STRUCTURALIST AND DECONSTRUCTIVE UNDERSTANDING OF JAPANESE COMPETITION POLICY TOWARD DIGITALIZATION AND INNOVATION

Koki Arai*

ABSTRACT

This study systematically critiques the application of Japanese competition law (Antimonopoly Act) to promote digital markets competition and innovation. We focus on the enforcement of Japanese competition law from four perspectives: (i) multifaceted markets, (ii) digital ecosystems, (iii) e-commerce, and (iv) data markets. The research discusses four perspectives on recent competition policy toward innovation: (i) the Qualcomm case in Japan, (ii) the basic principles of rule development in response to the rise of platform businesses, (iii) the two guidelines of the Japanese Fair Trade Commission, and (iv) the three Japanese Fair Trade Commission research reports. We adopt structuralist and deconstruction approaches. The study categorizes and systematically organizes the competition authorities' enforcement in digital markets in a specific and inductive manner. Taking a multifaceted view of the competition authorities' efforts on innovation and deconstructing it, innovation is a process itself, and the differentials, which cannot be recovered by dichotomies could be examined. The Japanese competition policy efforts toward digital technology highlight its complementary nature. This excellent feature applies to the discussion and reveals the content of the competition law application. Japanese competition policy has excellent enforcement to ensure balance, insofar as it is not aggressively targeted and decisive enforcement.

JEL Code: K21, L40, O30

Acknowledgments: The author would like to express his gratitude to the referees of the 2021 ASCOLA and the helpful comments. The author would like to thank Sei Shishido for his helpful comments in preparing this study.

Funding: This work was supported by a Grant-in-Aid for Scientific Research (KAKENHI) 19K01610.

* Professor of Economics, Faculty of Business Studies, Kyoritsu Women's University.

address: 2-2-1 Hitotsubashi, Chiyoda-ku, Tokyo, Japan, 101-8437

e-mail: koki.arai@nifty.ne.jp

There are no conflicts of interest related to the cases or policies mentioned in the paper.

STRUCTURALIST AND DECONSTRUCTIVE UNDERSTANDING OF JAPANESE COMPETITION POLICY TOWARD DIGITALIZATION AND INNOVATION

I. INTRODUCTION

The digital economy poses challenges to competition and innovation. These are also reflected in the application of competition law in digital markets. Considering this situation, this study systematically critiques the application of Japanese competition law, the Antimonopoly law[1], in digital markets in a way that promotes competition and innovation. Although this study targets the enforcement of Japanese law, it should promote a general discussion of such issues, not only in the sense that it is limited to a specific jurisdiction, say Japan. From this perspective, this study promotes the discussion of (relatively) similar issues encountered globally.

This study focuses on the enforcement of Japanese competition law in the digital market from four perspectives: (i) multifaceted markets, (ii) digital ecosystems, (iii) e-commerce, and (iv) data markets, with a focus on the enforcement of the law by the Japanese competition authorities, namely the Japanese Fair Trade Commission (JFTC). Besides, the following four perspectives on recent competition policy toward innovation are discussed: (i) the Qualcomm case in Japan, (ii) the basic principles of rule development in response to the rise of platform-type businesses; (iii) the two guidelines of the JFTC (abuse of a superior bargaining position in transactions between digital platform providers and consumers who provide personal information, and revisions to the business combination guidelines), and (iv) three JFTC research reports.

We adopt structuralist and deconstruction approaches. The study categorizes and systematically organizes the competition authorities' enforcement in digital markets in a specific and inductive manner. Taking a multifaceted view of the competition authorities' efforts on innovation and deconstructing it, innovation is a process itself, and the differentials, which cannot be recovered by dichotomies could be examined in the study.

The categorization and organization of these digital competitive policy initiatives in Japan highlight the complementary nature of the characteristic of Japanese competition policy, which applies to the general discussion and clarifies the content of competition law that should be applied. Competition is not essential for dynamic growth; however, it achieves efficient resource allocation in the market. Therefore, it is difficult to find the balance between investment and consumption to achieve the optimal growth path in the ongoing digital market, while ensuring fairness. Insofar as Japan's competition policy is not aggressively targeted and decisively enforced, it may be given high marks for its excellent enforcement in

[1] Competition law in Japan is a legal system centered on the "Act on Prohibition of Private Monopolization and Maintenance of Fair Trade" (April 1947).

ensuring balance, achieving economic stability, and securing social trust.

In what follows, section II of this study explains the methodology, starting with the use of structuralist and deconstruction approaches. Section III explains the enforcement of antitrust laws against digitalization formation. Section IV describes the efforts of competition authorities on innovation. Section V concludes the study.

