

The Electricity Liberalization Policy and Disputes over Concerted Action by Private Power Companies

I. Research Background

The international society has been promoting electricity liberalization for over two decades. Opening and liberalizing the electric power market has become the reform policy of many countries since 1990. Likewise, electricity liberalization is not a new issue, and many amendments to the Electricity Act were drafted by the Executive Yuan and Legislative Yuan in the past for electricity liberalization. Even though nine draft amendments were proposed for the Electricity Act since it was enacted in 1947, none of the amendments were able to pass the third reading in the Legislative Yuan. Hence, the market structure and management system for the electric power industry set forth by the Electricity Act has not been adjusted for over 50 years.

Even though the draft amendment to the Electricity Act has not yet been approved by the Legislative Yuan, electricity liberalization has been established as the direction for developing the electric power market. In fact, electricity liberalization began in the mid-1990s due to continuously increasing demand on electric power, but increasing electric power supply was difficult as the construction of power plants, substations, and electricity grid were constantly opposed. As power supply could no longer keep up with the increase in demand, the reserve margin during summer was only 5%, far lower than the reasonable reserve margin of 15~20%. Power shortage during peak hours frequently occurred, and power rationing was implemented 40 times between 1991 and 1996, greatly impacting the economy, society, and people's livelihood. To resolve the issue of insufficient power supply due to the Taiwan Power Company being unable to successfully build new power plants, the Ministry of Economic Affairs opened the market to independent power plants (IPP) in four stages in January 1995, August 1995, January 1999, and June 2006; a total of 9 IPPs participated in tenders, were approved, and began actual operations since 1999. These 9 IPPs are undoubtedly a source of competition in the domestic electric power market, even though their competition only exists as a part of the market mechanism. Still, the competition from these IPPs serves as a demonstration for market structure and development after electricity liberalization. The 9 IPPs signed a 25-year long-term contract with the vertically integrated utility – the Taiwan Power Company, but made an agreement to refuse making adjustments to the purchase/sales price with the Taiwan Power Company from August 2008 to October 2012, and the FTC imposed a penalty on the IPPs on March 15th, 2013 for violating the Fair Trade Law by engaging in concerted action, imposing a total fine of NT\$6.32 billion on the 9 IPPs. The amount of the fines set a record in the FTC and drew the attention of various sectors.

After the FTC made its disposition, the case went through appeal, administrative litigation, appeal to the Supreme Court, and was remanded to the Taipei High Administrative Court. The investigation, disposition, and administrative remedy process brought different perspectives of market competition, which will undoubtedly have a decisive effect on market competition after electricity liberalization.

Therefore, this study summarizes domestic and foreign data to analyze the structure of the domestic electric power market, and thereby understands the liberalization process and experiences of electric power markets in Chinese Taipei, Europe, America, and Japan. This study then analyzes the points of dispute in the only case of the FTC involving the electric power market, hoping gain a better understanding of the current status and future development of the domestic electric power market, while identifying potential competition issues in the electricity liberalization process to provide a basis for future law enforcement by the FTC.

II. Scope of Research and Methodology

(I) Scope of Research

To thoroughly examine the experiences of different countries with electricity liberalization, as well as the dispute over the FTC's disposition regarding concerted action by IPPs, this study first analyzes characteristics of electric power and the market structure to understand its difference with other industries, and divides the electric power market into four stages based on power flow and value chain, namely generation, transmission, distribution, and retail; the market structure and current status of each stage is then analyzed and organized. The second part of this study analyzes and organizes the process and experiences of the US, EU, and Japan in electricity liberalization, in order to understand how each country lifts restrictions on the electric power industry, as well as the difficulties they encountered and key issues in the process of electricity liberalization; this part helps understand the role and responsibilities of the FTC with respect to competition advocacy in the process of electricity liberalization. The third part of this study analyzes and organizes the domestic electricity liberalization process, allowing further comparison with other countries. The fourth part of this study focuses on the concerted action case involving IPPs in 2013, specifically the points of dispute in the disposition and administrative remedy process; this part of the study will provide a basis for law enforcement when facing actions by IPPs that restrict competition after electricity liberalization in the future. Finally, conclusions and recommendations are made based on the market structure analysis, electricity liberalization process in different countries, and case study, providing a basis for the FTC's competition advocacy in different stages of electricity liberalization in the future. It will also provide a basis for law enforcement

by the FTC when investigating cases of the electric power industry in the future.

