

DIGITAL PLATFORM AND COMPETITION LAW IN JAPAN

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OVERVIEW

- 1) Antimonopoly Law (AML) in Japan regulates private monopolization, unreasonable restraint of trade, unfair trade practices, and mergers. This presentation focuses on private monopolization and unfair trade practices.
- 2) The Fair Trade Commission (FTC) and other governmental bodies in Japan have recently published reports on this issue.
- 3) Cases investigated by the FTC include mergers, transactions with exclusion conditions, MFN clauses, etc. Among them are investigations of Amazon (MFN clause) and Apple (contract for smartphone).
- 4) However, investigations are closed in many cases by the commitment (or undertakings) voluntarily submitted by the parties, and there are few cases in which a full-scale analysis has been conducted. Many issues under the competition law remain unresolved.

ANTIMONOPOLY LAW

- Private monopolization (Articles 2(5) and 3)
- Unreasonable restraint of trade (Articles 2(6) and 3)
- Unfair trade practices (Articles 2(9) and 19)
- Mergers (Articles 9 to 18)

ANTIMONOPOLY LAW

- Scholars and FTC study groups have been researching the legal standard to be applied to the practices of the digital platform operators (platforms) to clarify when such practices should constitute private monopolization, unfair trade practice or unlawful merger.
- The reports published by such groups also consider whether the actions of so-called digital cartels should be regarded as unreasonable restraint of trade.
- In most of the presentation's cases, however, the FTC, which commences investigations on suspicion of unfair trade practice or private monopolization and finding possibility that the practice at issue may constitute unfair trade practice, closed the investigation because the enterprise voluntarily decided to take measures to remedy the situation.

REPORTS OF THE FTC, ETC.

- The FTC Competition Policy Research Center (CPRC), *Report of the Study Group on Data and Competition Policy* (June 2017)

<https://www.ftc.go.jp/en/pressreleases/yearly-2017/June/170606.html>

- Ministry of Economy, Trade and Industry (MITI), Ministry of Internal Affairs and Communications (MIC) and the FTC, *Draft Interim Report of the Study Group on the Improvement of the Trade Environment Involving Digital Platform Businesses* (November 2018).

http://www.meti.go.jp/english/press/2018/1105_003.html

The public comment period on the interim report lasted until 4th of December. The Study Group also conducted the hearing from Google and Apple on 28th of November. It is expected that the final report will be released in December and that an English translation of the report will also be published.

LIST OF CASES

- June 2011:** FTC issues a cease and desist order to DeNA.
- June 2017:** FTC closes investigation into Amazon Japan (Amazon Marketplace - MFNs)
- August 2017:** FTC closes investigation into Amazon Services International Inc. (e-book related contract - MFNs)
- March 2018:** FTC commences investigation for Amazon Japan (under investigation – abuse of superior bargaining position)
- May 2018:** FTC closes investigation into Minna no Pet Online [Everyone's Pet Online] (exclusive trading)
- July 2018:** FTC closes investigation into Apple Japan (restriction of business activities in relation to iPhone)
- October 2018:** FTC closes investigation into Airbnb
- *August 2018:** [Reported in the media] FTC commences investigating Apple Japan (under investigation? unfair Interference with Competitors' Transactions in relation to Game Plus?)

MERGERS

KADOKAWA/Dwango (2016)

Vertical merger (business combination) case in which the paid video distribution business and contents business were integrated. The FTC decides that there is no AML concern because the parties' market share is too low.

There has been no platform-related case in which market definition, anticompetitive effect or efficiency were thoroughly analyzed.

Recently, however, the FTC is more often to be engaged in thorough analysis of vertical and conglomerate mergers in non platform-related cases and to express concern about anticompetitive effect, which often results in remedies voluntarily taken by the parties to solve the issues.

UNFAIR INTERFERENCE WITH COMPETITORS' TRANSACTIONS

Cease and desist against DeNA (2011)

- DeNA, a game-providing platform using mobile phones, restricted game developers from developing for rival platforms.
- The FTC deemed such practice unfair interference with competitors (AMA Art 2(9) (vi) and FTC General Designation Paragraph 14) and thus an unfair trade practice.

EXCLUSIVE TRADING

Minna no Pet Online co, ltd. (2018)

https://www.FTC.go.jp/en/pressreleases/yearly-2018/May/180523_1.html

Pet breeder intermediary platform required the breeders not to post information on other platforms. The FTC commenced investigation on suspicion of unlawful exclusive trading falling under AMA Article 2(9) (vi) and General Designation Paragraph 11. The platform submitted remedial actions voluntarily to the FTC, which subsequently closes the investigation.

Airbnb (2018)

<https://www.FTC.go.jp/en/pressreleases/yearly-2018/October/181010.html>

Platform that intermediates private lodging services restricted the lodging service providers from posting information on other platforms. The FTC began investigation, suspecting private monopolization (AMA Article 2(5)) and transaction with exclusive trading (Article 2(9)(vi) and General Designation Paragraph 11). The platform voluntarily made an offer to take remedial actions, and the FTC closed the investigation.

MFN (PRICE PARITY) CLAUSES

Amazon Japan G.K. (Amazon Marketplace)(2017)

<https://www.FTC.go.jp/en/pressreleases/yearly-2017/June/170601.html>

Amazon Services International, Inc. (e-Books Agreements)(2017)

<https://www.FTC.go.jp/en/pressreleases/yearly-2017/August/170815.html>

- Amazon Japan and Amazon Services International impose MFN (price parity) clauses on sellers. The FTC began investigation on suspicion of unfair conditional dealing (AMA Article 2(9) (vi) and General Designation Paragraph 12). Amazon voluntarily offered remedial action, and the FTC closed the investigation.
- The FTC explained in a press release on the closing of the investigation how they view such clauses. Scholars and practitioners are of various opinions about the appropriateness of their view.

