

Japanese Approach to Data, Platforms and Competition Law

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Topics

I. Report of Study Group on
Data and Competition Policy

II. Amazon Japan case

III. Conclusion

I. Report of Study Group on Data and Competition Policy

1. Study Group on Data and Competition Policy

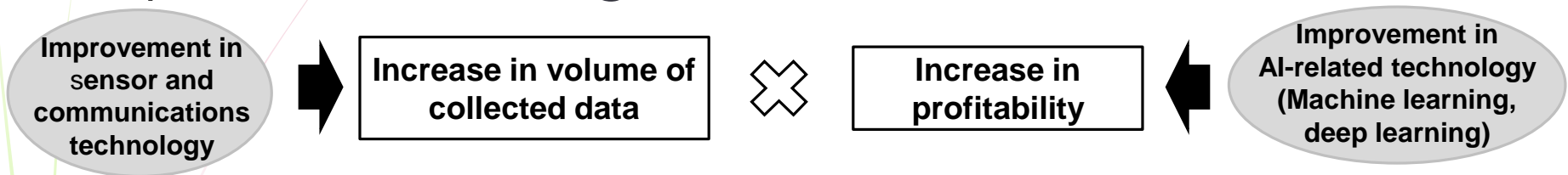
- The spread of IoT and the advancement of AI-related technology
 - ➡ Enhanced data availability for business has increased the possibility to improve productivity and to realize providing services optimized to individual consumers
 - ➡ It is important that any enterprise can collect and use data in fair and free competitive environments.
- On the other hand, there are concerns about further oligopoilization by digital platforms on a global basis
 - ➡ JFTC established “Study Group on Data and Competition Policy” to discuss the issues of antitrust law enforcement and competition policy relating to data

1. Study Group on Data and Competition Policy

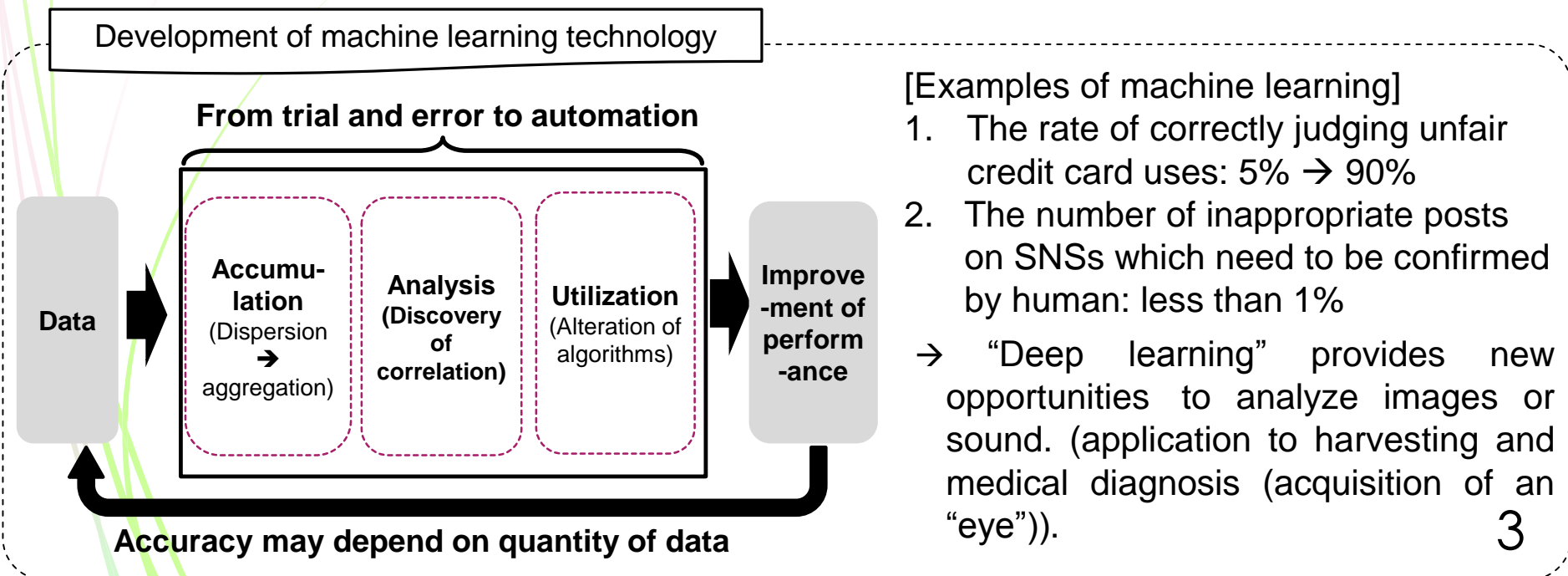
- Study Group Members
 - Consisting of 11 members (Chair: Akira GOTO, Emeritus Professor at the University of Tokyo)
 - The members are academics of law, economics, technology and data protection and legal practitioners
- 5 related ministries join as observers
- The Study Group has held 6 meetings from January and published its report on 6th June
- Secretariat: Economic Research Office, JFTC
 - In parallel with the discussion, carrying out interviews with data users (e.g. manufacturers), internet advertisement companies, digital platformers etc (about 60 enterprises etc.).

