

Guidelines Concerning Abuse of a Superior Bargaining Position in
Transactions between Digital Platform Operators and Consumers that
Provide Personal Information, etc. (draft)

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Japan Fair Trade Commission

Introduction

Under the Fourth Industrial Revolution, digital platform operators provide third parties with the platforms for various services, utilizing information and communication technologies and data. They develop innovation, creating new businesses and markets, which benefits enterprises, including small- and medium-sized ones, by dramatically increasing the possibility of accessing markets and consumers by improving convenience. Thus, digital platform operators show their important presence in the Japanese economy and society.

The services provided by digital platform operators constitute multi-sided markets with multiple user segments, and such services readily expand and promote monopolization and oligopolization through their characteristics – network effects, low marginal cost, and economies of scale, etc. Furthermore, the data concentration through network effects and economies of scale increase users' benefits, but also the data-based business model with accumulating and utilizing data by digital platform operators create advantageous cycles which maintain and enhance competitive advantages by further accelerating the accumulation and use of data by digital platform operators.

Since some digital platform operators adopt a business model where they provide free goods and services in exchange for the acquisition or use of personal information, etc., there are some concerns over the acquisition or use of consumers' personal information, etc. by digital platform operators that provide services to consumers.

If the digital platform operator's acquisition or use of personal information, etc. in unfair manners causes consumers disadvantage and adverse effects on fair and free competition, the issues under the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 1947; hereinafter referred to as "Antimonopoly Act") will arise.

Therefore, the Guidelines describe what kind of conducts related to the acquisition or use of personal information, etc. will be issues concerning abuse of a superior bargaining position in view of transparency of the Antimonopoly Act enforcement and improvement of predictability for digital platform operators.

Note that if a conduct described in Part 5 below violates other laws and regulations,

interventions under such other laws and regulations will not be prevented.

* A “digital platform” has the characteristics of providing third parties with platforms for the various services by using information and communication technologies and data for creating multi-sided markets with multiple user segments. In the Guidelines, a “digital platform operator” refers to an enterprise that provides the digital platforms, such as online shopping malls, apps markets, search services, digital content (image, video, music, e-book, etc.) distribution services, and social networking services (SNS).

* In the Guidelines, “personal information” refers to the personal information stipulated in Paragraph 1 of Article 2 of the Act on the Protection of Personal Information (Act No. 57 of 2003). “Personal information, etc.” refers to the personal and other information.

1 Basic concepts of the regulation on abuse of a superior bargaining position

The trade terms are basically left to the independent judgement of the trading parties. However, in transactions between enterprises and consumers, there is “the disparity in the quality and quantity of information and negotiating power between consumers and enterprises” (Article 1 of the Consumer Contract Act (Act No. 61 of 2000)), and the trade terms are likely to be unilaterally unfair to consumers.

If a digital platform operator in a superior bargaining position over consumers who are the counterparties to transactions unjustifiably causes, in light of normal business practices, disadvantage for such consumers by making use of such position, the digital platform operator will not only impede the free and independent judgements of such consumers but will also likely gain competitive advantage over its competitors. Because such a conduct is likely to impede fair competition, it is restricted under the Antimonopoly Act as abuse of a superior bargaining position, a type of unfair trade practices.

It is determined on a case-by-case basis whether a certain conduct is likely to impede fair competition, considering the degree of disadvantage in question the spread of such conducts, and so on.

2 Concepts of the “counterparty” to a transaction

The Antimonopoly Act (Item 5 of Paragraph 9 of Article 2) defines abuse of a superior bargaining position as conducts that cause disadvantage for the counterparty in continuous transactions ((a) and (b) of this Item) or for the counterparty ((c) of this

Item) by unjustifiably making use of one's superior bargaining position over the counterparty in light of normal business practices. "Counterparty (in continuous transactions)" includes consumers.

The personal information, etc. includes all information related to the individual consumer, such as the consumer's personal attributes and activities. Such information is used in the digital platform operator's businesses and thus has economic value.

Therefore, when it is found that consumers provide personal information, etc. in exchange for the use of the services provided by a digital platform operator, then such consumers obviously fall within the definition of a "counterparty (in continuous transactions)" of the digital platform operator.

