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Interim Discussion Paper

Improvement of Trading Environment surrounding Digital Platforms

Study Group on Improvement of
Trading Environment surrounding Digital Platforms

The Study Group on Improvement of Trading Environment regarding Digital Platforms (“Study Group”) has held discussions nine times, starting from the first meeting on July 10, 2018. This Interim Discussion Paper sorts out the content of the discussion so far, which considers opinions collected through interviews with businesses conducted by this Study Group, as well as opinions submitted through a Public Comment.

The Study Group expects that the Ministry of Economy, Trade and Industry (“METI”), the Japan Fair Trade Commission (“JFTC”), and the Ministry of Internal Affairs and Communications will advance policy discussions on improvement of the trading environment surrounding digital platforms based on the discussion of this Study Group.

1. Roles and Features of Digital Platforms

- Services called “digital platforms (online platforms)”, which utilize ICT and data to provide users a “field”, include various categories of services such as:
 - Online shopping malls, internet auctions, online flea markets, application markets, search services, contents delivery services (movies, videos, music, e-books etc.), booking services, sharing economy platforms, social networking services (“SNS”), video sharing services, electronic payment services, etc.
- With the swift development of ICTs and generation of massive data under the Fourth Industrial Revolution, digital platform operators have become innovation leaders that continue to drive new businesses and markets, and have achieved rapid growth. As the layerization (stratification) of digitalized industries and businesses progresses, this trend of “platformization”, through covering certain layers, is irreversible on the whole.
- These digital platforms dramatically raise the possibility of small and medium-sized companies, as well as startup companies, to access both domestic and international markets, and sometimes bring opportunities for explosive growth.

- Digital platforms are also beneficial to consumers since they not only provide consumers with a variety of choices of goods and services, but also enable them to make transactions under certain secure and safe environments provided by digital platform operators.
- Digital platforms are described by the following factors appearing remarkably in economic order:
 - In general, a platform's business is a multi-sided market composed of multiple different layers of users, creating one whole ecosystem.
 - It is pointed out that, as far as such multi-sided platforms are concerned, not only direct network effects (e.g., as the number of users of an SNS increases, they can communicate with more people, resulting in increasing the benefit of the SNS) but also, as an equally important feature, indirect network effects (e.g., in online shopping malls, as the number of members increases, the sellers will enjoy more opportunities to gain profit) work, which would tend to facilitate monopolization or oligopolization.
 - As for businesses that make full use of ICT technologies, unlike hard infrastructure, production costs are generally low mainly due to small marginal cost for reproduction of data, and economies of scale continue to work with the continuous decrease of per unit cost even if the scale of business expands.
 - While network effects and economies of scale increase the utility of users by concentration of data, they also raise switching costs between different platforms, which would tend to facilitate monopolization or oligopolization.
 - In addition, it is pointed out that once a business model based on data is established through accumulation and utilization of data, a virtuous cycle may be created, where the competitive advantage of such business is maintained and strengthened through further accumulation and utilization of data (as a way of such accumulation of data, a business model where goods or services are provided for free in exchange of obtaining personal data, may sometimes be adopted).
- With these features, some digital platform operators have grown rapidly and have become extremely large. They tend to expand their business through acquiring different businesses, forming conglomerated corporate groups, and oligopolizing or eventually monopolizing the market. These giant digital platform operators now provide consumers (individuals) and businesses with socio-economically more or less essential basis.

- According to the world ranking of market capitalization as of March 2018, digital platform operators occupy top rankings, as shown below:
1st Apple (approx. \$851 billion), 2nd Alphabet (Google) (approx. \$719 billion), 4th Amazon.com (approx. \$700 billion), 6th Tencent (approx. \$492 billion, 7th Alibaba Group (approx. \$467 billion), 8th Facebook (approx. \$464 billion)
- On a worldwide basis, the number of Google searches is 230 million per hour on average (2016), the annual sales amount of Amazon is approx. \$177.8 billion (2017), and the number of Facebook’s active users is approx. 2.2 billion (2018).