II. METHODOLOGY

This study takes a structuralism approach ("structuralisme"). Here, structuralism not only categorizes the enforcement of competition authorities in the digital market historically and inductively, but also examines how the situations are connected, and systematically organizing and presenting them while clarifying the interconnections, development forms, and dependencies of the categorization from a functional perspective. The term "structuralism" is used in the sense that it refers to a methodology for extracting the latent structure of a phenomenon and using that structure to understand and possibly control the phenomenon.

With regard to this structuralism approach, three types of considerations have been made in the competition policy literature thus far. First, it should be noted that in the US, the term structuralism has also been used in market structuralism, which views markets in terms of structural behavioral outcomes, primarily by the Harvard School[2]; Internet Ecosystem as a perception of broadband markets[3], for thinking about digital markets[4]; for perspectives from Europe[5], from Australia and New Zealand[6]. It should be

---

[2] Herbert Hovenkamp, *Antitrust and the Cost of Movement*, 78 Antitrust L. J. 67 (2012), Herbert Hovenkamp, *Antitrust and the Close Look: Transaction Cost Economics in Competition Policy*, Faculty Scholarship at Penn Law. 1836. Available at https://scholarship.law.upenn.edu/faculty_scholarship/1836 (2014), and Daniel Crane, *A Neo-Chicago Perspective on Antitrust Institutions*. 78 Antitrust L. J. 43 (2012).

[3] Jeffrey Eisenach, *Broadband Competition in the Internet Ecosystem*. Available at https://www.judiciary.senate.gov/imo/media/doc/Eisenach%20Attachment%20II.pdf (2012), and Dirk Auer, Geoffrey Manne, Aurelien Portuese, & Thibault Schrepel, *Why sound law and economics should guide competition policy in the digital economy*, ICLE Working Paper, 30, Available at SSRN: https://ssrn.com/abstract=3384405 (2018)

[4] Nicolas Petit, *Comment on Federal Trade Commission Hearing #3 on Competition and Consumer Protection in the 21st Century,* Available at https://www.ftc.gov/news-events/events-calendar/2018/10/ftc-hearing-3-competition-consumer-protection-21st-century (2018).

[5] Frédéric Marty, *Is the Consumer Welfare Obsolete? A European Union Competition Law Perspective*, GREDEG WP No. 2020-13 Available at https://ideas.repec.org/s/gre/wpaper.html (2020).

[6] Baskaran Balasingham & Hannah Jordan, *Big Data and Competition Analysis under Australian Competition Law: Comeback of the Structuralist Approach?* Available at SSRN: https://ssrn.com/abstract=3589237 (2020), and David Teece *A capability theory of the firm: an economics and (Strategic) management perspective*, 53 New Zealand Economic Papers1, Available at https://doi.org/10.1080/00779954.2017.1371208 (2019).

mentioned, in connection with this structuralism, that there is also an emerging claim of neo-structuralism that seeks to radically strengthen antitrust in a contemporary way[7]. Second, in the debate on information law, some grasp personal data protection and other issues as panopticonically positioned and structuralist manifestations, and position competition law as one such regulation[8]. Third, there are many, but not all, approaches to competition law enforcement that take a structural view of competition policy, e.g., analyses of the evolution of European competition policy, suggesting that the embedded liberal order structures industrial and social policy[9]; Should European Union (EU) competition law move toward a Neo-Brandeis approach[10], which takes a structural view of competition policy developments in Europe and Germany relating to the institutional change in light of digitalization[11] and a comparison between the TFEU's conceptualization of objects and the US Quick Look analysis is structurally analyzed (no specific mention of structural considerations)[12]. Furthermore, an article concerned with the negative effects on the effectiveness, uniformity, and legal certainty of EU competition law enforcement regarding priority setting is also considered to be in this perspective[13]. When these previous studies are critically examined, the first typology has a slightly different structuralist connotation. As for the second typology, besides the fact that it is not a direct analysis of competition law, it lacks development and deepening beyond conceptual borrowing. As for the third typology, it does not recognize and make use of structuring, but only conceptualizes, typifies, and systematizes it, and we believe that it is necessary to promote its structuralist approach in earnest. It is also a challenge to deconstruct it further.

As for the methodology to be dealt with here, specifically regarding digitalization, we inductively

---

[7] Lina Khan, *Amazon's Antitrust Paradox*, 126 The Yale Law Journal 710 (2017), Lina Khan, *The Separation of Platforms and Commerce*, 119 Colum. L. Rev. 973-1098 (2019), and Richard Langlois, *Hunting the Big Five: Twenty-First Century Antitrust in Historical Perspective*, 23 The Indep. Rev. 411 (2019).

[8] Brian Fitzgerald, *Software as Discourse: The Power of Intellectual Property in Digital Architecture*, 18 Cardozo Arts & Entertainment Law Journal 337 (2000), and Francesco Lanzone, *Do we Need a Political Economy of Surveillance? The Case of the GDPR: A Critical Account of the Norms Governing Cyberspace*, MaRBLe Research paper Vol. 4. Available at https://doi.org/10.26481/marble.2018.v4.645 (2018).