(II) Research Methodology

1. Document analysis: Literature on the process and current status of electricity liberalization in the US, EU, and Japan, as well as contents of the draft amendment to the Electricity Act are compared and analyzed, evaluating potential competition issues and effects of the draft amendment and how systems of other countries may be applied in Chinese Taipei.
2. Case study: The case on March 15th, 2013 of 9 IPPs reaching an agreement to refuse adjusting the purchase/sale price to the Taiwan Power Company was a concerted action that violated the Fair Trade Law. The points of dispute over each element of the disposition and the reasons given by each side during litigation, including definition of market boundary, whether or not the market has a competition mechanism, whether if each IPP is engaged in horizontal competition, and whether if competition law may intervene in the electric power market, are summarized and compared to show the disputes that arise when the Fair Trade Law intervenes in the electric power market. The case study determines points of dispute the FTC should focus on when conducting investigations or making dispositions on cases of restricting competition in the electric power market, and will provide a basis for future law enforcement by the FTC.

III. Conclusion

(I) Development Trends of the Electric Power Industry in Other Countries

The following trends can be observed from the development of the electric power industry in other countries:

1. Aside from the power market in the EU, most power exchanges (PX) are merged into the Independent System Operator (ISO) in other countries to lower transaction cost and increase synergistic effects.
2. In the process of electricity liberalization, it is not mandatory to break apart a vertically integrated utility by its generation, transmission, distribution, and retail functions, i.e. the vertically integrated utility does not need to be separated in a specific way; it can either keep separate account books or become completely separated. However, great emphasis is placed on having an ISO for power dispatch to ensure all IPPs have equal access.
3. Ensure stable and reliable power supply is the top priority in every country in the electricity liberalization process. Deregulation measures of the countries to achieve electricity liberalization have given IPPs autonomy and the opportunity to be creative, fully protected the interests of users, and also

ensured the stability and reliability of power supply.

4. In the process of electricity liberalization, synergistic effects in the generation stage are clearly beneficial, followed by the retail stage. As for transmission and distribution, even though they are monopolistic in nature, it is not absolutely necessary to maintain a monopoly, and they can also be open to market competition as long as there is a robust ISO system in place. Therefore, fully opening the market is acceptable as long as the system ensures stable and reliable power supply. The fair competition mechanism must become a part of market deregulation measures, and not purely rely on law enforcement by the competent authority of competition law, which will not benefit synergistic effects brought by market liberalization.

(II) The current stage of electricity liberalization is insufficient

Fairness of power dispatch is crucial to fair competition in upstream and downstream markets of the electric power industry, and also the key to whether or not electricity liberalization is successful. Yet, the new draft amendment to the Electricity Act excluded previous plans for an ISO, which is a pity and somewhat confusing. Luckily, amendment for electricity liberalization will be implemented in stages, and market structure changes, which are even more important, will be completed in the first stage of the amendment. Once the market achieves stable development, the second stage of market structure changes will be implemented, allowing new generation, transmission, and retail companies, and opening the electric power retail market. Hence, the FTC must use the second stage of amendment for competition advocacy in various situations, and urge the competent authority of the electric power industry to include ISO into the market structure.

