

When Taiwanese Buffalos Meet Transnational Rhinos—A Study of Price Competition between Cross-border E-commerce Platforms and the Fair Trade Law

1. Background of Study

Economic globalization and the arrival of the information era have eliminated the limitation of geographic regions. E-commerce platforms are rapidly infiltrating all kinds of businesses and many of them are international operators. These rhino-like cross-border e-commerce platforms may promote domestic market competition and enhance the interests of consumers, but the approaches they adopt can also lead to competition restraints. In 2018, there was public opinion showing concerns about competition issues triggered by the low price competition measures taken by e-commerce platforms. In particular, cross-border e-commerce platforms with immense resources made special offers to both buyers and sellers in the beginning to enter the market and compete with existing domestic e-commerce platforms and caused domestic competitors to suffer huge losses. The media doubted that cross-border e-commerce platforms took the financial advantage of their parent company or group overseas to subsidize their subsidiaries to engage in low price competition. As a consequence, domestic competitors lost their customers and market shares.

Since the US established its antitrust system in 1890, cracking down on predatory pricing has been a focus in enforcement of antitrust law. Domestic regulations against predatory pricing and inducement with low prices are respectively set forth in Article 9(ii) and Article 20(iii) of the Fair Trade Law. However, such marketing strategies of abusing market position and setting low prices have to be segregated from the normal price decreases made by regular enterprises to compete in the market. Therefore, it is necessary to further examine the mode of management, competition issues, academic theories and practice viewpoints of cross-border e-commerce platforms to establish references for law enforcement in the future.

2. Methods and Process of Study

This is conducted by comparative study of antitrust theories associated with predatory pricing and other types of low-price competition, practices adopted by competition law authorities, characteristics of competition and opinions from various sectors about domestic cases. Domestic scholars and specialists are invited to contribute their viewpoints in writing or attend seminars to talk about the measures taken by cross-border e-commerce platforms to entice consumers with low prices as well as proposed guidelines for establishing an appropriate legal system to cope with illegitimate inducement with low prices.

3. Main Suggestions

Although it has always been expected in different sectors that the FTC resorts to price intervention when handling related cases, the FTC actually advocates competition and has expressed several times that it is not a price control agency and will not get involved in price determination. The FTC also adheres to the same principle with cases concerning inducement with low prices. It does not play a role in pricing. Besides, low prices are advantageous to consumers under most circumstances. Excessive enforcement can only increase the public's stereotypical impression and wrong perception that the FTC is a price-regulating agency. Moreover, it will become an excuse from existing businesses in the market not to lower prices to protect their interests. Based on this, the following conclusions and suggestions are proposed:

- (1) Applying results of cross-disciplinary research to examine the legitimacy of low-price practices of businesses

Whether consumers are enticed or not and what the intents and purposes behind businesses' low-price practices cannot be readily identified. Above all, as "subscription economy" is increasingly popular, the pricing and subscription plans of

e-commerce platforms are changing all the time. “Freemium”, for example, means free of charge. Therefore, other than conventional jurisprudence and economics, the pricing practices of businesses or consumers’ possible reactions to such pricing practices can be explained in accordance with related theories and empirical evidence associated with the pricing strategies of businesses, consumer behavior, neuro-marketing and behavioral economics to assess whether businesses have justifiable reasons to reduce prices. If the answer is positive, the intents and purposes of the parties in concern should be considered during subsumption. Otherwise, further assessment has to be conducted to determine whether other constitutive elements exist in order to reduce the possibility of false conviction.

(2) Learning from the advantages of analytic practices of the US and the EU

As indicated in Chapter 3 of this paper, the US and the EU, two major competition law systems, differ in analysis of whether predatory pricing practices are in violation of the law. In the US cases focus on compensation analysis and the intention to monopolize is not valued. In the EU, on the contrary, the intention to monopolize is valued and compensation analysis is not emphasized. Both approaches have their advantages and disadvantages. When such approaches are adopted, the biggest problem in law enforcement against illegitimate use of low prices to impede competitors from competing is that overemphasizing either one can lead to false conviction or false acquittal. With the emergence of platform economy, it is difficult for law enforcement agencies to assess whether the offer of low price by an enterprise is illegitimate enticement or performance competition. Hence, handling of related cases has to be impartial and to the point. The strong points of approaches applied in the US and the EU should be adopted and the intent of an enterprise suspected of violating the law and the likely effect of the practice on competition should both be taken into account to prevent excessive enforcement from creating the chilling effect and discouraging businesses from engaging in price competition. On the other hand, weak enforcement can end up causing businesses to obstruct competitors and jeopardize competition.

(3) Increasing objective evaluation standards and decreasing subjective value judgment

If a practice of illegitimate inducement with low prices involves value judgment or subject cause-effect inference, since there is no obvious or absolute objective standard to assess whether inducement with low prices exists, the plight of every one sticking to his /or her own story is bound to happen in the end. For this reason, the top priority at the point is to increase objective judgment standards and decrease subjective value judgment. In this study, past cases are consolidated, related literature from the OECD is presented and the opinions of domestic scholars and specialists are sorted out. These information sources perhaps can give an inspiration to help establish a set of objective standards to serve as the guideline in judgment of illegitimate inducement with low prices, such as whether a practice of inducement with low prices is focused on certain targets, implementation of the practice is secretive, the implementation is not temporary, most parties are existing businesses with market position, market concentration is high, competitors are few, the products or services offered by competitors in the market are not diversified, competitors seldom compete on quality, service or other transaction terms, or whether the “harm to competition” and “reduction of social welfare to a certain degree” results in competitors of equal efficiency getting pushed out of the market, and the intention is to teach the rivals a lesson or to stop war with war, or whether such a practice is economically reasonable. It is hoped that the abovementioned objective standards for judgment of illegitimate inducement with low prices can serve references in handling of related cases in the future.