[9] Hubert Buch-Hansen & Angela Wigger, *Revisiting 50 years of market-making: The neoliberal transformation of European competition policy*, 17 Rev. Int'l Pol. Econ. 20 (2010).

[10] Florian Kraffert, *Should EU competition law move towards a Neo-Brandeis approach?* 16 Eur. Competition J. 55 (2020).

[11] Oliver Budzinski & Annika Stöhr, *Competition policy reform in Europe and Germany – institutional change in the light of digitization*, 15 Eur. Competition J. 15 (2019).

[12] Kelvin Hiu Fai Kwok, *Re-Conceptualizing "Object" Analysis under Article 101 TFEU: Theoretical and Comparative Perspectives*, 14 J. Competition L. & Econ. 467 (2018).

[13] Or Brook, *Priority Setting as A Double-Edged Sword: How Modernization Strengthened the Role of Public Policy*, 16 J. Competition L. & Econ. 435 (2020).

clarify the enforcement status of competition authorities toward the formation of digital markets by looking at four historical developments in turn. The first is the enforcement of antitrust laws to deal with competition issues in business activities utilizing the multifaceted marketability of companies in the formation of digital markets. The second is the enforcement of antitrust laws in the maintenance of the digital ecosystem when the digital market emerges autonomously. Third, enforcing antitrust laws against obstacles in e-commerce as the actual market operation of the digital market. Fourth is the enforcement of competition law in the data trading and data market, which is the further digitization of the actual digital market content. In this order, we examine the enforcement of Japan's antitrust laws in the formation of digitalization structurally.

For innovation, we then take a deconstructive approach ("déconstruction") rather than a structuralist approach[14]. It is an attempt to deconstruct the competition authority's approach to innovation by taking a multidimensional view of it. After structurally positioning the competition authority's enforcement, it is then reorganized without historical events, but from a new perspective as static environmental improvement and dynamic proactive support measures. The term "deconstruction" does not refer to the historical or hierarchical approach to competition policy, but rather to the necessary and sufficient conditions for the realization of innovation pertaining to the development of a static environment (accumulation of knowledge, such as patents) and the support of dynamic actors (stimulation of competition and other incentives). Although not limited to digital technology, the clarification of competition authorities' views on addressing knowledge such as patents by (i) the decision in the Qualcomm Japan case and (ii) the publication of the basic principles for rule development in response to the rise of platform-type businesses is an aspect of static development. In addition, (ii) the publication of the basic principles for rule development in response to the rise of platform-type businesses and (iii) the revision of the JFTC's consumer preference guidelines and business combination guidelines can be positioned as dynamic measures to support competition and obtain legitimate incentives. Furthermore, (ii) the publication of the basic principles and (iv) the statement of basic policy in the JFTC's investigation report can be considered to clarify that innovation is a process itself.

Taken together and organized, these indicate that the competition authorities are working towards a process. The fact that policies are being implemented and laws are being applied in a comprehensive and overarching manner, and not just in this hierarchical and dichotomous metaphysical system, suggests that we are in a situation where deconstruction is being realized. This is the innovative Japanese competition policy for innovation that balances uniformity (predictability) and individuality (concrete relevance), and it is an enforcement philosophy with an ideological background that we believe should be applied to other jurisdictions.

---

[14] See Jacques Derrida *Positions*, Trans. Alan Bass. Chicago: University of Chicago Press, (1981). ISBN 978-0-226-14331-6

III. DIGITALIZATION

In digitalization, we look at the four historical developments in sequence. By doing so, we inductively examine how competition authorities enforce the formation of digital markets[15]. The first is antitrust enforcement of competition issues in business activities that take advantage of the multifaceted marketability of companies in the formation of digital markets. First, when a digital market is formed, companies develop their business by focusing on the multifaceted marketability of the digital market. In this case, the enforcement of antitrust laws against multifaceted markets can be seen as an effort toward digitalization.

The second is the enforcement of antitrust laws in maintaining the digital ecosystem at the time of the autonomous establishment of digital markets. Regardless of whether there is a multifaceted market when a digital market is formed and maintained, the market must develop autonomously as an ecosystem. The enforcement of antitrust laws against this digital ecosystem can be positioned as an important initiative of competition authorities, as it supports digitalization.

The third is the enforcement of antitrust laws against obstacles in e-commerce, which is the actual market operation of the digital market. The multifaceted nature of the market and the autonomous operation of the digital market as a digital ecosystem have shaped e-Commerce as a real market. Today, digital shopping malls have achieved a certain level of success as they have developed in a demander-friendly manner and ensure the trust of consumers. This is attributable to the fact that antitrust law enforcement in these fields has realized that competition in the market is fair and free. For this reason, antitrust enforcement against the behavior of digital platforms that impede e-commerce needs to be significant and appropriate.

