whether the RPM exceeds the period or range necessary for achieving efficiency since participating parties have the responsibility to provide evidence to prove the legitimacy of the RPM they impose. Then, the competent authority will assess the validity of such evidence to determine whether the RPM in question really has the effect of promoting competition and whether the proviso in Paragraph 1 of Article 19 of the FTA is applicable.

7. In recent years, the FTC has processed ten cases² involving RPM on online platforms. These violations have mainly involved restrictions stipulated in sales contracts signed between product suppliers and online retailers to demand that retailers adhere to the suggested prices provided by the suppliers. The contracts have also included penalties for breaching the contract. If online retailers offered prices that were deemed to be too low, suppliers would cut supply immediately as well as request that the online platform operators concerned remove the web pages in question on the grounds of an intellectual property rights infringement or terminate the distribution contracts.

8. The FTC believes that retailers have to adopt different sales tactics because of cost differences between different brands. In addition, the marketing approaches, operating costs, prices and profitability of various retailers also differ, whereas the product prices of different brands are transparent in online sales. In the meantime, when a retailer purchases products to sell, the ownership of the products is transferred to the retailer so that the retailer has the freedom to decide its marketing channels and prices in accordance with the operating costs or supply and demand in the market. Since the distribution contract signed between a supplier and a retailer carries certain binding force, the retailer could face penalties such as having supply disconnected, web pages removed or dealership terminated when failing to comply with the contract. This can definitely create pressure for the retailers. In other words, the retailer's freedom to determine prices is bound by the disadvantageous penalizing measures. Therefore, the conduct of suppliers to restrict online resale prices of retailers not only deprives them of their freedom to decide product prices but also weakens intra-brand price competition among different sales channels, while the FTC imposes sanctions in accordance with the FTA.

² The ten cases all relate to events that took place before the amendment on February 14, 2015. Therefore, sanctions were imposed according to Article 18 of the FTA at the time.

3. Suppliers Informing Online Platform Operators of Competitors' Infringement of Intellectual Property Rights and then Sending Suggested Prices to Coerce Competitors into Adopting Suggested Prices to Prevent Price-undercutting Competition

9. As set forth in Subparagraph 4 of Article 20³ of the current FTA, “No enterprise shall engage in any of the following acts that is likely to restrain competition: ... 4) causing another enterprise to refrain from competing in price, or to take part in a merger, concerted action, or vertical restriction by coercion, inducement with interest, or other improper means.” The provision of “causing another enterprise to refrain from competing in price” refers to coercing by warning about disadvantages or harm in the future to make another enterprise afraid, or enticing by offering economic benefits able to affect the decision of another enterprise or any other “inappropriate means” of coercion or enticement to influence the decision of another. The types of conduct subject to the said provision are culpable in competition law because the approaches to competition adopted are inconsistent with business ethics and the efficacy of competition, and can therefore create negative effects on competition order. An enterprise does not need to possess considerable market power to engage in such conduct. For this reason, the provision is not limited to apply to enterprises with considerable market power.

10. As the e-commerce market is developing rapidly, the C2C type of auction websites are cheaper to manage than brick-and-mortar stores and are therefore adopted by many businesses as marketing channels. To prevent disputes over intellectual property rights, most auction websites provide an infringement reporting mechanism to allow intellectual property rights holders to have web pages of products involving intellectual property rights infringement removed at the earliest time. If an enterprise follows such a procedure and files an infringement notice to request that an auction website remove the web page involving a controversial product, this is a dispute over intellectual property rights or a civil dispute. However, the exercise of such rights may not be abused. When the abuse of intellectual property rights causes anti-competition or unfair competition, it is the duty of the FTC to investigate and impose sanctions in accordance with the FTA. According to the FTC's experience, such situations have normally involved disputes between intellectual property rights holders and parallel import businesses.

3.1 Case example: Liyi Shop International Co., Ltd. in Violation of the FTA

11. An online retailer filed a complaint to the FTC alleging that Liyi Shop International Co. (Liyi Shop) was in violation of the FTA by forcing him not to compete with lower prices. The retailer was selling parallel-imported Nillkin cell phone cases on Yahoo! Kimo and Ruten auction websites but Liyi Shop issued intellectual property rights infringement notices to the two websites and his web pages were removed. Subsequently, he received an email from Liyi Shop identifying itself as the agent for Nillkin and requesting him to set his prices according to the suggested rates attached; otherwise, his authorization to use the trademark and official images would be cancelled. To prevent Liyi Shop from sending further infringement notices to have his seller member account on the two websites suspended, the complainant had no choice but to cooperate and raise the prices. However, he believed the measure taken by Liyi Shop had been in violation of the FTA.

12. The FTC's investigation showed that, after the complainant's Nillkin product web pages were removed from the Yahoo! Kimo and Ruten auction websites, the complainant deleted the product description text of Nillkin and reposted the ads to sell them at the original prices. Later, the complainant adopted the suggested prices from Liyi Shop on Ruten and the operator of Ruten never received any further

³ Before the amendment on February 4, 2015, this was Subparagraph 4 of Article 19: “No enterprise shall have any of the following acts which is likely to lessen competition or to impede fair competition: ...4) causing another enterprise to refrain from competing in price, or to take part in a merger or a concerted action by coercion, inducement with interest, or other improper means.”

infringement notices. However, he did not raise the prices on the Yahoo! Kimo auction website and his web page was removed a second time. Then the complainant acquiesced and raised the prices, and Liyi Shop never issued any more infringement notices.