3 Concepts of "making use of one's superior bargaining position over the counterparty"

(1) A digital platform operator has a superior bargaining position over consumers who provide personal information, etc. when the consumers, even though suffering detrimental treatment from the digital platform operator, is compelled to accept this treatment in order to use the services provided by the digital platform operator.

(2) To determine whether consumers are, even though suffering detrimental treatment from the digital platform operator, compelled to accept this treatment in order to use the services provided by the digital platform operator or not, the "necessity to trade with" the digital platform operator for the consumers is to be considered.

A digital platform operator is normally in the superior bargaining position over the consumers; (i) when there is no other digital platform operator that provides alternative services for the consumers; (ii) when other digital platform operator exists, it is practically difficult to stop using the service provided by the existing digital platform operator even if an alternative service exists; or (iii) when the digital platform operator is in a position to control somewhat freely the trade terms, such as prices, qualities, and quantities.

(3) Also, when the digital platform operator in a superior bargaining position conducts a transaction by unjustifiably imposing a disadvantage on consumers, such a conduct is normally deemed as "making use of" its superior bargaining position.

(4) In the determination stipulated above, it is necessary to consider that there is the disparity in the quality and quantity of information and negotiating power between

consumers and a digital platform operator.

4 Concepts of “unjustly in light of normal business practices”

The requirement of “unjustly in light of normal business practices” shows that abuse of a superior bargaining position is determined on a case-by-case basis from the viewpoint of the maintenance and promotion of fair competitive order. “Normal business practices” here are acceptable in terms of the maintenance and promotion of fair competitive order. Therefore, a conduct will not be necessarily justified simply because the conduct is consistent with existing business practices.

5 Types of abuses of a superior bargaining position

This section clarifies the concepts of determining what kind of conducts by digital platform operators related to the acquisition or use of personal information, etc. through transactions between digital platform operators and consumers who provide personal information fall under the scope of abuse of a superior bargaining position under Item 5 of Paragraph 9 of Article 2 of the Antimonopoly Act.

Note that the conducts that raise issues of abuse of a superior bargaining position are not limited to the following conducts. Also, note that the conducts consistent with other laws and regulations may raise the issue of abuse of a superior bargaining position.

(1) Unjustifiable acquisition of personal information, etc.

If a digital platform operator engages in the following conducts against consumers who use the services provided by it, it will unjustifiably cause disadvantage for the consumers in light of normal business practices, for example, by providing services inequivalent as compensation. Therefore, if a digital platform operator in a superior bargaining position over consumers engages in the following conducts by making use of its position, the issues of abuse of a superior bargaining position will arise.

Note that the issues of abuse of a superior bargaining position will arise not only in the following examples but in any case where a digital platform operator’s conduct concerning the acquisition of personal information, etc. provided by consumers unjustifiably causes a disadvantage for consumers in light of normal business practices.

- a. Acquiring personal information, etc. without stating the purpose of use to consumers

[Assumed Example (i)] Digital Platform Operator A in acquiring personal information, caused consumers to provide personal information without stating the purposes of use on its webpage or in any other ways. (Note 1, 2)

(Note 1) Normally, no issue will arise if a digital platform operator has posted the purposes of use in an easily recognizable place on its webpage or if a digital platform operator has notified consumers of the purposes of use by e-mail or in any other ways.

(Note 2) It may be determined that a digital platform operator has acquired personal information without stating the purposes of use to consumers if the digital platform operator causes consumers to provide personal information in situations where it is difficult for consumers to understand the purpose of use: for example, explanations of the purposes of use are unclear, written using technical jargon, posted in a place not easily found or dispersed in many places, or not clearly distinguished from explanations for other services. Normally, no issue will arise if the purposes of use are explained in an easily accessible place, in a clarifying manner, and in a way that is easy to understand for general consumers using clear, plain, and simple terms.