Fourth, competition law enforcement in data trading and data markets further digitizes the actual digital market content. After the market has been fostered based on multifaceted marketability, the market has been maintained and strengthened by the digital ecosystem, and consumer confidence in the market has been ensured by antitrust enforcement against e-commerce, the actual products, and services traded in the market become data as well. This is one of the achievements of digitalization. The final discussion of this structural analysis is to examine how competition law has been enforced, mainly in business combination decrees, to achieve fair and free competition in the trade of this data. In this section, we examine the enforcement of Japanese antitrust laws in the formation of digitization in this order.

A. Multi-Sided Markets

The JFTC has been promoting competition policy based on the development of digitalization in the social

---

[15] The recent efforts of the JFTC regarding the digital market are outlined in Naoko Teranishi, *Digital Shijo ni kansuru Kosei Torihiki Iinkai no Torikumi ni tuite (Efforts of the JFTC regarding the digital market)*, 844 Kosei Torihiki 4 (2021), and business combination regulations are discussed in Fumio Sensui, *Digital Shijo ni okeru Kigyo Ketsugo Kisei (Business Combination Regulation in the Digital Market)*, 844 Kosei Torihiki 7 (2021).

economy and has been actively enforcing competition law (the Antimonopoly Act) in multi-sided markets. In this section, we explain the characteristics of the application of competition law in multifaceted markets based on three cases and touch on the notable points in the definition of relevant markets.

1. This is about the handling of an alleged antitrust violation case against Amazon Japan LLC. (June 1, 2017)[16]

The JFTC has been examining Amazon Japan G.K. under the provisions of the Antimonopoly Act because it was suspected that Amazon Japan G.K. was restricting the business activities of sellers of Amazon Marketplace by stipulating the conditions of equivalence of prices, etc., and the conditions of equivalence of product lineups in the listing-related agreements with the sellers. Therefore, we have been examining the company based on the provisions of the Antimonopoly Act.

Recently, Amazon Japan G.K. promptly offered voluntary measures, and having examined the contents of those measures, we decided to terminate the examination of the case because we recognize the suspicion mentioned above to be resolved.

2. Handling of the Alleged Antimonopoly Law Violation Case against Minna-no-Pet Online, Inc. (May 23, 2018)[17]

The JFTC alleged that Minna-no-Pet Online, Inc. violated the Antimonopoly Act concerning breeders who use "Minna-no-Breeder" and "Minna-no-Kitten Breeder," websites operated by Minna-no-Pet Online, Inc. that mediate transactions of dogs and cats between breeders and general consumers ("pet intermediary websites"). We have been examining Minna-no-Pet based on the provisions of the Japanese Antimonopoly Act because we suspected that Minna-no-Pet restricted breeders who use "Minna-no-Pet" and "Minna-no-Kitten Breeder," which are websites that mediate transactions of dogs or cats ("Pet Brokerage Sites"), from posting information of dogs or cats on other pet brokering sites.

Recently, the JFTC received a report from Minna-no-Pet that they have voluntarily taken remedial measures, and after examining the contents of the report, the JFTC concluded the examination in this case on May 23, 2008, because the above suspicion was found to be resolved.

3. Handling of the alleged violation of the Antimonopoly Act against Airbnb Ireland U.C. and Airbnb Japan K.K. (October 10, 2018)[18]

The JFTC has found that Airbnb Ireland and Airbnb Japan Co. Under the agreement between Airbnb Ireland U.C. and its business partners, Airbnb Ireland U.C. restricts its business partners from posting information

---

[16] https://www.jftc.go.jp/houdou/pressrelease/h29/jun/170601.html (in Japanese)

[17] https://www.jftc.go.jp/houdou/pressrelease/h30/may/180523.html (in Japanese)

[18] https://www.jftc.go.jp/houdou/pressrelease/h30/oct/181010_10.html (in Japanese)

on homestay services on websites operated by Airbnb Ireland U.C. that mediate the provision and receipt of homestay services using application programming interfaces, and from posting information on homestay services using APIs on other homestay service mediation websites. Therefore, we have been examining Airbnb based on the provisions of the Antimonopoly Act.

The JFTC examined the contents of the agreement and found that it resolved the above suspicion. Therefore, the JFTC decided to terminate the examination.

4. Findings

With regard to these multi-sided markets under digitalization, the three JFTC cases are based on the concept of bidirectional markets and multi-sided markets, such as sellers and buyers in the Amazon case, suppliers and consumers of pet information of breeders in the Minna-no-Pet case, and hosts and guests in the Airbnb case. The application of competition law is based on the reality of digital competition in interactive and multifaceted markets.

