

## **Prepared Remarks of Chair Kazuyuki Furuya**

### **The G7 Joint Competition Enforcers & Policy Makers Summit on 12 October 2022**

#### **Publishing new guidelines related to Abuse of a Superior Bargaining Position rule in digital markets**

From the JFTC, I would like to talk about the "Abuse of a Superior Bargaining Position", which is a type of prohibited conduct under the Antimonopoly Act. We use it as a regulatory tool to address the issue of digital platform's collection and use of consumers' personal information.

Collection and use of personal information has traditionally been addressed as a privacy policy issue. However, in recent years, as digital platforms have been further strengthening its market power by collecting large amounts of data in exchange for free services, competition concerns about the collection and use of personal information have arisen. So, the JFTC has decided to address this issue as a competition issue.

Enforcing the Antimonopoly Act promptly against digital platforms is a big challenge for us as market definition and the identification of theory of harm are required. I am confident that Japan's Abuse of a Superior Bargaining Position regulation, which is sometimes called unique in the world, is an effective tool for enforcement against digital platforms.

Japan's Abuse of Superior Bargaining Position rule regulates conducts of an enterprise having a relatively superior bargaining position against its counterparties which cause an unfair disadvantage to the counterparties. Therefore, enforcing an regulation of Abuse of a Superior Bargaining Position does not require the identification of a dominant market position, the market definition, or building a complicated theory

of harm.

The Abuse of Superior Bargaining Position rule has been traditionally applied to “B to B” transactions. However, as based on the fact that consumers provide personal information which has economic value to digital platforms in exchange for consumption of services, we published new guidelines to clarify that the Abuse of a Superior Bargaining Position rule can be applied to digital platforms’ unjustifiable collection and use of personal information.

For example, if a digital platform “collects personal information without informing the consumer of usage purposes” or “uses personal information against the consumer’s will beyond the scope necessary to achieve the purpose of use”, such conducts could violate the Antimonopoly Act.

So far, we have no cases of Abuse of a Superior Bargaining Position application to “B to C” transactions, but we believe that it is important and effective to develop such soft law to increase the predictability in antitrust law enforcement against digital platforms and prevent its violations of the Antimonopoly Act.

In our fact-finding survey on the digital advertising subsequently published, we pointed out that collection and use of personal information for online-targeting can be problematic based on the new guidelines, and requested digital platforms to clarify the types of information to be collected and their usage purposes.

Of course, if problematic behaviors are actually recognized, the JFTC will strictly enforce the Abuse of Superior Bargaining Position rule in accordance with the guidelines.

When we published the guideline, there was a kind of friction between the JFTC and the Personal Information Protection Commission as it was concerned that enforcement of the Antimonopoly Act and that of the Personal Information Protection Law might overlap against a same

event. After confirming and coordinating enforcement approaches between the authorities, we have agreed to cooperate in handling cases involving unfair collection and use of personal information by digital platforms in the future.

### **Collaboration between the JFTC, CAA and PPC**

I would like to talk about the collaboration between the JFTC, the Consumer Affairs Agency or "CAA" and the Personal Information Protection Commission of "PPC" in Japan.

When discussing data markets in which personal data is processed, it is important to balance three perspectives of "Competition," "Data Protection," and "Consumer Protection".

Frictions among these three policy objectives are not necessarily generated, and in some cases each policy issue can be addressed at the same time. For example, data-portability can achieve data protection in that consumers will be able to fully control their own information, and also promote competition and encourage innovation by promoting the use of data.

From this perspective, the JFTC, the CAA, and the PPC have set up regular meetings to exchange views and experiences on policy tools and actual case studies among the three authorities, and we will further strengthen the cooperation in the future.

### **Justification by security or privacy issues under the Antimonopoly Act**

In the process of law enforcement and fact-finding survey, when we communicate with digital platforms regarding their activities potentially problematic under the Antimonopoly Act such as various restrictive practices and self-preferencing, digital platforms often justify their conducts as necessary to ensure consumers' security and to protect their privacy.

The evaluation of whether a conduct is justifiable is based on a comprehensive consideration of anticompetitive effects and benefits of consumers. When evaluating the justification, we examine the following three perspectives:

- ① firstly, justifiability of purpose (which means, whether the purpose is consistent with consumer benefits);
- ② secondly, rationality of the conduct (which means, whether the conduct is truly necessary to achieve the purpose); and
- ③ thirdly, reasonableness of means (which means, whether there is no other appropriate means to replace the action; and socially appropriate).

This examination may require us sophisticated technical evaluations related to ensuring security and protecting privacy in some cases, which require extensive verification work as well as high-level expertise. It is a big challenge for us.