The second stage of amendment focuses on opening the generation, transmission, and retail stages of the electric power industry, and improving the market structure of the electricity retail industry. As described above, observing the electricity liberalization process of advanced countries, the generation, transmission, and retail stages are all potential targets for liberalization, but ISO, PX, equal access, and information transparency measures are the key to ensuring the synergistic effects of liberalization. It is clear that the second stage of amendment to the Electricity Act is still conservative. It is not necessary to split the original monopolistic enterprise in the market – the Taiwan Power Company by its functions, not to mention the current direction of amendment to establish a holdings company. The effects of separating it by function are already visible. Hence, with regard to competition advocacy, it is necessary for the FTC to urge the competent authority of the electric power industry to step up the pace of electricity liberalization, so as to become aligned with the international trend of electricity liberalization.

(III) Gradually assume the role of competition advocate in electricity liberalization and carry out law enforcement of anti-competitive practices

The investigation, disposition, and administrative remedy process of the case on concerted action by IPPs brought different perspectives of market competition. Claims by IPPs and the court's opposing verdict all believe that the domestic electric power industry is still under strict control by the competent authority. Any changes to price and volume in the bilateral PPA are subject to multiple layers of control, and the IPPs thus believe that the electric power market is still a controlled industry; there is no competition between IPPs, and the IPPs are only partners and OEMs for the Taiwan Power Company; there is no competition mechanism in the market, and they would even go as far to say that there is no market, so competition law has no grounds to intervene and should not intervene; related disputes fall under the jurisdiction of the competent authority of the electric power industry, or the disputes should be resolved through a civil lawsuit. These claims originate from misconceptions generated during long-term control over the domestic electric power industry. It is not only that IPPs are unable to adapt to being in competition with each other, the competent authority and court also neglect the fact that parts of the market has already been liberalized and are in early stages of free competition, and they are unwilling to accept the fact that competition is allowed in the market. However, regardless of the final verdict, the FTC's disposition in the case has already achieved expected effects in intervening in the electric power market, which is to challenge the preexisting controlled structure. It is still necessary, however, for the FTC to step up law enforcement of cases that restrict competition in the electric power industry in each stage of electricity liberalization. It is also necessary to explain the applicability of competition law from a wider perspective to compensate for the insufficient liberalization measures in the overall electric power market.

Furthermore, the electric power industry is under the purview of the Fair Trade Law if it is involved in practices that restrict competition, such as monopoly, merger, or concerted action, after electricity liberalization. Observing the electricity liberalization process of other countries, the establishment of market competition rules is still mainly based on the perspective of the industry's competent authority. After all, the electric power market not only involves a wide scope of affairs, but is also extremely specialized as well. Hence, future law enforcement by the FTC should focus on assisting the industry's competent authority with making competition concepts a part of the Electricity Act, and then gradually carry out law enforcement of practices that potentially restrict competition, such as mergers, price manipulation, differential treatment in power dispatch, refusing access without proper grounds, and impeding market entry. Also, the FTC may test market power using HHI and profit

margin to determine if an enterprise is at risk of violating the Fair Trade Law and take precautionary measures.

Domestic electricity liberalization in our century not only had a late start, but also lack good liberalization measures. Hence, the FTC plays an important role in both the process of electricity liberalization and subsequent maintenance of competition in the electric power market, including competition advocacy, administrative guidance, supervision, and disposition. Since the electric power market will transform from one vertically integrated utility to open competition between upstream and downstream power companies, market patterns and the experience and concepts of power company operators will require the FTC's competition advocacy and administrative guidance. The IPP case showed that the overall market, competent authority of the industry, and even the legal system are still bound by old concepts of a controlled market. This situation will not only hinder the FTC's effectiveness in maintaining market order, but may waste future efforts in electricity liberalization. Hence, the FTC should utilize its law enforcement experience with the Fair Trade Law and provide its expert opinion to related departments, especially the competent authority of the electric power industry and power companies, so as to change old concepts and create an environment for free competition. It is crucial that the FTC refer to the experiences of other countries in electricity liberalization, especially in the second stage of amending the Electricity Act, and step up competition advocacy, including ISO, PX, equal access principles, and information transparency measures, which will benefit competition, into the amendment.