

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Implications of E-commerce for Competition Policy - Note by Japan

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More documents related to this discussion can be found at www.oecd.org/daf/competition/e-commerce-implications-for-competition-policy.htm

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1. Introduction

1.1. JFTC's agenda

1. JFTC recognises that the critical role of competition policy is to promote innovation. JFTC believes that it is one of our top priorities to make public its enforcement policy in order not to discourage pro-competitive business activities and eliminate anticompetitive behaviour, in the digital economy.
2. Digitalisation of economy improves convenience of everyday life. Meanwhile, it can also cause competition concerns such as monopolisation or oligopolisation of market by digital platformers using network effects.

1.2. Contents

3. Firstly, this paper describes the basic framework and background of the "Guidelines concerning Distribution Systems and Business Practices under the Antimonopoly Act (DSBPG)", which gives guidance on the application of the AMA to e-commerce markets by JFTC.
4. Also, this paper introduces a case regarding so-called "Most Favoured Nation (MFN)" clauses by Amazon Japan G.K. (Amazon Japan) as one of JFTC's enforcement experiences with vertical restraints in e-commerce markets, and then explains JFTC's general view over MFN clauses.

2. Vertical restraints in e-commerce markets

5. This section introduces the basic framework of regulating vertical restraints in e-commerce markets described in the DSBPG and the idea which gives a basis of the framework.

2.1. Analytical framework of vertical restraints in the DSBPG

6. Any vertical restraint which tends to impede fair competition is prohibited as unfair trade practices (Article 19 of the AMA), which is sometimes interpreted as a preventive regulation of private monopolisation or unreasonable restraint of trade (Article 3 of the AMA).
7. JFTC published the DSBPG in order to encourage companies and trade associations to dedicate themselves in their business without any infringement of the law. The DSBPG gives detailed description and specifies examples on, with respect to Japanese distribution systems and business practices, what types of conduct in

commercial transactions may impede fair and free competition and therefore violate the AMA¹.

8. It also sets out the criteria for assessing non-price vertical restraints such as restrictions on products or sales territories of distributors, i.e. whether the restraint has market foreclosure effects or price maintenance effects.

9. The DSPBG explains that the assessment of these effects begins with the consideration of the scope of the market influenced by the restraint depending on factors such as objects, regions and manners of the restraint. Next, the following factors are considered comprehensively:

- i. Inter-brand competition;
 - ii. Intra-brand competition;
 - iii. Market position of the company that imposes the restraint
 - iv. Impact of the restraint on business activities carried out by the affected trading partners; and
 - v. The number of trading partners affected by the restraint, and their market positions.
10. In this assessment, due consideration should be given to not only anti-competitive effects but also pro-competitive effects which result from the restraint.

2.2. Analytical framework in the DSPBG applied to platformers' conduct

11. After the enactment of DSPBG in 1991, commercial use of internet proliferated and the environment of Internet access has dramatically changed in Japan.

12. With the widespread use of smartphones in recent years, e-commerce has developed more than ever and new Internet business models have emerged one after another. Given the significant changes of distribution and business practices in Japan, JFTC held the "Study Group on Competition Policy for Distribution Systems and Business Practices" in 2016. The Study Group, which consisted of external experts, gave necessary considerations for the review of DSPBG in accordance with the actual conditions of distributions and business practices in the digital era.

13. The Study Group issued a Report and suggested amendment of the DSPBG. In particular, it pointed out that the rise of online platformers offering marketplaces and SNS had significant impacts on the behaviour and options for consumers and distributors as well as competitive situation in the relevant markets.

14. Moreover, the Study Group concluded that vertical restraints on e-commerce including vertical restraints by online platformers can be regulated, in principle, under the existing framework described in the DSPBG. Therefore, it stated that JFTC did not need to treat vertical restraints on e-commerce in a significantly different manner at its law enforcement, even though the e-commerce markets have been dramatically changed.

¹ JFTC clarifies the analytical framework of vertical restraints prohibited as private monopolisation (Article 3 of the AMA) by "Guidelines for Exclusionary Private Monopolisation under the Antimonopoly Act (October, 2009)".

15. However, the factors to be considered in assessing vertical restraints described in the initial DSPBG set in 1991 were still based on traditional business practices between manufacturers and distributors. The Report recommended that JFTC examines whether it is needed to refer in the DSPBG to indirect network effects observed in recent e-commerce.

16. In June 2017, JFTC revised the DSPBG based on the implication of the Study Group Report. As to the assessment of vertical restraints by platformers, the revised DSPBG apparently mentions that JFTC should consider the competition among platformers in light of direct or indirect network effects.

17. For example, in the situation where indirect effects are at present in a two-sided platform, benefits and utilities of users in one side of the platform will be improved by increase of the number of users in the other side. Accordingly, in assessing the “market position of the company that imposes the vertical restraint” described in the DSPBG, network effects may be deemed to enhance the market position of a platformer depending on circumstances.

18. When assessing effects of vertical restraints on competition in the market, it can be seen that the enhanced market position of a platformer reinforces market foreclosure effects or price maintenance effects, even though other factors are also taken into account in some cases.

3. Amazon Japan (2017)²

3.1. Outline

19. The previous section provided JFTC’s analytical framework of vertical restraints in e-commerce markets. This section introduces actual enforcement against vertical restraints in the markets according to the framework described in the DSPBG.