Appropriate clauses were chosen for the application, such as restrictions on joint action and restrictions on monopolization, per the actual situation of the act. In all cases, the law was applied by fully grasping the actual situation of competition in multifaceted markets based on indirect network effects in market definition.

In addition to this, a characteristic feature of the law is that it expresses concern about the violations of hub-and-spoke businesses, especially those that are hubs, and attempts are being made to resolve them. The qualification of competition law enforcement as an administrative agency can be seen in the most appropriate and effective response to the actual efforts to restore competition. This is a method that fully realizes the need for competition resolution based on the purpose of competition law, which is not seen in case resolution through litigation. For this reason, it is noteworthy that the market definition does not focus on the bidirectional part, but rather on a certain degree of flexibility in market definition while using the effective method of eliminating contractual clauses and announcing them to restore competition.

B. Digital Ecosystem

The JFTC does not pay special attention to the digital ecosystem in its application of competition law. However, we can infer the following ideas related to the digital ecosystem of the JFTC on the way the competition law has been applied in actual merger cases. Both of these cases are merger review cases in e-books and how the competition authorities view the digital ecosystem.

1. Yahoo Japan's acquisition of e-Book Initiative Japan Co. (FY 2016)[19]

In this case, Yahoo Japan Corporation (Softbank Group: SBG), which operates the Internet portal site

[19] https://www.jftc.go.jp/houdou/pressrelease/h30/oct/181010_10.html (Case 11) (in Japanese)

"Yahoo!", planned to acquire over 20% of the voting rights related to the shares of E-book retailer E-book Initiative Japan Inc.

The following is a careful analysis of the products and services in certain business fields. While there is no definitive definition of the term "e-book," "Trends in the e-book market" (June 26, 2013, Competition Policy Research Center) states that "e-books" (1) are textual and graphical information that replaces existing books and magazines, (2) are provided as electronic information through information and communication networks for a fee, and (3) the information is provided to electronic terminals (such as a personal computer, mobile phone (including smart phones), e-book terminal, and tablets).

According to this definition, blogs on the Internet, electronic information sold on CD-ROMs (dictionaries, white papers, etc.), electronic information that is printed on paper for reading (print-on-demand printing), and those that can be acquired for free (Aozora Bunko, online catalogs, etc.) are all movie-books. The term "e-book" does not include those that are available for free (Aozora Bunko, online catalogs, etc.).

In examining this action, following this example, we defined a movie-book as one that satisfies these three conditions. With regard to the distribution of e-books, the distribution channels are as follows: Paper-based books (hereinafter "general books"). In the case of paper books, the general distribution format is that publishers produce general books and wholesalers specializing in general books, called "agency," wholesale general books to bookstores.

Conversely, in the distribution of e-books, publishers generally produce e-books by converting general books into electronic data and selling them to e-book retailers themselves or sell them to e-book retailers through e-book wholesalers called e-book distributors. However, in the case of e-books, there are cases where the publisher itself operates an e-book retailer, or where the author makes a direct contract with an e-book retailer to sell the book without going through a publisher or e-book distributor. E-books are immaterial, and the transaction method differs from that of general books, which are tangible.

In business-to-business transactions related to e-books, when an e-book publisher provides e-book content to an e-book distributor or e-book retailer, the publisher provides the consumer with the "right to read e-books" (hereinafter "e-book license") through the e-book distributor or directly to the e-book retailer. Here, the publisher grants the e-book retailer the right to grant the consumer the e-book license, which is referred to as the sublicensing method. In this method, the e-book retailer grants the e-book license to the consumer. There is another method of transaction called the consignment sale method whereby the publisher grants e-book licenses directly to consumers, and the e-book retailer acts as an intermediary. All parties sell e-books to consumers using both the sublicensing and consignment sales methods.

Based on the empirical analyses results, the report concluded that the substitutability of demand for online and offline services in Japan was unclear at the time of the 2011 survey and that complementary demand structures were available in the fields of books, music, and video, online and offline services. As for the background to the lack of a clear substitution relationship, constraints such as copyright handling

and the separation of various standards and formats characterize the online market. In the online market, the main reason for the lack of a clear substitution relationship seems to be supply-side constraints, such as the insufficient supply of attractive content because of copyright handling restrictions and separation of various standards and formats.

If these supply-side restrictions are resolved, substitutability between e-books and general books is expected to increase. However, it is considered that the restrictions have not yet been resolved at this stage, therefore it is appropriate to evaluate that the substitutability of demand and supply between e-books and general books is limited, at least at this point, in light of the results of the empirical analysis in the report.