To address such a challenge, retaining technical specialists is necessary, and we are strengthening our institutional capacity and ability by commissioning some experts of security and privacy fields as “Digital Special Advisors”, and also hiring other experts in such fields as JFTC’s staff members for newly created position, “Digital Analysts”.

## **Digital enforcement**

I would like to introduce JFTC’s law enforcement in the digital markets. We are prioritizing digital platforms’ prompt and secure corrective actions in the investigations on the digital markets.

First, we recognize that one of the critical challenges in law enforcement on complex and rapidly changing digital markets is that issuing formal Cease and Desist orders and litigation processes are highly time-and-resource consuming.

Therefore, the JFTC’s position is that in case a digital platform

proposed a commitment to correct anti-competitive behaviors in the dialogues under the investigation process, the JFTC prioritizes to achieve the "outcome" to promptly restore competitive environment by securing implementation of corrective measures.

Based on the above policy, we have been actively engaged in flexible and agile law enforcements through commitment procedures or communications with digital platforms. As a result, we have succeeded in making effective remedies actually implemented in the markets. We believe that such practices in enforcement can balance two imperatives in the digital markets; promotion of competition and facilitation of innovation.

As specific examples of recent investigation cases, I would like to introduce three cases related to global digital platforms.

The first case is about Apple. As a result of the investigation, in March 2022, Apple implemented a corrective measure to allow app developers introduce outlinks on their own websites for their music, e-book, and other reader apps.

We believe that this corrective measure is significant not only in Japan but also worldwide, on the point that reader app developers now have an effective means to sell their digital contents without paying any fees to Apple.

The second case is about Amazon. We investigated Amazon's conduct in deducting the payment due to its suppliers of products to be sold by Amazon, based on the suspicion of the violation of Abuse of a Superior Bargaining Position rule.

In the process of the investigation, JFTC approved a commitment plan proposed by Amazon, that includes a corrective measure refunding approximately 2 billion yen in total to about 1,400 disadvantaged suppliers. It is a significant achievement because for remedies, the usual orders issued by the JFTC do not include such financial recovery to

disadvantaged enterprises.

The third case is about Most Favored Nations (MFNs) clause conducted by Expedia and Booking.com.

Under a commitment by Booking.com, it is required not to manipulate its ranking algorithms to downgrade hotels that do not comply with price-parity clauses under the service agreement between Booking.com and such hotels, and for the next three years the JFTC will receive from Booking.com annual reports on the implementation status of such commitment. We will be evaluating whether its commitment is sufficiently implemented.

While dealing with such anticompetitive conducts by global big-tech is a common international challenge, the JFTC has also been paying attention to and handling a wide range of issues of domestic digital platforms unique in Japan.

For example, we have quickly handled some cases of domestic digital platforms, such as online mall named "Rakuten", a platform for brokering funeral services, and a platform for brokering pet animal transactions.

## **Advocacy**

We also recognize that advocacy is a material tool to complement the law enforcement.

We believe that the JFTC's fact-finding survey not only reveals the actual status of the market, but also has significance as a soft law to prevent anticompetitive conducts and promote industry players' voluntary improvement activities by indicating the views under the Antimonopoly Act. In addition, based on the result of such surveys, we are also making policy proposals on the development of new rules to complement the Antimonopoly Act.

For example, in our fact-finding survey on cloud services, we recommended that cloud services providers take some actions in order to improve transparency and maintain competition in the cloud services market. Following the recommendation, Google explained to us that it would provide more detailed explanations to its customers to improve the transparency of transactions.

In addition, based on the JFTC's fact-finding survey on the digital platformers, the Act on Improving Transparency and Fairness of Digital Platforms was enacted to supplement the Antimonopoly Act. We will continue contributing to the discussions in the government about the development of new rules with our on-going surveys on mobile OS.

In the digital market, we need to increasingly stimulate competition in the future by, such as, the growth of startups. The Japanese government regards growth of startups as a key factor to promote dynamism and growth of the Japanese whole economy and solve some social issues, and is working on to improve the business environment for them.

The JFTC accurately reviews M&A cases including killer acquisitions in the digital sector, with revising guidelines and policies concerning procedures. In addition, the JFTC, in cooperation with the Financial Services Agency, made a survey on possible causes of a common phenomenon that opening price becomes much higher than offering price when a startup makes an IPO (Initial Public Offering). And, the JFTC made recommendations for the reform of IPO pricing process.

## **New Challenges**

In the complex and rapidly changing digital market, services utilizing new technologies, such as metaverse and blockchain, are being developed. We recognize that it is important to identify at an early stage trade practices which can affect competition and harm consumers so that we can respond quickly when competitive issues arise in the near future.

We would like to continue to deepen international cooperation among G7 countries to address enforcement challenges like those shared today.