13. The FTC found that Liyi Shop issued 24 intellectual property rights infringement notices to Yahoo! Kimo regarding 405 product web pages and 26 to Ruten concerning the contents of 971 web pages, with a total of 1,376 web pages being reported. After inspecting Liyi Shop's company registration and intellectual property rights documents, the operators of both websites complied with the company's requests and removed all the web pages in question. Besides regularly issuing to auction websites infringement notices regarding controversial web pages marketing Nillkin products, Liyi Shop also emailed suggested price lists to certain sellers after their web pages were removed and issued warnings that their authorization would be cancelled.

14. According to the infringement reporting mechanisms adopted by auction websites, online sellers' member accounts will be suspended after they are accused of infringement of intellectual property rights more than two or three times. Sellers with member accounts suspended cannot continue to do business and their reputations accumulated over time may be completely ruined. Therefore, having member accounts suspended has a huge impact on the interests of business operators marketing on auction websites. In this case, Liyi Shop not only issued infringement notices to auction websites, but also identified itself as the agent for the products and emailed suggested prices to online sellers after their web pages were removed. The FTC believed that the purpose of Liyi Shop's conduct was obviously more than just the protection of intellectual property rights. In fact, the protection of intellectual property rights was merely an excuse for sending suggested prices after issuing infringement notices in order to achieve the anti-competition effect of forcing competitors to give up price competition or maintain price rigidity. The company's conduct met the description of "causing another enterprise to refrain from competing in price" set for in Subparagraph 4 of Article 19 of the FTA at the time. In addition to ordering the company to cease the unlawful act, the FTC also imposed an administrative fine of NT\$ 100 000.

4. Use of Contract Stipulations to Restrict Distributors' Online Business Activities to Achieve the Purpose of Price Monitoring

15. It is set forth in Subparagraph 5 of Article 20 of the FTA⁴: "No enterprise shall engage in any of the following acts that is likely to restrain competition: ... 5) imposing improper restrictions on its trading counterparts' business activity as part of the requirements for trade engagement." The term restrictions in this provision refers to tie-in sales, exclusive dealing, restrictions on operating regions, customers or use of products and other restraints imposed on business activities. Whether the restrictions imposed are illegitimate is assessed according to the intention, objective and market status of the restriction imposer, the structure of the relevant market, the characteristics of products and the impact of the enforcement of such restrictions on market competition. In other words, if an enterprise takes advantage of its market dominance and imposes unfair trading conditions to restrict the business activities of trading counterparts and the conduct results in restrictive competition in the relevant market, such conduct is considered to be in violation of the aforesaid regulation.

16. In order to maintain price rigidity, suppliers are likely to include stipulations in contracts to restrict retailers from displaying and selling their products online. However, the FTC believes that transparency of transaction information is an important factor in the assurance of the efficacy of competition. All kinds of information circulate rapidly on the Internet and enable consumers to make product quality and price comparisons between brick-and-mortar outlets and online stores before finalizing purchase decisions. If suppliers restrict retailers from engaging in online sales, transparency of price

⁴ Subparagraph 6 of Article 19 before the February 4, 2015 amendment.

information will be suppressed whereas the freedom of retailers to compete and win customers is also restrained. At the same time, retailers are also deprived of their freedom in deciding how they will market products of different brands. Such restrictions imposed on the business activities of trading counterparts as conditions for transactions can lead to anti-competition or impediments to fair competition and are thus in violation of the aforementioned regulation.

17. In 2012, the FTC sanctioned a bicycle manufacturer for restricting retailers from engaging in online sales. The FTC's investigation showed that the bicycle manufacturer had significant market power and the restriction made it impossible for retailers to market or disclose actual prices online. The FTC believed that such a practice had limited retailers' freedom to compete and fight for transaction opportunities as well as the freedom to decide which marketing approaches to adopt. Consequently, the transparency of trading information that could promote the efficacy of competition was suppressed and market competition could have been weakened. Therefore, the FTC concluded that the inappropriate restriction imposed on the business activities of trading counterparts as a condition for transactions was in violation of Subparagraph 6 of Article 19 of the FTA at the time. In addition to ordering the company to cease the unlawful act, the FTC also imposed an administrative fine of NT\$2 million⁵ on the bicycle manufacturer.

5. Conclusion

18. As online business makes rapid progress, the transparency of online trading information is increasing. However, it is also becoming easier for suppliers to keep track of the online prices of their products and establish across platform parity agreements. In recent years, the FTC has investigated and processed 13 cases involving sales on online platforms. Among them, restrictions on the resale prices of online distributors or retailers have constituted the majority of such cases (10 cases). The FTC will continue to maintain a close watch on the further development of this issue and strictly enforce penalties on such anticompetitive conduct that may affect price competition.

⁵ See DAF/COMP/WD(2013)16, pp. 5-7.