20. JFTC investigated Amazon Japan since Amazon Japan was suspected to restrict business activities of the sellers in Amazon Marketplace by the contract which contains the MFN clauses (price parity clauses³ and selection parity clauses⁴) in the seller contracts.

3.2. Amazon Japan’s conduct and closing of the case

21. Major online shopping malls in Japan are Amazon Market Place, Rakuten Ichiba and Yahoo! Shopping.

² JFTC publicised a similar case in 2017: JFTC received a report from Amazon Services International, Inc. (ASII), which engaged in the e-books delivery business on the Amazon.co.jp website, which ASII would take voluntary measures on the parity clauses contained in the agreements with publishers or distributors regarding the e-books delivered from said website.

³ 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

⁴ Clauses to require sellers to offer in Amazon Marketplace all variations in colour and size, etc. of all products they sell via other sales channels

22. Amazon Japan conducted review on prices or sales terms for goods sold in and line-ups offered in Amazon Marketplace by some sellers in order to ascertain the status of their compliance with the MFN clauses. When any non-compliance was found as a result of the review, Amazon Japan sometimes gave a notice or an explanation to the relevant sellers to remind them of the contracts containing MFN clauses or requested the sellers to expand a line-up of goods in Amazon Marketplace.

23. During JFTC's investigation, Amazon Japan made a proposal to JFTC to promptly take voluntary measures such as deleting the MFN clauses, waving its rights in relation to the MFN clauses, pledging not to newly specify MFN clauses and reporting the implementation status of the measures to JFTC for three years.

24. JFTC examined the measures of Amazon Japan and concluded that the suspected violation of the AMA would be eliminated. Consequently, JFTC decided to close the investigation on this case after it confirmed that the measures had been actually taken in July 2017.

3.3. Assessment process according to the DSPBG

25. This section introduces how the criteria of illegality of vertical restraint stipulated in the DSPBG can be applied to *Amazon Japan* case in general terms.

26. The DSPBG indicates to take into account network effects in considering the "market position of the company that imposes the vertical restraint", which is one of the five factors, as explained in 2.2.

27. Online shopping mall is a typical platform. Since operators of online shopping malls cannot run their business without either sellers or consumers, they compete with each other in the both market of sellers and consumers. For this reason, in order to evaluate the market position of an online shopping mall operator, consideration should be given to the fact that both sides of competition have an influence on each other by network effects.

28. In particular, it can be said that the more sellers Amazon Japan gets within its platform, the greater appeal Amazon Market Place offers for consumers (competition for sellers has an influence on competition for consumers.). On the other hand, it can also be said that the more consumers Amazon Japan pulls in, the greater Amazon Market Place attracts sellers (competition for consumers has an influence on competition for sellers.).

29. In the light of the analytical framework of the DSPBG, consideration should be given to these impacts by network effects in order to evaluate the market position of Amazon Japan in the online shopping mall market.

3.4. Concerns over effects of MFN clauses on competition⁵

30. When JFTC announced the closing of *Amazon Japan* case, JFTC made public its general concerns over MFN clauses imposed by operators of online shopping malls on sellers. It said that JFTC would consider that MFN clauses may have negative effects on

⁵ These are general concerns over the influence of the MFN clauses on competition. JFTC has not identified whether the MFN clauses imposed by Amazon Japan had such negative impacts on competition.

competition as below: (i) is a negative effect which restricts sellers' business. Both (ii) and (iii) are negative effects on competition between online shopping malls through (i).

- vi. Restrict sellers' business activities by limiting reduction of prices and expansions of line-ups of goods that the sellers sell via other sales channels
 - If Online Shopping Mall A imposes MFN clauses on sellers in its market place and those sellers try to discount prices and expand a line-up of goods in Online Shopping Mall B, those sellers will be forced to offer the same deal in Online Shopping Mall A. Therefore, sellers in Online Shopping Mall A may refrain from discounting prices and expanding a line-up of goods in other sales channels because of the MFN clauses.
- vii. Distort competition among online shopping mall operators by allowing an online shopping mall operator imposing those parity clauses to easily achieve the lowest price and the richest line-up of goods sold in its online shopping mall
 - If Online Shopping Mall A imposes MFN clauses on sellers in its market place, Online Shopping Mall A will be able to have the lowest price and the richest line-up of goods due to the effect of (i) above. Therefore, the MFN clauses would give Online Shopping Mall A the great advantage among online shopping mall operators for competition for consumers. They may decrease incentives of online shopping mall operators to compete.
- viii. 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 line-ups
 - If Online Shopping Mall A imposes MFN clauses on sellers in its market place, those sellers will refrain from discounting prices and expanding a line-up of goods in Online Shopping Mall B regardless of its more favourable terms such as lowering fees for sales due to the effect of (i) above. Therefore, the MFN clauses may decrease incentives of online shopping mall operators to lower fees for competition for sellers. It would prevent new entrants which offer lowered fees.

4. Conclusion

31. JFTC recognises that there is no significant distinction between the criteria for the online or offline environments in deciding of illegality of vertical restraints according to the AMA.

32. At the same time, given the current change of business models in e-commerce markets, JFTC has clarified in the DSPBG that network effect is one of the factors to assess the vertical restraints.