

Morgan Lewis Seminar

Antitrust/Competition Authorities and Big Tech – Japan Perspectives

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Overviews of the Policy Structure of Digital-Data Market Sector in Japan

Digital Sector

Japan Fair Trade Commission (JFTC)

- Sector inquiry on online malls and app stores (Oct. 2019)
- Report on digital advertisement (Feb. 2021)
- Sector inquiry on mobile operating system (Feb. 2023) , etc.

Committee on Competition of Digital Market

- Decision on the fundamental framework of the Act (Jan. 2020)
- Analysis on the competition of the digital advertisement sector (Apr. 2021)
- Analysis on the mobile eco system (Apr. 2022), etc.

Ministry of Economy, Trade and Industry (METI)

- Enactment of the Act (Apr. 2021)
- Start operating the Act for online mall and app stores sector (Apr. 2021)
- Start operating the Act for digital advertisement sector (Fall 2022)

Data Market Sector

Japan Fair Trade Commission (JFTC)

- Report on competition policy of the data market (Jun. 2021)

Headquarter of Government-wide IT strategy

- Enactment of comprehensive data strategy (Jun. 2021)

Digital Agency

- Encouragement of government-wide data utilization policy

Key Measures under the Anti-Monopoly Act (AMA)

Unfair Trade Practice (or Private Monopolization)

- Cease and Desist Order is available
- Some of the conducts are subject to administrative surcharge
- Injunction and private enforcement is available

Exclusive Dealing

Policy: E-Commerce Report (JFTC)
Investigation: Minna no Pet (2018)
 Airbnb (2020), etc.

Trading on Restrictive Terms

Policy: E-commerce Report (JFTC)
Investigation: OTAs (2019-2022), Apple (2021) etc.

Abuse of Superior Bargaining Position

Policy: Guidelines on ASBP regarding personal information (JFTC)
Investigation: Rakuten, Amazon (2020), etc.

Unilateral Boycott

Policy: E-commerce Report (JFTC), DPF Transparency Act
 → Rejection of the opening of a new store

Tying and Bundling

Report: Restaurant Portal Research (JFTC)
 → Tying of the paid services and listing of the restaurant

Interference with Competitor Transactions

Policy: E-Commerce report, Restaurant Portal Research (JFTC)
 → Unfair handling of the customer info

Merger Review

- Updating merger review protocol in digital sector by introducing the concept of killer acquisition, data accumulation, etc. (2019)
 - the Merger Review Guidelines (Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination)
 - Policies Concerning Procedures of Review of Business Combination
- Major Merger Review Case
 - Salesforce.com / Slack (2021)
 - Google / Fitbit (2021)
 - ZHD / LINE (2020)

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Major Trends and Topics in Enforcement Actions



Moderate but Not a Few Enforcement

- The JFTC has opened various investigations against Big Tech companies, but has not yet imposed harsh sanctions against them (investigations closed by a commitment or voluntarily)



Not Only Big Tech

- The JFTC has made investigations not only for global Big Tech companies such as GAFA, but also for Japanese IT giants including Rakuten



Relatively Swift Enforcement

- In general, the JFTC's investigations take a couple of years which is relatively not so long compared to other major jurisdictions

Amazon Japan – E-Commerce (Sep. 2019)

Overview

- The JFTC suspected that Amazon Japan (“Amazon”) violated the AMA by involving abuse of superior bargaining position regarding the following conducts:
 - To deduct the purchase price once agreed by indemnifying remained stocks
 - To make suppliers pay undue moneys for compensating Amazon’s profits etc.,
 - To return the supplied products without justifiable reasons if Amazon assumes they are overstocked
- After the JFTC’s investigations, Amazon proposed a commitment plan including the following. The JFTC approved the commitment on Sep.10 2020
 - To cease and desist the alleged infringement
 - To establish the viable compliance system
 - To compensate the monetary damage suffered by suppliers

Key Takeaways

- JFTC frequently uses abuse of superior bargaining position and commitment approval by a convenient tools to enforce the AMA against the tech giants. This case is one of such examples
- From the technical perspectives, antitrust practitioners in Japan are interested in the fact that the commitment plan include the compensation of the monetary damage for suppliers.

