

Japan's Antitrust Watchdog Prepares to Step Up Enforcement in the Digital Economy

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Several recent measures by the Japan Fair Trade Commission (JFTC) indicate that Japanese antitrust regulators are preparing for heightened enforcement efforts to protect competition in digital markets. Following two years of studies examining digital platform business in Japan and how competition policy could be used to regulate platform operators, the JFTC appears poised to shift from theory to practice.

New Guidelines for Digital Platforms

On December 17, 2019, the JFTC finalized new antitrust and merger guidelines for digital platform companies. Both sets of guidelines are effective immediately and apply both to domestic Japanese and global digital platform companies.

First, the JFTC published guidelines concerning abuse of superior bargaining position in transactions between digital platform operators and consumers, which clarify when collection of personal data can be considered an “abuse of superior bargaining position” under the Antimonopoly Act subject to an administrative fine.[1] The guidelines aim to improve predictability for digital platform operators and provide transparency with respect to enforcement priorities by explaining that the JFTC will investigate conduct covered “on a priority basis.”[2] Specifically, the guidelines provide that such conduct includes acquiring personal information without stating the purpose of use to consumers, and using personal information against the intention of consumers beyond the scope necessary to achieve the purpose of use.[3] Personal information means not only information which can identify the specific individual by name and date of birth, etc., but also information with which a digital platform operator may identify a certain person by collating it easily with other information.[4]

On the same day, the JFTC announced that it had finalized amended merger guidelines, focusing primarily on business combinations in the digital market.[5] The market definition focuses on competition by means of quality as opposed to price, and clarifies the considerations in definition of the product market (e.g. characteristics of content, qualities and user-friendliness) and the geographic market (e.g. a range within which a user can enjoy the service provided by a supplier on the same terms and quality).[6] As for the effects of the business combination, they described views on competition analysis based on characteristics of digital services such as network effect and switching cost, and views on elimination of the possibility for new entry into the market by acquiring a start-up.[7]

Notably, in November 2019, Yahoo! Japan operator Z Holdings Corp. and Line Corp. announced a planned merger. As they offer a wide array of internet-based services, the integration of these companies will be the first case to see how the JFTC actually applies the amended guidelines. Specifically, how to define the relevant product and geographic market will be an important issue in that integration.

Heightened Enforcement in the Near Future

The JFTC is now taking concrete steps as it gears up for increased enforcement in the digital space. It recently announced that it will create a new digital economy team in the next fiscal year, which starts in April 2020. The new team will include fifteen staff members and be led by the Senior Investigator in charge of the field of the digital economy.^[8] The JFTC is also reportedly planning to introduce a new forensic system with machine-learning capability next fiscal year. The new system would be expected to shorten data-ranking time and come with automatic translation capability from English to Japanese, which will provide the JFTC with a stronger tool to pursue foreign companies for antitrust violations impacting the Japanese market and consumers in Japan.^[9]

The JFTC's new Secretary General, Shuichi Sugahisa, began his tenure on January 15, 2020. But this change in leadership will not likely influence the stated enforcement priorities. On his first day in office, Sugahisa stated that the new guidelines will help enterprises avoid violating the Antimonopoly Act, and that the JFTC would continue to appropriately enforce the Antimonopoly Act.^[10]

Meanwhile, the JFTC has continued surveying the digital platform market, and has recently focused on collecting information about digital advertisements, including transactions between advertisers and digital platform operators.^[11]

Takeaway

The JFTC has improved not only the relevant regulations but also its human resources and infrastructure for enhanced enforcement efforts. Enterprises doing business related to data or technology in Japan should carefully study these new guidelines and prepare for future enforcement efforts by the JFTC.

[1] See “Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc.” (December 17, 2019), *available at* <https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217DPconsumerGL.pdf>

[2] See *id.* at 4.

[3] See *id.* at 7, 10.

[4] See *id.* at 3.

[5] See Press Release, Japan Fair Trade Commission, Amendments of the “Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination” and the “Policies Concerning Procedures of Review of Business Combination” (December 17, 2019), *available at* <https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217.html>

[6] See “Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination” (December 17, 2019), at 13, 15, 17, *available at* <https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/1912173GL.pdf>

[7] See *id.* at 29, 36, 56.

[8] See Japan Fair Trade Commission, Jimusoutyou teirei kaiken Kiroku (事務総長定例会見記録) (January 8, 2020), *available in Japanese at* https://www.jftc.go.jp/houdou/teirei/2020/jan_mar/kaikenkiroku200108.html

[9] See Sachiko Sakamaki, “[Japanese competition regulator to introduce forensic system with machine-learning capability](#),” MLex (Jan. 21, 2020).

[10] See Japan Fair Trade Commission, Jimusoutyou teirei kaiken Kiroku (事務総長定例会見記録) (January 15, 2020), available in Japanese at https://www.jftc.go.jp/houdou/teirei/2020/jan_mar/kaikenkiroku200115.html

[11] See Japan Fair Trade Commission, available in Japanese at <https://www.jftc.go.jp/cgi-bin/formmail/formmail.cgi?d=digitpf>

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