The horizontal business combination, and vertical business combination (downstream market) indicate the impact of this action on competition as follows: Since the incremental value of Herfindahl-Hirschman Index (HHI) is approximately 20, this action meets the safe harbor criteria for a horizontal business combination. Additionally, since the combined market share of the parties after the action is approximately 5%, action also meets the safe harbor criteria for a vertical business combination.

The JFTC concluded that the conduct in question does not substantially restrict competition in a certain trade field.

2. The acquisition of the shares of Publishing Digital Organization, Inc. by Media-Do Co. (FY 2016)[20]

In this case, Media-Do Inc., which operates an e-book brokering business, planned to acquire over 50% of the voting rights related to the shares of Publishing Digital Organization Inc.

Concerning the e-book brokering business, the parties' groups are all engaged in the e-book brokering business. The main services in the e-book brokerage business are commercial distribution (procuring contents from publishers and providing them to e-book retailers). Furthermore, it monitors the sales status daily, manages and aggregates the list of contents downloaded by consumers, manages the usage history of consumers, and outputs monthly forms related to these data on behalf of the company). Also, the system manages and aggregates e-book data, converts e-book data and metadata (bibliographic data, etc.) into formats (e.g., centrally manages e-book data and converts it into formats corresponding to each e-Book retailer, and converts metadata such as bibliographic data created by publishers into formats corresponding to each e-Book retailer), and converts each data into formats corresponding to each e-Book retailer. It also converts metadata such as bibliographic data created by publishers into formats for each e-Book retailer and provides the respective data to the e-Book retailers.

There are at least seven e-book brokers, and Company A and Company B are the leading competitors with a market share of 10% or more, and several other e-book brokers such as Company C.

As for e-books, each e-book distributor conducts business with various e-Book retailers.

[20] https://www.jftc.go.jp/houdou/pressrelease/h30/oct/181010_10.html (Case 12) (in Japanese)

Considering the differences between customers (e-book retailers) of each e-book distributor, publishers usually sell the same title through multiple e-book distributors. According to the interview by the JFTC, since the marginal cost of e-books is very small, and publishers have a significant advantage of increasing sales opportunities by expanding sales channels, it is common to sell the same title through multiple e-book distributors from this perspective. Therefore, it is unlikely that publishers sell e-books only to the parties' group after this action.

According to the hearing, Company A and Company B have the same attributes with the contents they mainly handle, and the e-book retailers mainly trade with them. Then again, Company C and Company D deal with a variety of publishers and e-book retailers and have a high substitutability with the services of the parties. Furthermore, some competitors share most of the content with the parties, and e-book retailers can procure most of the content they purchase from the parties from these competitors.

Since the main business of the competitors in the e-book agency business is sending and receiving electronic data, format conversion as described in section B (1) above, the physical constraints on increasing the volume of transactions are considered being small, and all of them are considered having sufficient supply capacity.

The JFTC considered that the Acts would not substantially restrict competition in a certain trade field by acting alone, because competitive pressure from competing businesses is recognized, besides, entry pressure is recognized to a certain extent and competitive pressure from consumers is recognized.

Even after this action, several competing businesses other than the parties, and the e-book market is rapidly expanding with the increase in the number of consumers with smartphones and tablet devices, and the scale of transactions through e-book brokers is also expanding. Each e-book distributor's share is determined by the percentage of revenue share determined individually with e-book retailers, which is relatively difficult to ascertain from the outside, and there is no index or price information published by industry organizations regarding such a percentage. Furthermore, it is difficult to obtain the price information from other companies, and the deviant behavior of other companies cannot be easily monitored. Also, a certain degree of entry pressure and competitive pressure from consumers are recognized. It is considered that the cooperative behavior of the parties and competing firms do not substantially restrict competition in a certain trade field.

3. Findings

With regard to the digital ecosystem, the JFTC has concluded that, even if mergers are planned in parallel with digitization, there are multiple competing businesses other than the parties, and that the e-book market is rapidly growing in size, backed by the increase in the number of consumers of smartphones and tablet devices. Additionally, the share of each e-book distributor is determined by the percentage of revenue share determined individually with e-book retailers, which is relatively difficult to ascertain from the outside, and there are no indices or price information published by industry organizations regarding such a percentage.

Because there is no price information published by industry organizations, it is difficult to predict the behavior of other companies with a high degree of accuracy among competing businesses, including the parties, and therefore, it is not easy to reach a common understanding that restricts competition.

Conversely, they also consider that it is difficult to obtain price information of cage companies, as in the case of normal merger review, and it is not easy to monitor the deviant behavior of other companies, but these are seen as important issues in digitalization. However, they also see that it is difficult to substantially restrict competition in a certain trade area through cooperative behavior, as there is sufficient supply capacity and that, a certain degree of entry pressure and competitive pressure from consumers are also recognized.