Apple Inc. – In App Purchase (Sep. 2021)

Overview

- The JFTC suspected that Apple Inc. (“Apple”) violated the AMA by involving “Private Monopolization” (a kind of abuse of monopoly) and/or “Trading on Restrictive Terms” regarding the following conducts:
 - To impose In App Purchase (“IAP”) of the digital contents on developers and prohibit developers from outer-link (a link enables customers to use non-IAP purchase) in its music/e-book/movie streaming business
 - As a background, Apple are imposing substantial commission (15 or 30%) on developers in relation to IAP
- After the JFTC’s investigations, Apple voluntarily proposed an improvement plan including the following. The JFTC confirmed the installment of the improvement plan and announced the termination of the investigation on Sep.2 2021
 - To allow developers use outer-link in its application (Reader App) and revise its guidelines in line with it

Key Takeaways

- This case is one of the typical examples that the JFTC terminates its investigation without reaching to the formal decision.
- Apple applied the improvement plan voluntarily proposed in this case globally
- The relevant market in this case is different from App market globally discussed

Booking.com B.V. – Parity Clause (Mar. 2022)

Overview

- The JFTC suspected that Booking.com B.V. (“Booking.com”) violated the AMA by involving “Trading on Restrictive Terms” regarding the following conducts:
 - To impose Parity Clause or MFN (Most Favored Nation) Clause or Parity Clause (“Parity Clause”), which request counterparties (operators of accommodation facilities) to ensure that the offering price and availability of the facilities on the website are equivalent to or more favorable than those offered through other sales channels other than the own sales channels
- After the JFTC’s investigations, Booking.com proposed a commitment plan including the following. The JFTC approved the commitment on Mar.16 2022
 - To cease and desist the alleged infringement
 - To establish the viable compliance system including the guidelines to comply with the AMA
 - To introduce regular monitoring systems

Key Takeaways

- This case is another typical examples that the JFTC terminates its investigation without reaching to the formal decision.
- Originally, several OTAs (online travel agencies) were dawn raided on April 10 2019. Nonetheless, apart from Rakuten, it took relatively long time to reach the end of the case

Expedia Lodging Partner Services Sàrl – Parity Clause (Jun. 2022)

Overview

- The JFTC suspected that Expedia Lodging Partner Services Sàrl (“Expedia”) violated the AMA by involving “Trading on Restrictive Terms” regarding the following conducts:
 - To impose Parity Clause or MFN (Most Favored Nation) Clause or Parity Clause (“Parity Clause”), which request counterparties (operators of accommodation facilities) to ensure that the offering price and availability of the facilities on the website are equivalent to or more favorable than those offered through other sales channels other than the own sales channels
- After the JFTC’s investigations, Expedia proposed a commitment plan including the following. The JFTC approved the commitment on Jun.2 2022
 - To cease and desist the alleged infringement
 - To establish the viable compliance system including the guidelines to comply with the AMA
 - To introduce regular monitoring systems

Key Takeaways

- This case is one of the typical examples that the JFTC terminates its investigation without reaching to the formal decision.
- Antitrust issues of the parity clause or MFN clause imposed by the OTAs has been globally discussed. This case could be understood as a series of such discussions
- Originally, several OTAs (online travel agencies) were dawn raided on April 10 2019. Nonetheless, apart from Rakuten, it took relatively long time to reach the end of the case

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Major Trends and Topics in Merger Review



Extensive Merger Reviews in Digital Sector

- The JFTC conducted various merger reviews in digital sector, among others; Microsoft/Activision Blizzard (Mar. 2023), Google/Fitbit (Jan. 2021) and Salesforce/Slack (July 2021).



Not Only Big Tech

- The JFTC reviewed not only merger involving global Big Tech but also Japanese platform giants including Z-holdings and LINE (Aug. 2020)



Reform of Operation of the Merger Review Process

- Amendments of Merger Review Guidelines and Policy for Merger Review Procedure (Dec. 2019)
- Strengthening Enforcement of Merger Review including the expansion of staffs and economic analysis
- Proactive public announcement of the result of the review



Guidelines of the submission of the internal documents (Jun. 2022)

- The JFTC positions the guidelines as the tools for effective merger review especially for digital sector
- The range of the internal document which may be requested is wide (it includes, among others, internal e-mails among officers and employees)

Google LLC / Fitbit Inc. (Jan 2021)

Overview

- The JFTC conducted merger review on the integration of the business of Google LLC (a part of the corporate group headed by Alphabet, Inc., “Google”) and that of Fitbit, Inc. (“Fitbit”)
- The major product/service market definition and concerns JFTC identified in this case are as follows:

	Relevant markets	Concerns
(A)	The business of distribution of an operating system (“OS”) for wrist-worn wearable devices by Google and the business of manufacture and distribution of wrist-worn devices by Fitbit	Input foreclosure by Google with respect to the OS for wrist-worn wearable devices
(B)	The business of distribution of the OS for mobile devices by Google and the business of manufacture and distribution of wrist-worn devices by Fitbit	Input foreclosure by Google with respect to the OS for mobile devices
(C)	The business of both parties pertaining to healthcare information database and distribution of healthcare applications	Input foreclosure by both parties with respect to healthcare information
(D)	The business of both parties pertaining to healthcare information database business and the digital advertisement business of Google	Unfair utilization by Google of the users’ healthcare information possessed by the parties

- The JFTC issued the conditional clearance and concluded as follows:
 - For concern (A): there are substantial competition pressures from the other OS distributors
 - For other concerns: the JFTC approved the parties proposed remedies including ensuring the interoperability regarding OS, free access of the healthcare data to the third parties and committing to avoid unfair utilization of the users’ healthcare information

Key Takeaways

- This transaction was globally reviewed by multiple authorities. Though competition landscape in Japan is not so tight, JFTC conducted detailed review since this is a typical example of conglomerate merger in digital market.

Salesforce.com Inc. / Slack Technologies Inc. (July 2021)

Overview

- The JFTC conducted merger review on the integration of the business of salesforce.com, Inc. (“Salesforce“) and that of Slack Technologies, Inc. (“Slack“)
- The major product/service market definition JFTC identified in this case are as follows:
 - For CRM software: “entire SaaS-type CRM software”, “SaaS-type CRM software for sales”, “SaaS-type CRM software for customer service”, “SaaS-type CRM software for marketing” and “SaaS-type CRM software for e-commerce”.
 - For business chat service: “Business chat service.”
- The main theories of harm presented by the JFTC regarding this transaction are as follows:
 - Foreclosure of API interconnectivity between (i) Slack’s competitors (business chat providers) and Salesforce’s CRM software, and (ii) Salesforce’s competitors (CRM software providers) and Slack’s business chat service. (A)
 - Tying of Salesforce’s CRM software and Slack’s business chat service (B) , and
 - Access to competitively sensitive information of the competitors from Salesforce and Slack (C)
- The JFTC issued the non-conditional clearance and explained as follows:
 - For concern (A) and (B): there are substantial competition pressures from the competitors
 - For concern (C) (access to competitively sensitive information): it is unlikely that the parties would actually provide access to competitors’ competitively sensitive information

Key Takeaways

- This transaction was also globally reviewed. It looks like JFTC conducted detailed review based on the close communication with the other agencies

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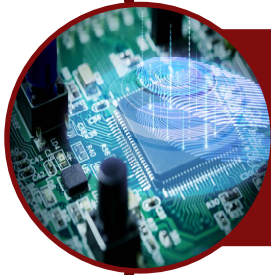
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Major Legislations and Guidelines relevant to Digital Sector



Introduction of the Commitment Procedure

- Similar to the European Commission, a commitment procedure was introduced to the AMA (Dec. 2018)
- The procedure has been vigorously used in the enforcement actions against Big Tech



Adjustment of Guidelines and Policies re Merger Review

- Merger review guidelines procedures policies were amended (Dec. 2019) and addresses some issues typical for mergers relevant to Big Tech
- Practices of the submission of the internal documents are announced (Jun. 2022)
- These tools are actively used in the merger review relevant to Big Tech



Introduction of the Guidelines re Abuse of Superior Bargaining Position re Personal Information provide by Consumers

- The guidelines was introduced on Dec. 2019 and pointed out that abuse of superior bargaining position may be applied towards digital platform operators and explains various types of abuse of superior bargaining position relevant to handling personal information submitted by consumers

Overviews of Recent Attitudes towards Advocacy Work

New position paper on advocacy and enforcement

- Released on 16th Jun, 2022.
- Focuses on Active Promotion of Competition Policy in Response to Social Economics, such as Digitalization—Coordinating and Strengthening Advocacy and Enforcement

Role of the advocacy for the JFTC's competition policy

- The JFTC explains advocacy as a policy measure for improve competition environment and positions it as one of the two major measures of its competition policy

Positive results from the JFTC's advocacy actions

- Improvements of the trade practice and compliance atmosphere
- Amendments of the rules and systems by other sections in Japanese government
- Smooth collaborations with the JFTC's enforcement actions on the infringements