2. Perspective of Legal Evaluation of Digital Platform Operators

- As mentioned above, digital platform operators include various types of businesses and there is no established definition.^[1]
- In this regard, there is an international movement towards establishing legal discipline on digital platforms by targeting some types of such digital platforms under certain conditions.
 - In April 2018, the European Commission published the “Proposal for a Regulation on Promoting Fairness and Transparency for Business Users of Online Intermediation services” (the “EU New Regulation Proposal”). The EU New Regulation Proposal suggests imposing disciplines on “online intermediation services”,^[2] where B2C digital platform operators are assumed, from the viewpoint of fairness and transparency in the relationship with their business users. In addition, in April 2018, the European Commission published the “New Deal for Consumers” package which proposes to impose certain disclosure obligations for consumers on “online marketplace”^[3].

¹ During the interview with businesses conducted by this Study Group, some digital platform operators expressed concerns that, since there are a variety of different kinds of digital platform operators, generalized discussions could cause unexpected adverse effects. Likewise, during the Public Comment procedure implemented on the Interim Discussion Paper (Draft), there were opinions which expressed the importance of clarifying the targeted digital platform operators based on the possible harm they may cause in order to avoid overregulation.

² The EU New Regulation defines “online intermediation services” as services that meet certain conditions including allowing “business users to offer goods or services to consumers, with a view to facilitating the initiating of direct transactions between those business users and consumers, irrespective of where those transactions are ultimately concluded.”

³ EU’s “Consumer New Deal” package, the “online marketplace” is defined as “a service provider which allows consumers to conclude online contracts with traders and consumers on the online marketplace’s online interface.”

- China's "E-commerce Law" adopted in August 2018 stipulates duties and responsibilities of "e-commerce platform operator" and "operator inside a platform".⁴
- In Japan, traditionally, the prevailing view has been that digital platform operators do not, in principle, owe responsibilities, since they merely provide a field for transactions.⁵
- However, a court case in which the plaintiff argued that an internet auction operator should bear responsibility with respect to fraudulent transactions that took place on the platform (Judgment of Nagoya District Court on March 28, 2008, Judgment of Nagoya High Court on November 11, 2008) held that, in general, a platform operator owes a duty to users to "build a system without defect when providing services concerned." The judgment further stated that the actual duty of an operator should be found "through comprehensive consideration of various factors, including social circumstances surrounding internet auctions at the time when the service was provided, relevant laws and regulations, technical standards of the system, the cost for structuring and maintenance of the system, the effect of introducing the system, the convenience for users". Taking this in mind, we should consider the current social circumstances, technical standards and user's convenience when considering appropriateness of legal rules to be applied to digital platform operators.
- Currently, there is a global trend to regard digital platform operators as a so-called points of control of regulation (an entity designated among other dispersed entities as a subject of exerting regulation to effectively realize control by the government) or as a gatekeeper.
 - In the United States, at the state level, there is a movement to clarify the legal status of Uber as a "Transportation Network Company", place them under control by introducing a license system, and to impose responsibilities of management on drivers.
 - Mainly in the EU, there is a movement to impose responsibilities on digital platform operators to take proactive measures against copyright infringing contents or terrorism-related contents etc.

⁴ In China's E-commerce Law, the "e-commerce platform operator" means "an legal or non-legal entity that provide services to a counterparty or a related party in e-commerce such as a place to operate internet businesses, transaction matching, and information sharing."

⁵ See "Guidelines on E-commerce and Information Material Commerce" Section I-6.

- These movements can be seen as an attempt to integrate digital platform businesses into the system of industry-specific regulations, and impose certain responsibilities on them as a point of control from the viewpoint of safety management, while allowing them to conduct business.
- With respect to digital platform operators that have become giant and provide an essential basis for socio-economy, some opinions attempt to justify placing certain responsibilities or disciplines on them by referring to the so-called essential facilities doctrine or public utilities doctrine.
- Digital platform operators design and operate rules and systems to be applied to consumers (individuals) and businesses participating in such digital platforms while integrating them with contracts (terms and conditions) (Along with the progress of digitalization, among factors that discipline people's actions such as "law" and "market", the importance of so-called "code/architecture"⁶ is said to have greatly expanded. Digital platform operators can be seen as a private designer of such code/architecture.). Contracts signed between users through digital platforms also depend on how such platforms are designed.
- As a result, especially as for giant digital platform operators, they could be seen as not only mere intermediaries of transactions but also as an entity that, with its market power, designs, operates and manages a market itself participated by many consumers (individuals) and businesses. However, unlike stock exchanges (regulated by Financial Instruments and Exchange Act) or wholesale markets (regulated by Wholesale Market Act), they are not subject to any industry-specific regulations on how to design, operate and manage the market.
- In addition, today's digital platform operators place algorithms supported by technologies including AI as an important factor of their rules and systems, and design and operate platforms based on analysis (i.e. profiling) using such algorithms. It is pointed out that this type of market tends to be essentially highly manipulative and non-transparent because digital platform operators can easily change the disciplines of the market based on their market power, or can provide