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

[Assumed Example (ii)] Digital Platform Operator B stated to consumers that the purpose of use was the sale of goods when acquiring personal information but caused the consumers to provide information on gender and occupation beyond the scope necessary for the sale of goods without obtaining the consent of consumers. (Note 3, 4)

(Note 3) In the event that the purpose of use is the sale of goods, no issue will normally arise if a digital platform operator asks consumers to provide the personal information necessary for the achievement of such purpose of use, for example, name, e-mail address, or payment information of consumers. Also, no issue will normally arise if a digital platform operator receives the personal information upon the express consumers' consent even if such information is beyond the scope necessary for the achievement of the purpose of use, such as gender or occupation. Note that if consumers are compelled to consent to providing personal

information beyond the scope necessary for the achievement of the purpose of use because the consumers have no other alternative but to use the services, the consent may be determined as made involuntarily .

(Note 4) In the event that the said enterprise provides other services in addition to the sale of goods, no issue will normally arise if the digital platform operator receives the personal information necessary for the provision of the additional services upon the express consent of the consumer who receives the additional services.

- c. Acquiring personal information without taking the precautions necessary and appropriate for safe management of personal information

[Assumed Example (iii)] Digital Platform Operator C caused consumers to use the services and to provide personal information without taking the precautions necessary and appropriate for safe management of personal information.

- d. Causing consumers in continuous use of services to provide economic interests like personal information, etc. in addition to the compensation provided in exchange for the use of services

[Assumed Example (iv)] Digital Platform Operator D caused consumers in continuous use of services to provide personal information, etc. in addition to the personal information, etc. provided in exchange for the use of services. (Note 5)

(Note 5) Such additional acquisition of personal information, etc. will become an issue even if the additional personal information, etc. is acquired without the conduct in question as explained in a, b, or c above. In the event the said enterprise provides other services in addition to the existing services, no issue will normally arise if the digital platform operator causes consumers to provide the additional personal information, etc. in exchange for receiving the additional services.

- (2) Unjustifiable use of personal information, etc.

If a digital platform operator engages in the following conducts in relation to the personal information acquired from consumers who use the services provided by it, it will unjustifiably cause a disadvantage for consumers in light of normal business practices, for example, by providing services inequivalent as compensation.

Therefore, if a digital platform operator in a superior bargaining position over consumers conducts the following conducts by making use of its position, the issues of abuse of a superior bargaining position will arise. Note that the issues of abuse of a superior bargaining position will arise not only in the following examples but in any case where a conduct by a digital platform operator concerning the use of personal information, etc. provided by consumers unjustifiably causes a disadvantage for consumers in light of normal business practices.

- a. Using personal information against the intention of consumers beyond the scope necessary to achieve the purpose of use

[Assumed Example (v)] Digital Platform Operator E stated that the purpose of use was the sale of goods and used the personal information acquired from the consumers by indicating the purpose of use as targeted advertising without obtaining the consumers' consent. (Note 6)

(Note 6) Normally, no issue will arise when a digital platform operator uses personal information that has been obtained from consumers after it communicates to each consumer that the personal information will be used for targeted advertising, in addition to the existing purpose of use for the sale of goods, for example, by e-mail and obtains the consumers' consent to the use of the personal information for such additional purpose by asking to check a checkbox on its webpage. Note that if consumers are compelled to consent to the use of personal information for targeted advertising because such consumers had no other alternative but to use the service for the sale of goods, the consent may be determined as made involuntarily.

[Assumed Example (vi)] Digital Platform Operator F provided the personal information acquired from consumers who use the services to third parties without obtaining the consent of consumers. (Note 7)

(Note 7) Regarding the provision of personal information to third parties, no issue will normally arise, for example, if a digital platform operator provides personal information that has been obtained from consumers after it e-mails to each consumer that the personal information will be provided to third parties and obtains the consumers' consent to the provision of the personal information to third parties by asking to check a checkbox on its webpage. Note that if consumers are compelled to

consent to the provision of personal information to third parties because such consumers have no other alternative but to use the services, the consent may be determined as made involuntarily. Also, note that no issue will normally arise if the sales department of a digital platform operator provides the personal information provided by consumers to the general affairs department even without obtaining the consent of consumers.

- b. Using personal information without taking the precautions necessary and appropriate for the safe management of personal information

[Assumed Example (vii)] Digital Platform Operator G caused consumers to use the services and used personal information without taking the precautions necessary and appropriate for the safe management of the personal information.