UNFAIR CONDITIONAL DEALING

Apple Inc. (2018)

<https://www.FTC.go.jp/en/pressreleases/yearly-2018/July/180711.html>

Apple Japan was suspected of obliging three Mobile Network Operators (MNOs) to pay terminal purchase subsidies to iPhone buyers. The FTC suspected that such practice was likely violate the AML and commenced investigation. Apple proposed partial revision of the contract terms, which the FTC considered sufficient to resolve the AML concern. The FTC then closed the investigation.

ABUSE OF SUPERIOR BARGAINING POSITION

Amazon Japan G.K. (under investigation)

- According to newspaper reports, Amazon Japan requested sellers bear part of the price discount of their goods. In addition, Amazon Japan requested the sellers' contribution range from a few percent to several dozen percent of the sales for the reason of updating the system and/or enhancing the convenience of use of the system.
- Such act may constitute an abuse of a superior bargaining position prohibited under AML Article 2(9)(v).

UNFAIR INTERFERENCE WITH COMPETITORS' TRANSACTIONS?

Reported in the media – Nihon Keizai Simbun (Nikkei) 16 August 2018

Apple Japan (investigation ongoing?)

- Yahoo has ceased the game provision service, 'Game Plus'. Nikkei reported that the FTC had commenced investigation into Apple suspecting that it had engaged in unfair interference with Yahoo's transaction.
- The media also reported that the FTC finds it difficult to prove the violation while they try to collect the information.

CURRENT STATUS AND ISSUES IN UNFAIR TRADE PRACTICE REGULATION

- Except in the DeNA case, the FTC closed investigation without issuing cease and desist orders.
- The FTC has never imposed a surcharge [civil fine] on the digital platform operators, although the Consumer Affairs Agency has imposed surcharges under Act against Unjustifiable Premiums and Misleading Representations.
- In December 2018, the commitment procedure will be implemented in Japan. The cases presented in the preceding slides would have been resolved through the commitment procedure had it been in place. It is believed that this is why the FTC did not issue cease and desist orders.

CURRENT STATUS AND ISSUES IN UNFAIR TRADE PRACTICE REGULATION

- In these cases, the FTC did not work through issues including 1) the market definition issue relating to two-sided markets, 2) the anti-competitive effect (note: the AML requires substantial restriction of competition (private monopolization) or impeding fair competition (unfair trade practice)), and 3) efficiency.
- In some instances, including private monopolization cases, the surcharge is imposed. Such instances will arise in the future, and the FTC will issue the cease and desist and surcharge payment orders rather than have recourse to the commitment procedure. Once such orders are issued, the FTC will clarify how to define the market and the way to assess anticompetitive effect, efficiency, and so forth.

COMPARISON WITH EUROPEAN REGULATIONS (DRAFT)

- The European Commission issued a 'Proposal for an EU Regulation on promoting fairness and transparency for business users of online intermediation services' (April 2018). This draft regulations set up a set of rules for the online intermediary service providers, who are involved in B2C platform business operation to improve fairness and transparency.
- In the MITI, MIC and JFTC 'Draft Interim Report of the Study Group on the Improvement of the Trade Environment Involving Digital Platform Businesses' (November 2018), it is pointed out that the similar regulation is possible in Japan through AML prohibition of abuse of superior bargaining position.

(APPENDIX) JFTC CPRC, STUDY GROUP ON DATA AND COMPETITION POLICY REPORT (2017) - OUTLINE

1. Current State of Competition

- (1) Data collection capability leads directly to the competitiveness of goods and services.
- (2) Competitive Situation Surrounding Data

2. Basic Approach

3. Reaction to Examination of Business Combinations Involving Data Accumulation (in relation to their markets)

4. Interference of Free Accumulation and Use of Data

5. Joint Collection and Use of Data

(APPENDIX) METI, MIC & JFTC, MID-POINT DISCUSSION (DRAFT)(2018) - OUTLINE

1. Significance and characteristics of digital platform operator

While digital platforms offer various benefits to users (small and medium enterprises, etc.) and consumers, there is a tendency for some digital platforms to become oligopolized and monopolized due to network effects, etc.

2. Legal evaluation perspective on digital platform operators

Based on the global regulatory trend towards gigantic digital platform operators, it may be necessary to consider the way to improve the trading environment.

3. Design of responsibility to bear as innovation's leader (role of laws to regulate certain industries etc.)

Revisions to existing law regulating certain industries that cannot deal with the platform business should be considered on a case-by-case basis.

(APPENDIX) METI, MIC & JFTC, MID-POINT DISCUSSION (DRAFT)(2018) – OUTLINE (CONT'D)

4. Realization of transparency to ensure fairness

In order to realize transparency and fairness in trading practices, in addition to grasping the actual situation of transactions through extensive and comprehensive and thorough investigation, consideration should be given to the establishment of specialized organizations and others to conduct continuous research and analysis and introduction of discipline from the viewpoint of ensuring transparency and fairness.

5. Redefining fair and free competition

Based on the growing importance of the competition law, it is necessary to consider methods of fair and free competition in the digital market (assessment of network effect in multi-sided market, mergers in a form to pick up the potential competitor's sprout, etc.).

(APPENDIX) METI, MIC & JFTC, MID-POINT DISCUSSION (DRAFT)(2018) – OUTLINE (CONT'D)

6. Examination of data transfer/release rules

We should consider the necessity of data transfer and release rules such as data portability and API release, and their contents.

7. International perspective

We should consider international harmonization of rules surrounding digital platformers, the way of extraterritorial application and effective way of enforcement.