⁶ In general, "code/architecture" is used to express a "physical or technological structure that restricts or enables actions of certain subject" in the cyber space. In this Interim Discussion Paper, it is also used to mean a legal structure with respect to digital platforms, such as contracts (terms and conditions), depending on the context.

information which is seemingly neutral but is actually biased by manipulating parameters.⁷

- As described above, giant digital platform operators notably have the following features, and the problem is how to improve the trading environment from which viewpoint in each aspect, and with what measures based on such features.
 - They provide an essential basis for socio-economy.
 - They design, operate and manage a market itself participated by many consumers (individuals) and businesses.
 - This type of market is highly manipulative and non-transparent.
- When examining the specific way of disciplines based on the viewpoints above, since digital platform operators include various types of businesses, it is also helpful to analyze each digital platform business from the viewpoint of whether it is a matching platform business or a non-matching platform business,⁸ what kind of business model, such as its revenue structure, is used, whether the transactions between users are B2C or C2C, and whether the governance should be structured based not only on individual transactions but also on the ecosystem as a whole.

3. Designing Responsibilities of Digital Platform Operators as Innovation Leaders (the way of Industry-Specific Regulation etc.)

- It is extremely important to facilitate further development of digital platform businesses in our country, considering the irreversible trend of platformization due to layerization as well as the roles of digital platform operators as discussed in the aforementioned 1. For this purpose, in addition to developing and attracting innovative technologies and companies, it is also necessary to consider

⁷ During the Public Comment procedure implemented on the Interim Discussion Paper (Draft), there were opinions which expressed concerns that expression, speech or commercial activities would be restricted by a unilateral decision of digital platform operators.

⁸ In general, digital platforms which intermediate users' transactions (e.g., online shopping malls and application markets) are often called "matching platforms (in a narrow sense)" and other digital platforms (e.g., SNSs or video sharing services) are often called "non-matching platforms". Having said so, it is pointed out that the differences between matching and non-matching platforms are fluid and they have some common features, including such that huge amount of information is accumulated to digital platforms. Also, even non-matching platforms can be seen as providing a field to intermediate information with respect to transaction when they obtain information from users and deliver advertisements.

appropriately easing barriers to entry from institutional aspects such as reviewing industry-specific regulations as discussed below.

- The core of services provided by digital platform operators is to analyze and optimize customers and goods or services by making use of ICT including big-data analysis, IoT, and AI, and connect consumers (individuals) and consumers (individuals), consumers (individuals) and businesses, and businesses and businesses. Companies with advanced ICT are expected to enter different industry sectors or provide customers with functions and services integrated across various industries.
- It can be said that traditional industry-specific regulations, given existing business models, mainly targeting the entity at the endpoint of the vertically sectioned value chain, select certain entities that can be recognized as reliable by permits and approvals, and impose codes of conduct such as transaction rules and safety standards. On the other hand, digital platform businesses do not necessarily fall within the forms of “industry” envisioned by the existing industry-specific regulations. Therefore, with regard to industry-specific regulations where the emergence of digital platform businesses was not necessarily expected (e.g., platforms for private lodging services, ride-sharing, social lending, etc.), certain phenomena such as the following has occurred.
 - The existing industry-specific regulations have become obstacles to conducting platform businesses.
 - The existing industry-specific regulations have failed to adequately exert control over platform businesses, thereby failing to legally secure the social benefits and values (e.g., consumer protection and safety ensuring) which must be protected.
- In order to facilitate a sound development of digital platform businesses in our country, it would be necessary to consider whether we should review each industry-specific regulation, turning back to concrete social benefits and values (e.g., ensuring consumer protection and redress, safety and health, and fair competition) and especially taking the following viewpoints in mind (when considering reviewing, it would be possible to utilize the regulatory sandbox system):
 - Whether the existing industry-specific regulations exert adequate controls from the viewpoints of social benefits and values to be protected under the current social circumstances including the progress of digitalization (e.g., whether the

contents of existing regulations are still reasonable now, whether there are legal infringement phenomena that the existing regulations fail to capture).