2. Current Situation of Competition

(1) Data collection capability leads directly to the competitiveness in goods and services:



(Note) Number of IoT devices is expected to more than quintuple from 2010 to 2020.



2. Current Situation of Competition

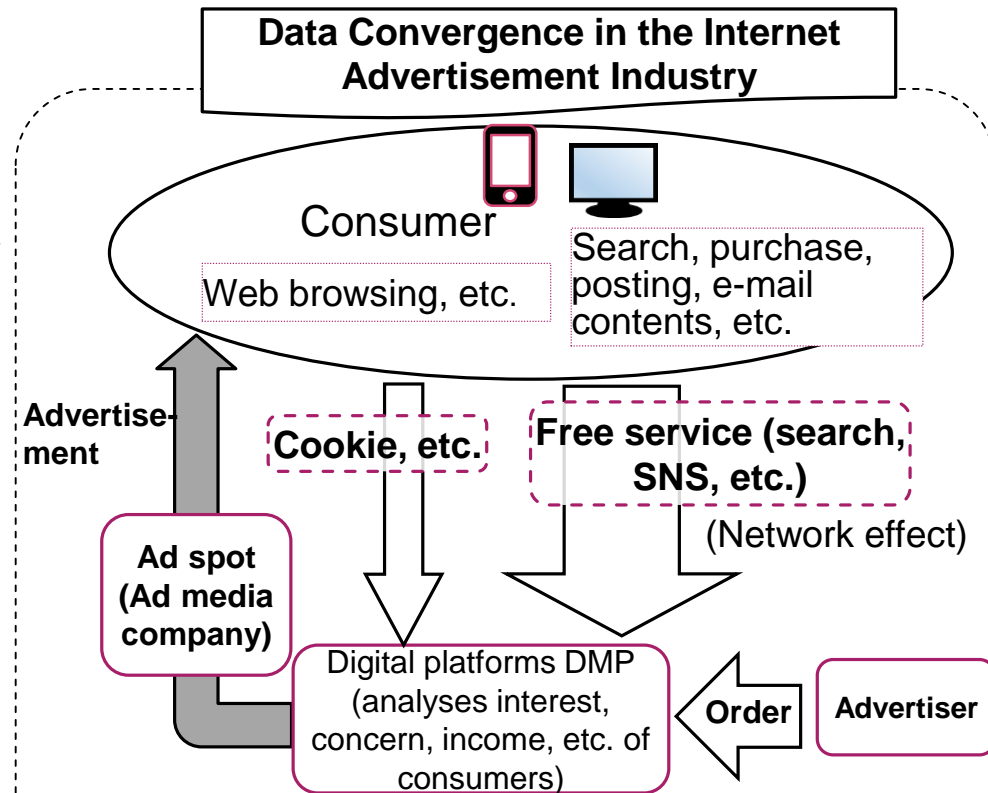
(2) Competitive Situation Surrounding Data :

(i) Personal Data

- A digital platform collects a large volume of personal data through free service and utilizes them for advertising business, etc.

