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Consumer data rights and competition – Note by Japan

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This document reproduces a written contribution from Japan submitted for Item 3 of the 133rd OECD Competition Committee meeting on 10-16 June 2020.

More documents related to this discussion can be found at
<http://www.oecd.org/daf/competition/consumer-data-rights-and-competition.htm>

Please contact Ms Anna BARKER if you have questions about this document.
[Email: Anna.BARKER@oecd.org]

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Japan

1. Introduction

1. The Japan Fair Trade Commission (hereinafter referred to as the “JFTC”) had rarely considered acquisition or use of data as a matter of competition law, until the JFTC held the “Study Group on Data and Competition Policy” from January 2017 and conducted interviews with various stakeholders and experts, many of whom raised concerns about competitive impact of acquiring and accumulating vast amount of personal data by digital platforms with their network effects in exchange for offering free services. Based on such concerns, the JFTC published “Report of Study Group on Data and Competition Policy” in June 2017, which pointed out that digital platforms’ collection of consumers’ personal information through unreasonable means could be a violation under the Antimonopoly Act (hereinafter referred to as the “AMA”).

2. In addition, the JFTC had held a series of discussions since July 2018, in the “Study Group for the Improvement of the Trade Environment Involving Digital Platform Businesses” with the Ministry of Economy, Trade and Industry (hereinafter referred to as the “METI”), and the Ministry of Internal Affairs and Communications (hereinafter referred to as the “MIC”). In its interim report, the Study Group proposed that it was necessary to discuss how the regulation of abuse of superior bargaining position under the AMA could be applied to the conduct of business platforms against consumers providing the platforms with their own personal data which might be economically valuable for platforms.

3. And, this proposal was confirmed by “Fundamental Principles for Rule Making to Address the Rise of Platform Businesses,” published by the JFTC, the METI and the MIC in December 2018.

4. Against the background, the JFTC decided to publish the “Guidelines Concerning Abuse of a Superior Bargaining Position under the Antimonopoly Act on the Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc.” (hereinafter referred to as the “Guidelines”) in December 2019, to ensure the transparency and the predictability for digital platforms by clarifying what kind of conducts to acquire or use personal information, etc. could be abuse of superior bargaining position under the AMA. It was followed by publishing its draft in August 2019 to request public comments.

5. Meanwhile, the JFTC has accumulated its insight regarding consumers’ recognition of their personal data. For example, it published an “Interim Report regarding Trade Practices on Digital Platforms” in April 2019, which pointed out that two thirds of consumers consider their own personal information of data as economically valuable, 47.7% of consumers who use digital platform services are dissatisfied with the fact that their personal information or data are utilized by digital platforms without being unaware of it and 75.8% of them have raised concerns about collection, utilization and management of their personal information, etc.

6. This contribution paper is organized as follows: first, it illustrates how our newly published guidelines explain the concepts of the regulation in section 2. Then, section 3 outlines the relationship between competition law enforcement and consumer data protection under the Act on the Protection of Personal Information (hereinafter referred to as the “PPI Act”). Lastly, section 4 briefly summarises this paper.

2. Overview of the Guidelines

2.1. Abuses of Superior Bargaining position applying to Digital Platforms

7. The Guidelines point out that in multi-sided markets with multiple user segments, digital platforms are said to readily expand and promote monopolization and oligopolization through some of their unique features like network effects, low marginal cost, and economies of scale, etc. And, in the case when the digital platform acquiring or using personal information, etc. in unfair manners brings consumers disadvantage and causes adverse effects on fair and free competition, there could be anticompetitive problems under the AMA.

8. That is, if a digital platform in a superior bargaining position over consumers who are the counterparties to transactions bring such consumers disadvantage by making use of such position, unjustifiably in light of normal business practices, such conducts will not only impede the free and independent judgements of such consumers, but will also be likely to give such platforms competitive advantage over its competitors¹.

9. Based on the above interim report of the “Study Group for the Improvement of the Trade Environment Involving Digital Platform Businesses” pointing out that users’ data collected by platforms could be economically as valuable as money in their operations, the Guidelines described that it could be viewed as “transaction” for consumers to provide their own personal information in exchange for the use of the services provided by digital platforms. And, it means that consumers fall within the definition of a “counterparty (in continuous transactions)” of the digital platform and would be regulated under the AMA as abuse of a superior bargaining position.

10. Here, it should be noted that these Guidelines clarified the concepts regarding regulation under the AMA as abuse of a superior bargaining position applying to such transactions and did not expand the scope of application of regulation on abuse of a superior bargaining position.

2.2 Requirements of “abuse of a superior bargaining position”

11. There are two requirements for a conduct to be considered as abuse of a superior bargaining position under the AMA as follows; (i) an enterprise has a superior bargaining position over the transaction counterparts, and (ii) when the enterprise impede fair competition by abusive conduct making use of such position.

2.3 Superior Bargaining Position

12. The Guidelines explained that a digital platform is to be considered to have a superior bargaining position over consumers who provide personal information, etc., if the consumers, even though suffering from unfavourable trade terms and conditions imposed by the digital platform, have no choice but to accept such terms and conditions in order to use the services provided by the digital platform. To determine whether a digital platform

¹ A digital platform is likely to gain an advantageous competitive position against its competitors if it can reduce costs or gain profits by making use of its superior bargaining position to impose a disadvantage on a consumer unjustly in light of normal business practices, and invests such profits in relevant or other businesses.

has such position or not, it is considered whether the consumers “need to trade with” the digital platform².