- How to appropriately divide the roles between digital platform operators on one side, and consumers (individuals) and businesses on the other side (It would be possible to devise effective consumer protection and ensuring safety by placing digital platform operators as points of control of regulation).
- Whether a level playing field with regard to competition conditions is ensured between businesses operating existing businesses (existing businesses) and digital platform operators (e.g., whether existing businesses are advantageous or disadvantageous depending on industry-specific regulations), and whether a level playing field with regard to competition conditions vis-à-vis foreign business operators is ensured (e.g., whether certain regulations in Japan are only applied to domestic businesses).
- Whether there is room to design systems that effectively make use of certification and audit in order to ensure trust for entities in digital markets such as digital platform operators.^{9]}
- As a method of regulatory system design, it would be appropriate to introduce co-regulation, a flexible way of regulation that combines self-regulation and legislation.

4. Ensuring Transparency to Achieve Fairness

(1) Necessity of achieving transparency and fairness

- There would be issues such as the following with respect to transparency and fairness in rules (code/architectures) designed, operated and managed by digital platform operators.

[Viewpoint from business(es)]

- In the relationship with businesses (especially small and medium-sized enterprises), lack of transparency in rules concerning platforms could possibly become a hotbed of unfair trade practices.
 - As the background of Japanese regulations on abuse of superior bargaining position and Guidelines concerning Distribution Systems and Business Practices, there is the basic recognition that lack of transparency in trade

⁹ As to sharing economy that expands in the digital market, Sharing Economy Association Japan (a general incorporated association) establishes a system that certifies sharing economy businesses that make efforts to ensure safety and trust.

practices will lead to unfair trade practices and eventually to anti-competitive effects in the market.

- As a matter of fact, some issues with regard to trade practices between giant digital platform operators and businesses have been pointed out.¹⁰
 - The EU carried out a large-scale questionnaire with respect to B2B transactions and figured out that many businesses have experienced problems with online platform operators or recognized issues in trade practices.
 - In 2016, the METI and the JFTC conducted “Joint Hearing Survey with respect to Internet-related Businesses” in which they interviewed businesses such as e-commerce operators including contents developers. As a result, several actual trade practices by certain digital platform operators were identified such as restrictions on payment method, rigid pricing structure, prohibition of the use of common virtual currencies between applications, exclusion of applications that compete with those offered by the digital platform operator itself, scarce information about sales and refund, lack of transparency in the reviewing standard and its operation, limitations on providing services without going through the application store, and conclusion of excessively broad non-disclosure agreement (METI, “Report by The Cross-sectional System Study Group for the Fourth Industrial Revolution”).
 - In addition, an online questionnaire to businesses conducted by METI in October 2018 revealed that, while many businesses enjoy the benefit of utilizing digital platforms, such as obtaining new customers or reduction of costs, a lot of businesses replied that they were not satisfied with the operations, contracts or trade practices of the digital platforms.
 - However, in these surveys, it was sometimes the case that businesses subject to the survey refused to provide detailed information due to non-disclosure agreement, and as a result that it was not possible to sufficiently grasp the problems in trade practices.

¹⁰ During the Public Comment procedure implemented on the Interim Discussion Paper (Draft), there were opinions which pointed out that there are problematic trade practices which need to be improved such as unilateral change or termination of contracts or services, or burden of excessive penalties or service fees. There were some opinions that we should consider establishing a framework that requests public disclosure of terms and conditions and enables the monitoring, as well as designing systems that protect one-person businesses or small and medium-sized enterprises.

- Considering these circumstances, it would be necessary to ensure transparency and fairness in the relationship between businesses and platforms.

[Viewpoint from consumers (individuals)]

- In the relationship with consumers (individuals) as well, lack of transparency could become a hotbed of unfair trade practices or causes of infringement of rights.
- These days, along with the spread of IoT and advancement of AI-related technologies, the importance of data has increased and it has become important to utilize such data on business activities. In this regard, the data which digital platform operators collected from consumers (individuals) using such platforms can be considered to have economic value in their business activities, just like money.
- In addition, depending on the way of handling personal data and of profiling, this could damage the personal rights of consumers (individuals) by leading to invasion of privacy or discrimination.^[11] Further, consumers (individuals) could suffer from economic disadvantage caused by profiling to produce credit information. When we consider the desired relationship between digital platform and consumers (individuals), it is also important to take account of the risks to the moral interests and the economic interests of consumers (individuals), in addition to the economic value the personal data itself has.
- Considering these arguments, it would be necessary to pursue transparency and fairness in the relationship between digital platforms and consumers (individuals) as well.
- In addition, with regards to the methods of redressing consumers (individuals), the task is to ensure an effective redressing method, taking into account that there are cases where individuals' exercise of their legal rights cannot be expected due to the small amount of damages suffered by each individual as such.