(Note) There are concerns about “exclusion” by foreclosing data collection channels in the Internet advertising industry.

- The network effect such that “a large scale equals to convenience” combined with the cycle of “i) data → ii) improvement of service by machine learning → iii) further increase of data” tends to make a new entry into similar businesses even more difficult.



(Note 1) A digital platform provides different services such as advertisement delivery to customers as free service (multi-sided market).

(Note 2) Consumers' website browsing history is bought and sold among enterprises.

(Note 3) The term “DMP”(Demand Side Platform) refers to an advertising business operator.

2. Current Situation of Competition

(2) Competitive Situation Surrounding Data :

(ii) Industrial Data (e.g. sensory data of humans/equipment, medical diagnostic image)

- Many companies have begun collecting industrial data on a full scale.
- In some cases, data collecting channels such as locations where sensors are installed may be limited.
- Some experts point to the occurrence of data “hoarding.”

(The number of data-related merger cases almost tripled from 2008 to 2012.).

3. Basic Approach to Consider Data and Competition Policy

- Accumulation and utilization of data, in itself, promotes competition and creates innovation.
- At the same time, issues such as
 - I. business combinations that could lead to restriction of competition including monopoly,
 - II. unjust collecting (or exploitation) of data from consumers or small and medium-sized enterprises and
 - III. unjust data “hoarding”

should be addressed under the Antimonopoly Act.

(Note) Most of these problems can be dealt with under the current framework of the Antimonopoly Act.

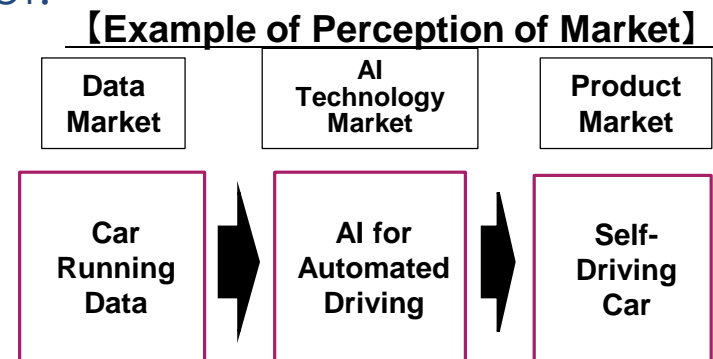
4. Examination of Business Combinations Involving Data Accumulation (in terms of their markets)

- Business combinations involving data accumulation should also be examined from standpoints mentioned below:
 - Whether it leads to reduction of competition for AI techniques or goods and services related to data
 - In the case where similar data are bought and sold in a data market, whether it has the effect of reducing competition in the “data market.” (e.g. continuing high price of the data)

(Note) In particular, (1) if the data collection channels are limited; and (2) if the cycle of functional improvement through machine learning has been enhanced by the network effect, the accumulation of data by a specific enterprise will make it difficult for other enterprises to enter or remain in the business.

- Free services such as SNS may be subject to the Antimonopoly Act from the perspective that they constitute a “market.”

[e.g. Facebook / WhatsApp case in EU (2014)]



5. Interference of Free Accumulation and Use of Data

(1) Unjust Data Collection:

- Collecting various kinds of data, in itself, is not usually anticompetitive.
- However, data collection may constitute a breach of the Antimonopoly Law in exceptional cases if data collection employs unjust methods or encourages concerted practices between competitors so that it undermines competition.

