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ECONOMIC ANALYSIS AND EVIDENCE IN ABUSE CASES – Contribution from Japan

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Economic analysis and evidence in abuse cases

- Contribution from Japan -

1. Introduction

1. Since a competition law is a basic act to protect market mechanism, it is essentially important that competition agencies understand the competition situation in each market in their law enforcements or policy makings; agencies need to understand and utilize economics whose subjects are market mechanism or corporate behavior and others.
2. As digitalization in economy advances, new types of business or marketing such as platform business or marketing utilizing big data has emerged which requires competition agencies careful evaluation in considering, for example, an impact of a certain conduct of an enterprise on a market, etc. As a result, the importance of economic analysis in law enforcement has been getting more and more obvious.
3. In fact, the Japan Fair Trade Commission (hereinafter the “JFTC”) has been trying to utilize economic analysis in various situations of law enforcement such as establishing theories of harms, defining relevant market, evaluating impact of anticompetitive conduct or contents of commitment plan.
4. This contribution paper introduces two antitrust cases of Amazon Japan G.K. (hereinafter “Amazon Japan”) to explain how the JFTC utilizes economics to establish theory of harms and evaluate the contents of commitment plan. Even though in those two cases the JFTC did not conclude abuse of dominance or monopolization of Amazon Japan or the illegality of Amazon Japan’s conduct, both are unilateral conduct cases and economics analysis to be introduced here can be used in the cases of abuse of dominance etc. too. Hence this paper would contribute to the discussion at the forum.
5. Lastly, when the paper says “economic analysis”, it means not only quantitative analysis such as econometric analysis or data analysis but also qualitative analysis, i.e. utilization of economic concepts etc. So the word of “economic analysis” in this paper can be understood as the utilization of “economic thinking.”

2. Economic Analysis regarding to Theories of Harms

2.1. Overview of the Case

6. The first case is the one in which the JFTC considers theories of harms utilizing economics. The JFTC investigated Amazon Japan, which operates online shopping malls (Amazon Marketplace¹) that is one of the major online shopping malls, as Amazon Japan was suspected to have restricted business activities of the sellers² in Amazon Marketplace by including the price parity clauses (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

¹ The online shopping mall opened on the Amazon.co.jp website.

² Entities which offer and sell goods in an online shopping mall, including ones which open a store to offer and sell goods in an online shopping mall.

channels) and the selection parity clauses (clauses to require sellers to offer in Amazon Marketplace all variations in color and size, etc. among all products they sell via other sales channels) in the seller contracts. On the course of the investigation, Amazon Japan proposed to promptly take voluntary measures in order to eliminate the suspected violation of the Antimonopoly Act. As a result of the JFTC’s review on this proposal, the JFTC recognized these measures would eliminate the suspected violation and decided to close the investigation in June, 2017.

2.2. Theories of Harms Considered

7. Price parity clauses and selection parity clauses above are so called “Across-Platforms Parity Agreements” (hereinafter “APPA”)³. There have been or are a lot of discussion about theories of harms of APPA⁴. In general, one of the important things to consider theories of harms is to consider “incentive” that enterprises or consumers concerned would have. For example, do sellers in the case above have an incentive to reduce its price of a certain product on a certain online shopping mall under APPA? Probably not, because once it reduces the price of a product on one online shopping mall it would have to reduce the price of the product on all the other online shopping malls. This implies the risk that APPA keep prices of the goods on the mall higher than competitive prices. Or do enterprises which operate online shopping malls (hereinafter “online shopping mall operators”), under APPA, have an incentive to go into a negotiation with sellers to reduce prices on their malls in order to attract customers to their own mall by offering reduction of fees sellers need to pay to online shopping mall operators and so on? Again probably not, because APPA prevent sellers to reduce prices on one particular shopping mall. This means that APPA might reduce competition among enterprises that operate online shopping malls. Or considering the viewpoint of enterprises which consider to enter the online shopping market, do they have an incentive to enter it? APPA could stifle those incentives because APPA prevents such potential entrants from asking sellers to sell products/services at cheaper prices on its online shopping mall in order to gain a certain amount of customer after entering. This means that APPA could be an entry barrier.

8. After all, the JFTC concluded on the case above that when an online shopping mall operator imposes price parity clauses and selection parity clauses on sellers, such clauses may exert influence as shown below to negatively affect competition:

- i) to restrict sellers’ business activities by limiting reduction of prices and expansions of lineups of goods that the sellers sell via other sales channels;
- ii) to distort competition among online shopping mall operators by allowing an online shopping mall operator imposing those parity clauses to achieve the lowest price and the richest lineup of goods sold in its online shopping mall without making any competitive efforts; and
- iii) to 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 lineups.

³ Most Favored Nation clause in more general term.

⁴ For example, Hearing on Across-Platforms Parity Agreements in the 124th Meeting of the Competition Committee held on 27-28 October 2015.

2.3. Brief Summary

9. An economic analysis on the case above is not quantitative one but qualitative, i.e. utilization of economic thinking by considering incentives of enterprises concerned. However, considering that it is fundamental to consider theories of harm in an individual case, this kind of economic analysis is crucial. At last in this section, it is worth mentioning that economic analysis is also useful to evaluate possible procompetitive effect of said conduct. Here it is introduced, economic analysis for theories of harm, but agencies need to consider possible procompetitive effect of said conduct too for detailed investigation. One of the possible procompetitive effects on APPA in this case was elimination of free riding. Although, since the JFTC closed the case on the course of investigation being proposed to promptly take voluntary measures by Amazon Japan, it did not make its evaluation of the procompetitive effect public, an economic analysis would contribute to that evaluation too.