[Viewpoint from regulators]

- It would be necessary to shed light on the actual state of trade practices surrounding digital platform operators, as a premise for regulators to

¹¹ On October 22, 2018, the Personal Information Protection Commission issued an administrative guidance on Facebook with respect to social plug-ins.
<https://www.ppc.go.jp/news/press/2018/20181022/>

appropriately enforce laws on unfair trade relationship or to consider the necessary policy measures such as amending the laws.

- Further, expertise and ability to understand rules (code/architecture) of digital platforms is becoming important.
- It would be appropriate to regard both businesses and consumers (individuals) as users of platform, and deliberate building transparency and fairness of transaction as protection for users in such mean.

(2) The way of efforts to achieve transparency and fairness

- As a starting point for a discussion to achieve transparency and fairness in trade practices surrounding digital platform operators, it would be necessary to conduct large-scale, comprehensive and thorough surveys with stakeholders.
 - When conducting a survey, as necessary, it would be appropriate to exercise the general investigation power (compulsory investigation power) provided for under Article 40 of the Antimonopoly Act, since there would be situations where the effectiveness of a survey without compulsory power is limited, for example in the case where businesses subject to the survey may refuse to offer information for reasons such as non-disclosure agreements.
- In addition, it would be appropriate to consider establishing an expert organization with certain continuity, having expertise and professional capability not only in law but also in economics, information processing, and system engineering, and have the organization competent to support law enforcement and policy making of each ministry.
 - This expert organization would continuously research and analyze the ways that digital platform operators design, operate and manage the rules (code/architecture) (including contract analysis), and make reports to relevant ministries and regulatory agencies.
 - In addition, how about making the expert organization suggest general interpretation of laws and necessary legislations and provide information to the regulatory agency when it recognizes facts of an individual case which shows suspicion of illegality.
- It would be appropriate to consider introducing disciplines from the viewpoint of ensuring transparency and fairness in trade practices between digital platform operators and users of digital platforms.

- As a means to complement the Antimonopoly Act, it would be possible to oblige digital platform operators to make available and disclose the important parts of their rules (code/architecture) to businesses.
- It would be necessary to consider the contents and measures of disciplines and the scope of digital platform operators that are subject to the rules, by taking account of the speed of business changes, the magnitude of the burden, the risk of impeding new entry, consideration on intellectual property rights, trade secrets and know-how, as well as in-camera proceedings.^[12]
- In order to create a competitive environment where innovations in the digital areas constantly keeps occurring, it would be necessary to consider, taking account of the balance with innovation, the contents of rules and the ways of such rules including co-regulation, a flexible way of regulation that combines self-regulation and legislation, from the viewpoint of making a flexible framework that can adapt itself to the speed of changes of technologies and businesses.^[13]
- It would be appropriate to consider introducing an effective dispute settlement mechanism whereby users of platforms can resolve problems with digital platform operators by themselves.
- It would be appropriate to consider a mechanism to ensure effective disclosure of information.

5. Ensuring Fair and Free Competition in Digital Markets

- Enforcement of competition law as an *ex-post* regulation will become more and more important as digital platform operators have become essential for socio-

¹² During the interviews with businesses conducted by this Study Group, digital platform operators addressed the necessity of facilitating innovation, ensuring fair competition conditions domestically and internally, and pursuing policies balanced between improvement of consumer convenience and consumer protection. They also expressed their opinions that the contents of disciplines should be considered carefully taking account of the adverse effects such as impeding innovation. In addition, during the Public Comment procedure implemented on the Interim Discussion Paper (Draft), there were opinions which insisted to avoid obstructing innovation by overregulation, and the importance of the mid- to long-term perspective and the balance between freedom and regulation.