Major Policy Reports and Sector Inquiries in Digital Sectors



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Key Points of Japan's Approach towards Big Tech



Japan's approach towards Big Tech is somewhat different from Europe and U.S. It may be characterized as: not harsh enforcements and proactive advocacy works

Moderate Investigations

- Several investigations has been made but most of them terminated without decision

Proactive Advocacy Work

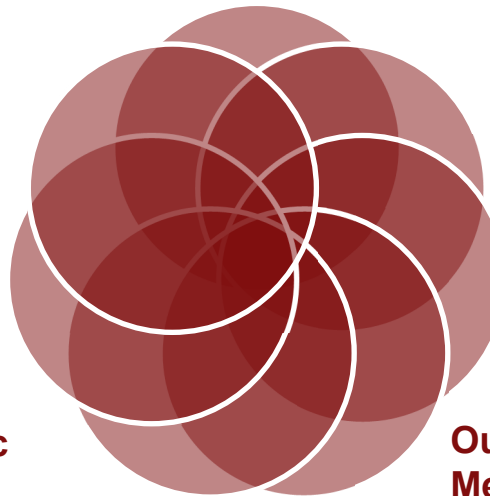
- Advocacy works including sector inquiries and policy report are proactively conducted in various digital markets

Revisions of Guidelines, etc.

- Guidelines relevant to merger review and gatherings of personal data by Big Tech were amended/introduced

Extensive Policy/Academic Research

- The JFTC and its thinktank (Competition Policy Research Center) extensively made policy/academic research on digital markets



Constant Merger Reviews

- Most of the globally filed merger cases have been filed in Japan as well but has not been suspended or imposed critical remedies

Global Collaborations

- It is announced and well known that the JFTC handles cases regarding Big Tech on the communications with foreign authorities

Outside Competition Law Measures

- Outside the AMA enforcements, DPF Act has strongly effects on Big Tech. It might be possible that DMA like regulation is introduced as well

Speaker Profile



Yusuke Takamiya, Ph.D.
 Partner
 Mori Hamada & Matsumoto

Admission
 Japan (2008)
 New York (2017)

Language
 Japanese (Native)
 English (Business Level)

Overview

- Extensive experience in prominent domestic and foreign antitrust and competition law cases, with a focus on notifications relating to business combinations, negotiations with competition authorities to obtain clearances, cartel and other violation cases, and leniency cases, as well as antitrust disputes

Awards

- Chambers Asia-Pacific "Competition" (2022)
- Law Business Research "Who's Who Legal: Global" and "Who's Who Legal: Japan" (2022)
- The 13th Edition of the Best Lawyers in Japan "Antitrust/Competition Law", "International Business Transactions" and "Trade Law" (2022)
- Financier Worldwide "Future Stars - Competition" (2020)
- Global Competition Review "40 under 40" (2020) (Only Japanese winner per every 4 years)

Recent Publications

- "Application of Antitrust and Competition Laws to Business Activities, Taking Into Account Perspectives on Sustainability"(No.856 Kosei-Torihiki, Feb. 2022)
- "Japanese Anti-monopoly Act- Annotated 2nd Edition" (Kobundo, Feb. 2022)
- "Regulations on Price Signaling under Competition Laws - Summarizing Relation to Provisions Regarding Unreasonable Restraint of Trade based on Discussions and Examples in Europe and North America"(CPRC Discussion Paper Oct. 2021)
- "Revision of the Merger Remedies Manual Released by the U.S. Department of Justice" (Dec. 2020)

Background

- 2005 University of Tokyo (LL.B.)
- 2007 University of Tokyo (J.D.)
- 2015 Research Assistant of International Competition Law to Professor Eleanor M. Fox
- 2016 New York University (LL.M)
- 2016 Gibson, Dunn & Crutcher (Washington D.C.)
- 2017 US Federal Trade Commission
- 2017 Kings College London (PG Dip. for EU Competition Law)
- 2017 Visiting Researcher at the Competition Policy Research Center of the JFTC
- 2018 Project Member of "Globalization, Innovation, and Competition Policy Project" at the Ministry of Economy, Trade and Industry
- 2022 Committee Member of "Study Group on Competition Policy for Achieving a Green Society" at the Ministry of Economy, Trade and Industry
- 2023 Kobe University (Ph.D.)



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