C. E-Commerce

With regard to e-commerce, JFTC has applied the Competition Law to the following three cases. The first case concerns the approval of a firm-commitment plan applied by Amazon Japan LLC. (September 10, 2020) Second, regarding the filing and withdrawal of an emergency cease-and-desist order against Rakuten, Japan's largest e-commerce mall. Ltd., Japan's largest e-commerce mall, regarding the filing and withdrawal of an emergency cease-and-desist order against Rakuten, Inc. (March 10, 2020). Third, regarding Amazon Japan LLC's response to changes in its terms of use for point services (April 11, 2020). Each of these cases is a regulation of abuse of a dominant position, which can be regarded as the same type of regulation of exploitative behavior in Europe.

1. Response to the amendment to the terms of service for Point service by Amazon Japan LLC (April 11, 2019)[21]

On February 20, 2019, the JFTC issued a notice that Amazon Japan G.K. (the "Company") had amended its Terms of Service for Amazon Point Service with Amazon Marketplace sellers to the effect that the Company would grant a minimum of one percentage point for all products to be listed on the marketplace, and that the sellers would bear the cost of the points. As there were concerns under the Antimonopoly Act (abuse of a dominant position), the necessary investigation was conducted.

Under these circumstances, on April 10, 2019, Amazon Japan G.K. revised the above-mentioned amendment to its terms and conditions, and left it up to the sellers to decide whether or not to make their products eligible for the Point service, and the JFTC decided not to continue the above-mentioned investigation into the said amendment.

2. Petition for an Emergency Suspension Order against Rakuten, Inc. (March 10, 2020)[22]

---

[21] https://www.jftc.go.jp/houdou/pressrelease/2019/apr/190411.html (in Japanese)

[22] https://www.jftc.go.jp/houdou/pressrelease/2020/mar/200310.html (in Japanese)

On February 28, 2020, the JFTC filed a petition for an emergency cease-and-desist order against Rakuten, Inc. (hereinafter "Rakuten") pursuant to Article 70–4, Paragraph 1 of the Antimonopoly Act, as follows:

"Until the JFTC issued a cease-and-desist order in this case, Rakuten had been implementing measures in the Rakuten Ichiba online mall operated by Rakuten, such as displaying "free shipping" along with the selling price of products when the total order amount is 3,980 yen or more including tax. Also, Rakuten's "common shipping line" is used.

Rakuten's introduction of the "common shipping line" is unfairly changing the terms and conditions of transactions to the disadvantage of the other party in light of normal business practices, taking advantage of its superior business position to the other party, and falls under Article 2, Paragraph 9, Item 5 (c) of the Antimonopoly Act, and is suspected of violating Article 19 of the Antimonopoly Act. It is suspected to violate Article 19 of the Antimonopoly Act.

More still, if Rakuten were to implement the "common shipping line" from March 18, 2020, it would impede transactions based on the free and independent judgment of a considerable number of businesses that have opened stores, and the situation would continue to harm the basis of free competition, as well as having a serious adverse effect on competition between such businesses and their competitors. Consequently, the fair and free competition order is significantly infringed, and the infringed fair and free competition order is difficult to recover if we wait for a cease-and-desist order, we have decided that it is urgently necessary to suspend the implementation of the "common shipping line" as stipulated in Article 70–4, Paragraph 1 of the Antimonopoly Act. (2) Rakuten's reason for suspending the implementation of the "common shipping line" was that it was deemed urgently necessary as stipulated in Article 70–4, Paragraph 1 of the Antimonopoly Act.

On March 6, 2020, Rakuten announced that, in light of the impact of the spread of the new coronavirus and other factors, it would allow merchants to choose whether or not to participate in the above-mentioned measures, which were scheduled to be implemented from March 18 of the same year and made a statement to that effect in the proceedings before the Tokyo District Court concerning the emergency suspension order.

On March 10, 2020, the JFTC withdrew its motion for an emergency suspension order, which had been filed with the Tokyo District Court, judging that the urgency of requesting a suspension would be diminished for the time being if the operators of stalls would be able to choose whether or not to participate in the above-mentioned measures.

3. Approval of the confirmation plan filed by Amazon Japan LLC (September 10, 2020)[23]

On July 10, 2020, the JFTC notified Amazon Japan G.K. of a firm-commitment procedure pursuant to the provisions of the Antimonopoly Act, based on the suspicion that Amazon Japan's conduct described in

[23] https://www.jftc.go.jp/houdou/pressrelease/2020/sep/200910.html (in Japanese)

Section 2 violated the provisions of Article 19 of the Antimonopoly Act (Article 2, Paragraph 9, Item 5 [abuse of a superior bargaining position] of the same Act). The JFTC received an application from Amazon Japan for approval of the commitment plan.

The JFTC found that the plan complied with all of the requirements for approval stipulated in the Antimonopoly Act, and approved the plan on September 10, 2020.