¹³ During the interviews with businesses conducted by this Study Group, some users of digital platforms pointed out that, in order for the better functioning of co-regulation, it would be ideal to ensure the incentives of the private sector by legislations, while ensuring legal enforcement. In addition, during the Public Comment procedure implemented on the Interim Discussion Paper (Draft), there were some opinions which addressed that utilization of co-regulation should be considered, that an incentive scheme where voluntary efforts of businesses are positively evaluated would be necessary, and that ensuring effective and fair treatment against digital platform operators who do not participate in such voluntary efforts would be important.

economy whereas they tend to grow giant and oligopolize or monopolize the market.

- Meanwhile, there are international discussions on whether traditional competition law disciplines (tools) are applicable to digital platform operators, and if there is a situation where that is impossible or difficult, what should be revised in what way (e.g., how either competition law, consumer protection law, or data privacy protection law should be reviewed, or whether other regulatory measures are necessary).
- It would be necessary to consider the necessity of ensuring “fair and free competition” in digital markets, in Japan as well, taking into account the following points of view.¹⁴
 - Whether digital platform operators owe any responsibility based on the fact that they provide an essential basis for socio-economy.
 - Whether the so-called essential facilities doctrine is applicable. Or whether it is possible to go back to the public utilities doctrine.
 - How to evaluate the fact that digital platform operators design, operate and manage a market based on their market power.
 - How to evaluate the fact that the market is essentially highly manipulative and lacks transparency due to analyses using algorithms (profiling) and so on.
 - Whether it is necessary to consider the relationship not only among online competitors but also with offline competitors when considering the effects of the conducts of digital platform operators on competition, since they expand their business areas to offline industries such as manufacturing.
- Specific issues for ensuring “fair and free competition” in digital markets include the following.
- The prevailing view is that many of possible anti-competitive conducts by digital platform operators can be regulated by the current Antimonopoly Act. However, at the level of operation of law, issues such as the following are pointed out as complicated whether to define multiple mutually related markets individually or as one market and how to evaluate the effects which one market brings to another market and the network effects or the impacts of data accumulation on

¹⁴ During the Public Comment procedure implemented on the Interim Discussion Paper (Draft), there were opinions which addressed the necessity to consider that digital platform operators are exposed to highly competitive environments.

competition, since markets related to platforms are multisided markets. It is also pointed out that the concept of market is vague with respect to digital platforms. It is further pointed out that even though accumulation and utilization of data itself do not necessarily become problematic under the Antimonopoly Act, it could raise an issue under the said Act if there are adverse effects on competition in such cases where the data collection was conducted by unfair means or it leads to coordinated conduct with regard to pricing decisions by way of sharing the same pricing algorithms between businesses. After all, it would be necessary to consider discussing reinforcement of competition policy or to further discuss those issues from the viewpoint of competition law, including reviewing the operation of competition law, as well as discussions on rules concerning data transfer and releasing data.

- How to consider business combinations where digital platform operators nip a potential competitor in the bud.
 - For example, Germany and Austria established a threshold based on transaction values, in addition to a threshold based on the turnover of the parties, as a threshold for pre-notification of business combination control.
 - How to evaluate possible impacts on competition brought about by accumulation of data, concentration of research and development investments (e.g., intellectual properties including patents with respect to AI), and of excellent human resources (researchers) and know-how, as a result of a business combination.
 - As is pointed out that more detailed examination was necessary in cases such as Facebook's acquisition of WhatsApp or an online company Amazon's acquisition of Whole Foods, an offline company, there are cases where digital platform operators acquire a company which is not even a potential competitor at the time of acquisition but conducts business somehow related to the acquiring digital platform. In this regard, it would be necessary to consider how to review horizontal, vertical or conglomerate business combinations where digital platform operators are involved.
- With respect to the relationship with consumers who, like business users, continue to provide data that has economic value for platform businesses, it would be necessary to consider applying rules about abuse of superior bargaining position.

- It would be necessary to consider appropriate enforcement regime to deter violation of laws, including surcharge systems.