[Example]

1. In a business alliance, an enterprise, in a superior bargaining position as a party to the alliance, unilaterally demands that the other party provide data to it.
2. A digital platform (whose service “locks in” the customers) collects personal data by unjust conduct under Japanese laws and regulations. [e.g. Bundeskartellamt's investigation against Facebook]

(Note) Although such conduct fundamentally constitutes a problem under the Act on Protection of Personal Information, it could be subject to the Antimonopoly Act.

5. Interference of Free Accumulation and Use of Data

(2) Unjust Data Hoarding :

- Data hoarding refers to refusal to admit access without justifiable grounds to the data which are essential to competitors' business and for which it is technically or economically difficult for competitors and/or customers to obtain
 - Even a dominant enterprise has the right to freely choose its trade partners
 - A problem under the Antimonopoly Act could arise only if the conduct deviates from normal business activities.
- [Supreme Court Judgement in NTT East case (2010)]

[Example 1]

If the data had been disclosed to the competitors so far and there is no rational reasons to discontinue so other than exclusion of competitors.

5. Interference of Free Accumulation and Use of Data

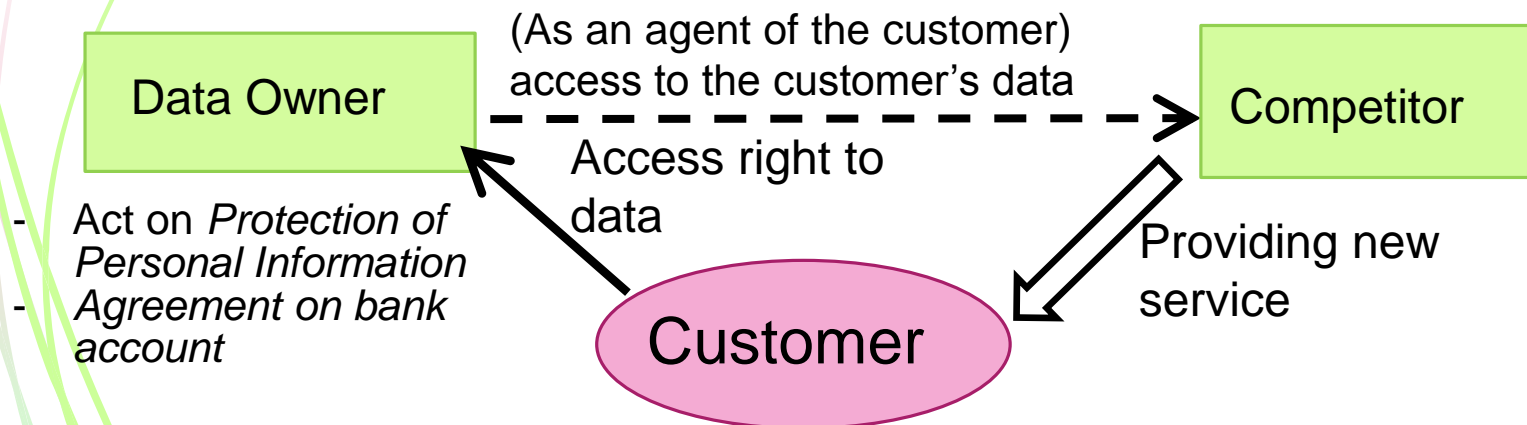
(2) Unjust Data Hoarding :

[Example 2]

If there is an obligation for a monopolistic or oligopolistic enterprise to allow customers or their agents (including its competitors) access to the data and if refusal of access by competitors would exclude the competitors from market:

For example,

- a) if a person has the legal right to request information disclosure, or
- b) if an agreement between a financial institution and a depositor allows access to the data including transaction histories.