13. The following three cases show examples that a digital platform is normally recognized as a superior bargaining position over the consumers; (i) when there is no other digital platforms that provides services alternative to the said service for the consumers; (ii) even when other digital platforms providing the alternative service exists, it is practically difficult to stop using the said service because of the network effects or switching costs regarding transferring accumulated data in the platforms; (iii) when the digital platform providing the said services is in a position to control somewhat freely its trade terms with consumers, such as prices, qualities and quantities.

2.4 Conduct constituting an abuse

2.4.1 Basic Concept

14. The conducts constituting abuse of a superior bargaining position are those which fall under any of the categories of Article 2, paragraph 9, item 5, (a) through (c) of the AMA. The Guidelines describe several examples of determining what kind of conducts may constitute abuse of a superior bargaining position by digital platforms related to the acquisition or use of personal information, etc. through transactions between digital platforms and consumers who provide their personal information. Note that the conducts constituting abuse of a superior bargaining position are not limited to the following examples.

2.4.2 Examples of Conducts

15. The Guidelines listed six types of conducts of unjustifiable acquisition or use of consumers’ personal information, etc. by digital platforms and ensured the predictability for digital platforms.

Unjustifiable acquisition of personal information, etc.

a. Acquiring personal information without informing consumers of the purpose of its use.

16. For example, Digital Platform A acquires personal information from consumers without informing them of the purposes of its use on its webpage or in any other ways when acquiring it. This includes the case that the Digital Platform A acquires personal information from consumers in situations where it is difficult for general consumers to understand the explanation of the purpose. In addition, it could also be violation similarly when Digital Platform A acquires personally identifiable information, such as information related to browsing websites or location of mobile devices, even if it does not generally have personal identification by itself, without informing consumers of it.

b. Acquiring personal information against consumers’ intention beyond the scope necessary to achieve the purpose of its use.

17. For example, despite that Digital Platform B explained to consumers that the purpose of use of their personal information was promoting its sale of goods when

² The Article 1 of Consumer Contracts Act stipulates that “in transactions between enterprises and consumers, there is disparity in the quality and quantity of information, and negotiating power between consumers and enterprises.” Thus, the trade terms are generally likely to be unilaterally unfair to consumers.

acquiring it, B acquired information on gender and occupation which were beyond the scope necessary for promoting its sale of goods, without obtaining the consent of consumers or with compelling consumers to consent.

c. Digital Platform C acquires personal data from consumers without taking any necessary measures to appropriately ensure safe management of the data.

d. In addition to making consumers provide their information in exchange for the use of services, Digital Platform D compels consumers to provide other economic interests like more detailed personal information, etc. when the consumers are continuously using the services of the platform.

Unjustifiable use of personal information, etc.

a. Using personal information beyond the scope necessary to achieve the prior notified purpose of its use, and against the intention of consumers.

18. For example, despite notifying consumers that their information will be used just for promoting its sales of goods, Digital Platform E used it beyond the notified purpose, like for targeted advertising for other enterprises, without obtaining the consumers' consent in advance. Other example is that, Digital Platform E provided the third parties with the personal information acquired from consumers using E's services without obtaining their consents.

b. Using personal data without taking any necessary measures to appropriately ensure safe management of personal information.

3. Legal Configuration as to Protection of Personal Data

3.1 Act on the Protection of Personal Information and the Personal Information Protection Committee

19. As explained in detail below, for the first time, the Personal Information Protection Committee (hereinafter referred to as the "PPC") issued a correction advisory against Recruit Career Co. in the context of protecting consumer's personal information, while the JFTC was formulating the Guidelines. A duty of the PPC is ensuring the proper management of personal information in order to protect the rights and interests of individuals. To fulfil the duty, the PPC monitors and supervises all private enterprises that manage personal information regardless of business field based on the PPI Act. The PPC may, if necessary, request reports and on-site inspections, offer recommendations, issue guidance, advices and orders, and impose penalties against private enterprises if they do not follow the orders.

20. The case of Recruit Career Co., was at first reported in some papers in August 2019, and then drew headlines across the country. The company was one of the major job matching platforms between students and businesses and sold the results of artificial intelligence (AI) data analysis about the probability of each job-hunting student's declining job offers based on the data obtained from the students utilizing its platform. Although the conduct of the utilization of the students' data without their consent was a violation of PPI Act, which led to the correction advisory issued by the PPC in August 2019, the conduct of "practically obliging users to give consent as a condition for using the service depending

on the usage of the service” was just subject to an administrative guidance under the Employment Security Act issued by the Ministry of Health, Labour and Welfare.

3.2 Relationship with Competition Law

21. If it is found that a company, regardless of its size or its share on the relevant markets, uses or collects personal information without consent of the person, that is, violation in the light of the PPI Act, the PPC would deal with the case under the Act. On the other hand, if the conduct was at a risk of adversely affecting competition, not just in the case that consumers do not consent, but also in the case that they are compelled to consent the use of personal information beyond the initially notified purposes, the JFTC might investigate the case suspecting abuse of a superior bargaining position.

22. Note that, the PPI Act regulates all of enterprises including SMEs and the definition of “personal information” is prescribed by limitative listing. On the other hand, the AMA would be applied flexibly and responding to rapid changing business models when there is a risk of adversely affecting competition based on actual competitive environments, cautiously taking care of the risk of false positive.

23. The JFTC, as necessary, cooperates with the PPC to tackle the cases of abuse of a superior bargaining position under the AMA regarding the transactions between digital platforms and consumers that provide personal information, etc.

4. Conclusion

24. Although the personal data issues have never been recognized in the field of competition law enforcement until recently, their impacts have been growing unexpectedly. And, the JFTC is just getting to the starting point to ensure fair and free competition to guide huge digital platforms collecting and utilizing personal information in a proper manner. The JFTC will enforce the regulation with the newly established Guidelines and continuously monitor the relationship between consumers and platforms and its impact on the relevant markets.