6. Considering Rules on Data Transfer and Open Data

- Rules on data transfer and open data such as data portability or open API have been being developed globally.
 - EU’s GDPR (General Data Protection Regulation) introduced the right to data portability with respect to personal data as a general right of individuals. This right not only reinforces the basic right of individuals to control their own data but also enables startups and small and medium-sized companies to gain more customers by lowering barriers to entry to the markets dominated by digital giants. In addition, the European Commission published in September 2017 the “Proposal for a Regulation on a Framework for the Free Flow of Non-personal Data in the European Union” which encourages and facilitates the development of self-regulatory codes of conduct concerning data portability with respect to non-personal data.
 - In the U.S., a mechanism whereby individuals are able to access their own personal data electronically for the purpose of reuse is being constructed in each sector (e.g., health care, electricity, finance) under “My Data Initiative”.
 - In the U.K., a system is being constructed, where individuals could obtain their personal data electronically in specific sectors including energy, finance, mobile and credit, originally under the “midata” project.
 - In Japan, efforts have been made in each sector. For example, in the finance sector, open API of banks to Fintech businesses is being developed based on the amended Bank Act and other regulations. As another example, in the electricity sector, standardization of data and disclosure of the data to consumers of smart meters have progressed.
 - These kinds of open data to businesses will accelerate innovations by connected businesses and will contribute to the development of new services.
- It would be necessary to discuss the necessity and the content of the rules on transfer of data and open data, such as data portability and open API, since they are important not only as consumer policy in the data-driven society, but also as competition policy and as improvement of competitive environment.¹⁵

¹⁵ During the interviews with businesses conducted by this Study Group, digital platform operators

- Before that, it would be appropriate to consider the importance of recognizing the right regarding the management or access to personal data, just like the right to control its information admitted in the EU.
- It would be important to improve competitive environment which keeps generating innovation, in relation to digital platform operators that accumulate data intensively and provide an essential basis for socio-economy or in areas where there is a high level of interoperability.

7. International Point of View

(1) Fair application and effective enforcement of laws

- Along with the further internationalization of transactions as a result of the progress of digitalization, it is becoming a big problem that certain laws are only applied to businesses based in Japan, and that law enforcement on foreign businesses is practically difficult.
- From the viewpoint of an equal footing, as well as that of protection of domestic consumers, it would be necessary to consider the ideal way of extraterritorial application of Japanese laws so that domestic businesses and foreign businesses providing equivalent services will be subject to equivalent rules.
- It would be necessary to consider the system concerning effective enforcement of applicable laws on foreign businesses.¹⁶

(2) International Rule Making

- Considering that digital platform operators conduct businesses globally, it would be necessary to seek international harmonization of the disciplines on digital platform operators.

expressed opinions that the rules on transfer of data including data portability should be discussed carefully considering the increasing importance of data uniquely owned by each business, the effects of excessive freedom of data transfer on industries (businesses), as well as taking account of the businesses that collected data with cost. During the Public Comment procedure implemented on the Interim Discussion Paper (Draft), there were opinions which insisted that the right to data portability is a fundamental condition which allows users to transfer data freely when there appears a digital platform which they find to be more attractive. Other opinions argued that while it is important to consider the right of data management or data access of individuals, it would be also necessary to take into account the incentive for research and development investment and the burden of introducing a new institutional framework such as changing system design.

¹⁶ During the interviews with businesses conducted by this Study Group, digital platform operators addressed the necessity to ensure that Japanese laws are applied to and enforced on foreign businesses equally in order to make sure fair competition conditions in Japan and overseas.

- According to past experiences in enforcement of competition laws, international harmonization is a premise for effective international cooperation among relevant competition agencies. Considering that international cooperation in law enforcement would be important when enforcing competition laws on digital platform operators that develop business activities globally, while it would of course be necessary to take into account the actual situation of competitive environment and the legal systems in Japan, it would be desirable to decide Japan's position basically in the direction of seeking international harmonization even at the rulemaking phase, based on such experiences and knowledge.
 - The EU, under the political goal of creating a digital single market, has newly established the "Observatory on the Online Platform Economy", and is planning to analyze and monitor the economic activities of digital platform operators, while at the same time ensuring transparency and fairness by the EU New Regulation Proposal.
 - In the U.S., under huge data markets, the innovative digital platform operators have grown in free market with less ex-ante regulation.
 - In China as well, digital platform operators have achieved rapid growth under giant data markets, but the markets are closed, allowing digital platform operators to store up strong competitiveness. It would be necessary to have international discussions as to whether the entry of such digital platform operators into other markets can be evaluated as fair.
- Given such trends in foreign countries, it would be necessary to discuss, in an internationally coordinated way, the way of effective disciplines on digital platform operators (including co-regulation, a flexible way of regulation that combines self-regulation and legislation), seeking international harmonization.