6. Joint Collection and Use of Data

- As a general rule, joint collection and joint use of data are regarded as pro-competitive (improvement of efficiency through establishment of standards, improvement of safety, etc.).
- However, care should be taken about joint data collection that would allow inference of competitors' price and quantity.
- As an exception, collective refusal access of jointly gathered data could pose a problem under the Antimonopoly Act as an exception, if the refused enterprise finds difficulty in carrying on business activities and be exposed to danger of being excluded from the market.
- However, one needs to consider that such a situation may not always fall under the case where "it becomes difficult for the third party concerned to carry out business activities", because the enterprise whose participation has been prevented could collect similar data independently.

7. Features of the Report

- This report mainly clarifies the views on
 1. Data collection [e.g. collection from client companies, data collection by digital platforms, collective data collection]
 2. “Data hoarding” such as unilateral or collective refusal to access
- ➡ Current approach is applicable to most of those issues
- “Industrial data” collected through “IoT” is included in the scope of the study
- Considered the effects on competition by new analysis technology such as “machine learning” and “deep learning”

8. Future Challenges

- It is necessary to pay close attention to the actual conditions of “digital cartel”
- Vigilance against monopolization or oligopolization of digital platforms is necessary

II. Amazon Japan case (2017)

1. Closed the Investigation on the Suspected Violation of the Antimonopoly Act by Amazon Japan G.K. (June 1, 2017)

- ✓ The JFTC has investigated Amazon Japan G.K. in accordance with the provisions of the Antimonopoly Act as Amazon Japan G.K. has been suspected to restrict business activities of the sellers in Amazon Marketplace by including the **price parity clauses (PPC)** and the **selection parity clauses (SPC)** in the seller contracts.

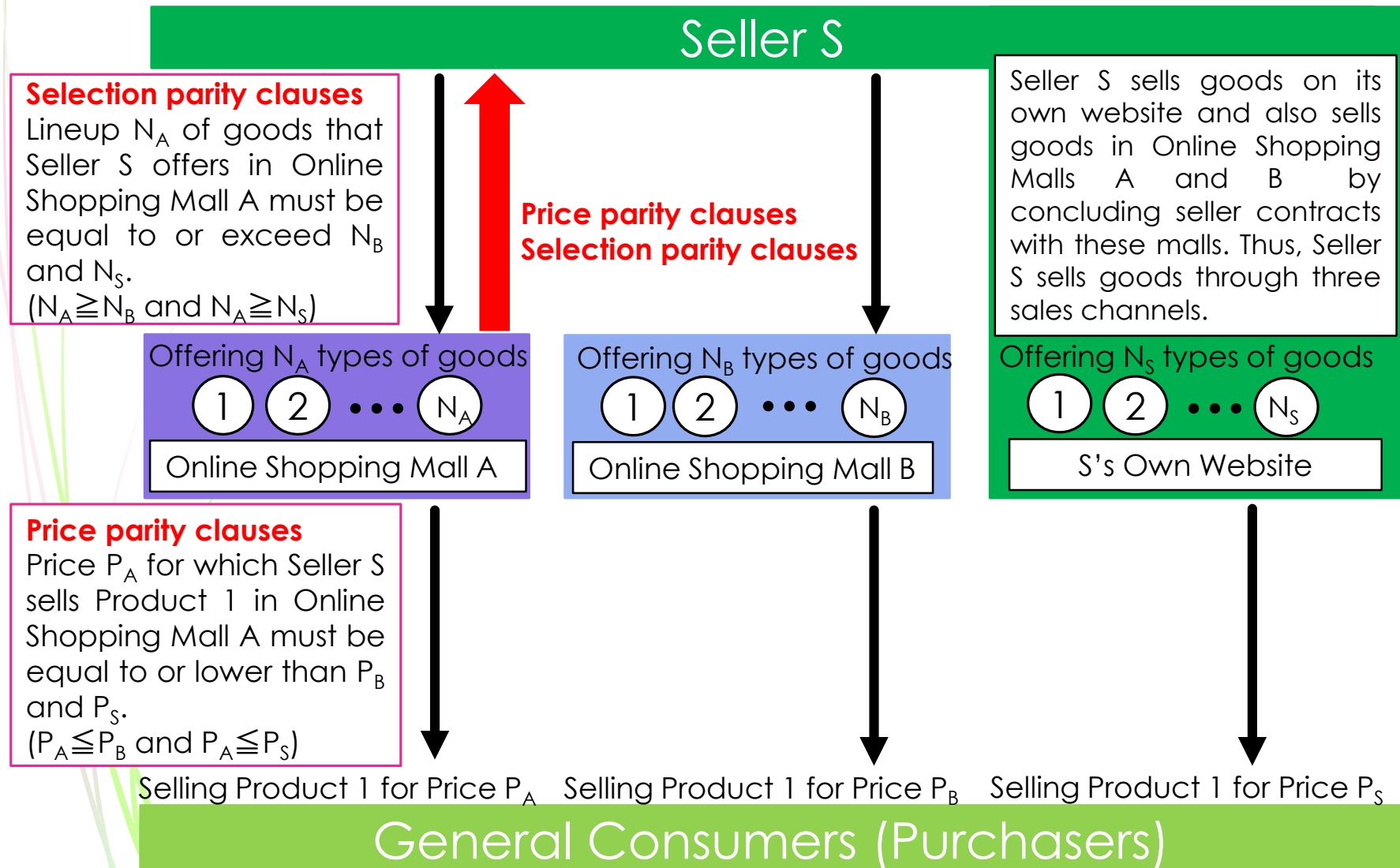
Price parity clauses: Clauses to require sellers to ensure that prices and sales terms for products they sell in Amazon Marketplace are the most advantageous for purchasers among the prices and sales terms for identical products they sell via other sales channels.