3. Economic Analysis regarding to Commitment Plan

3.1. Overview of the Case

10. The second case is the one that an economic analysis was utilized to evaluate one of the contents of the commitment plan submitted by Amazon Japan. The first case in section 2 was about Amazon Japan's Marketplace business but the case here was about Amazon Japan's retail business, i.e. the business Amazon Japan buys goods from vendors and retails those goods on its platform. Amazon Japan had conducted business activities such as reducing a certain amount of money Amazon Japan had to pay to vendors, without negotiation, etc., to improve its own profit, or asking its vendors to pay a certain amount of money as "cooperation money" for Amazon Japan's investment for its own system., to improve its own profit even though those amount was beyond the direct benefit which the vendors enjoyed from paying cooperation money, and so on.

11. The JFTC suspected those conduct violated the Antimonopoly Act and investigated them. On the course of the investigation, the JFTC issued the notice in accordance with the commitment procedures on July 10, 2020, and Amazon Japan made an application for approval of the JFTC. The JFTC, after considering the application, recognized that the commitment plan by Amazon Japan would conform to the requirements provided in Antimonopoly Act and approved it on September 10, 2020.

3.2. Economic Analysis regarding to Commitment Plan

12. One of the commitment plans was that Amazon Japan pay the vendors a certain amount of money back. Since the amount of money for direct benefits the vendors enjoyed by paying "cooperation money" to Amazon Japan was excluded from the money Amazon Japan needed to pay back to the vendors, the question was what the exact amount of those direct benefits was. Amazon Japan conducted economic analysis to calculate the amount of the direct benefits in paragraph 10 and submitted the results to the JFTC. The case team and the Economic Analysis Team (see section 4. below) in the JFTC cooperated to evaluate Amazon Japan's calculation, estimated the amount by ourselves and concluded that the

Amazon Japan's calculation was not based on the actual business activities of Amazon Japan and so on and, the amount was overestimated⁵.

3.3. Brief Summary

13. This is the first case where the JFTC utilized quantitative analysis to evaluate the contents of commitment plan. Economic analysis was useful to quantify something invisible such as "direct benefits" in the case above.

4. Management of Economics Staff for Case Investigations

14. As in paragraph 3, the JFTC has been trying to utilize economics in various activities such as merger reviews, investigation cases on the Antimonopoly Act violations, market studies and policy making such as establishment of guidelines. The central organization to promote economic analysis is Economic Analysis Team (hereinafter "the Team") which is a virtual team, i.e. the Team members belong to different divisions and has their own tasks. As of the end of September 2021, the Team is consisted of a team leader, 2 strategists and 12 economic analysis members who have expertise of economics or statistics. The Team provides supports with economic analysis, at requests of case teams, etc., by giving economic advice for the survey questionnaire, conducting quantitative analysis and others, which enables the JFTC to respond properly to fast-moving markets and enhance the credibility of its decisions.

15. The involvement to the Antitrust case including abuse case is one of the Team's priority and if the case team asks for the Team's assistant, two or three team members (depending on complexity of the case, etc.) are usually seconded to the case team, and those members contribute to the case investigation by, for example, giving an advice to the case team for considering theory of harms, designing questionnaire survey⁶, conducting quantitative analysis, or attending the state of play meetings with enterprises concerned at request.

16. Basically the Team assigns the team member to each case when the case team asks the Team to do so, especially the cases involving complex economic issues or the cases where the enterprises themselves conduct economic analysis and send them to the JFTC because obviously the reasonableness of the economic analysis is at issue in those cases.

⁵ Based on relevant evidence, the JFTC admitted that there existed certain amount of the direct benefits which was considered to evaluate the commitment plan.

⁶ In the investigation on the suspected violation of the Antimonopoly Act by Apple Inc. (hereinafter "Apple")(September, 2021, Japan Fair Trade Commission)(*), the Team supported the case team to design/evaluate consumer survey.

*The JFTC has investigated Apple since October 2016 because it has been suspected of restricting business activities, such as selling digital contents, etc., of enterprises that distribute applications based on App Store Review Guidelines (hereinafter "Guideline") as Apple operates App Store, where the developers distribute apps for iPhone. During the investigation, Apple proposed to take measures such as revising the Guideline related to the alleged conduct above. As a result of the JFTC's review on this proposal, the JFTC recognized it would eliminate the abovementioned suspicion and decided to close the investigation after the JFTC confirms the measure has been taken.

5. Conclusion

17. The JFTC feels that the role of economic analysis in antitrust investigation is getting more important more than ever for detailed investigation and accountable decision, especially at the time when the digitalization of economy is advancing. There are many areas or cases that economic analysis can be utilized and the JFTC believes that the abuse case is surely one of them. Again, the cases in the paper were not the cases in which the JFTC concluded abuse of dominance or monopolization of Amazon Japan or illegality of Amazon Japan's conduct but the analysis above can be used in those abuse cases too. The JFTC will continue updating reliable methods of economic analysis concerning both quantitative and qualitative approaches, and strengthening organization structure or capacity/ability for economic analysis.