Selection parity clauses: Clauses to require sellers to offer in Amazon Marketplace all variations in color and size, etc. of all products they sell via other sales channels

2. Concerns over the Influence of the PPC and SPC on Competition

- ✓ When an online shopping mall operator imposes PPC and SPC on sellers, such clauses may exert influence as shown below to negatively affect competition.
 - (i) Restrict sellers' business activities by limiting reduction of prices and expansions of lineups of goods that the sellers sell via other sales channels
 - (ii) Distort competition among online shopping mall operators by allowing an online shopping mall operator imposing those parity clauses to achieve the lowest price and the richest lineup of goods sold in its online shopping mall without making any competitive effort
 - (iii) Reduce online shopping mall operators' incentive for innovation and hinder new entrants' as the reduction of fees charged by an online shopping mall operator for sellers does not result in these sellers' reduction of prices and expansion of lineups

3. PPC and SPC



4. Measures Proposed by Amazon Japan G.K.

- ✓ During the JFTC's investigation, Amazon Japan G.K. (AJ) proposed to take voluntary measures outlined below.
 - AJ will, promptly after the confirmation by the JFTC, delete the PPC from concluded valid seller contracts, or will waive and will not exercise its rights in relation to the PPC and SPC in those seller contracts. AJ also pledges not to newly specify PPC and SPC in those seller contracts. AJ will disseminate these measures to all sellers.
 - AJ pledges not to specify PPC and SPC in seller contracts which it concludes after taking the measures mentioned above.
etc.
- ✓ After reviewing AJ's proposal, the JFTC recognized these measures would eliminate the suspected violation mentioned above and decided to close the investigation on this case.

III. Conclusion

- The JFTC needs to monitor markets so that the following is ensured: benefits of further innovation of the digital economy will be brought to people; the environment that facilitates new innovation will not be harmed by anti-competitive acts; and consumer benefits will not be undermined.
- The JFTC is seriously tackling these competition issues associated with the digital market by applying the Antimonopoly Act more stringently to anticompetitive conduct and conducting market researches associated with the digital market.
- The JFTC will continue to respond to changing conditions by enhancing information-gathering capabilities in the fields related to IT and digitization as well as further utilizing economic analysis.

Thank You !!

For more information



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