Since May 2016, Amazon Japan has been engaging in the following acts against suppliers whose business positions are inferior to its own in its business divisions, including the Car and Motorcycle Goods Division and the Toys Division.

(1) To improve the profitability of the company, the company has taken the following actions against the supplier in question: (i) to improve the profitability of the company, without any reason attributable to the supplier in question and without requesting to reduce the consideration as part of negotiations concerning the consideration, and without receiving an offer from the supplier in question to reduce the consideration to use it as a source of funds for discount sales, or based on such an offer; (ii) the amount specified in the inventory compensation contract is reduced from the amount of the price to be paid to the suppliers by concluding the inventory compensation contract, even though it is not in the direct interest of the suppliers to dispose of the goods by implementing the discounted sales.

(2) To improve the profitability of the supplier in question because the supplier is not able to obtain the profit that the company targets in the sale of the goods purchased from the supplier in question, the company does not clarify in advance the basis for calculating the amount of the burden, or does not take into consideration the direct profit that the supplier obtain through the provision of the money in question. (3) To improve the profitability of the company, the company has the suppliers provide money without clarifying in advance the basis for calculating the amount of the burden, although the provision of the money would be a burden beyond the reasonable range in consideration of the direct profit that the suppliers would gain through the provision of the money.

(3) To improve the profitability of the company, the company is making the supplier in question provide all or part of the money paid under the Joint Marketing Program Agreement without providing services under the agreement.

(4) To improve the profitability of the supplier, the supplier is required to provide the money to the supplier in the form of sponsorship money for the investment in the supplier's system, without disclosing the basis of the burden in advance. (viii) Although the provision of the money would be a burden on the supplier, the supplier is being made to provide money in an amount calculated by multiplying the amount of the monthly purchase payment from the suppliers by a predetermined rate.

(5) The company returns to the supplier in question goods that the company judges to be in excess inventory, even though there is no reason attributable to the supplier in question and none of the

following applies:

(a) In the case where the conditions of return are stipulated by the agreement with the suppliers at the time of purchase of the goods and the goods are returned under such conditions (limited to the case where such a return does not cause a burden beyond a reasonable range in consideration of the direct profit to be gained by the suppliers.

(b) Cases where the company obtains the consent of the suppliers in advance and bears the loss that would normally be incurred by the suppliers because of the return of the goods.

(c) When the supplier in question offers to accept the return of the goods and the disposal of the goods by the supplier in question directly benefits the supplier in question.

In response to these cases, Amazon Japan decided to take measures as a commitment plan, which mainly consisted of canceling these actions and restoring the monetary value of the products.

The JFTC found that the plan complied with all of the requirements for certification stipulated in the Antimonopoly Act and approved the plan. As a result of the implementation of the plan, the recovery of the monetary value mentioned in 3) above is expected to be approximately 2 billion yen in total for approximately 1,400 of the suppliers at present.

4. Findings

These e-commerce cases are all cases of abuse of a superior bargaining position. There is a view that abuse of a dominant position under Japanese law considers the effect on (a) competition between the abusing business and its competitors (third parties) or (b) competition between the abused business and its competitors (third parties) as the essence of the impediment to fair competition of abuse of a dominant position (so-called indirect competition infringement theory). However, as a general rule, the purpose of this regulation is to regulate what interferes with the proper allocation of resources through competition, and even e-commerce using digital platforms can be regulated where a market such as suppliers or consumers is considered. Here, it is appropriate to consider that the enforcement of antitrust laws is ensured even for e-commerce using digital platforms.

D. Data Markets

Concerning data markets, the following three merger cases of JFTC can be explained. The first is Yahoo Japan's acquisition of shares in Ikkyu Corporation. Yahoo Japan Corporation, mainly engaged in the Internet advertising business, planned to acquire all the shares of Ikkyu Corporation, which is mainly engaged in the Internet travel and restaurant reservation service business. Second, the acquisition of shares in Nihon Ultmarc, Inc. by M3 Co., which the JFTC gave as an example of a data transaction in its response, is described in detail. Third, the results of the review of the business integration of Z Holdings Corporation and LINE Corporation is another example of a data transaction given by the JFTC in its response. The first and third cases are mergers between major Internet service providers in which data transactions were raised

as a competition policy issue, and the second case was a stock acquisition in which data transactions were raised as an issue.

1. Yahoo Japan Corporation's acquisition of shares of Ikkyu Corporation (FY2015)[24]

In this case, Yahoo Japan Corporation, mainly engaged in the Internet advertising business, planned to acquire all the shares of Ikkyu Corporation, mainly engaged in the reservation service for travel and restaurants on the Internet.

Certain business fields are considered and defined as (i) online travel reservation service business, (ii) online restaurant reservation service business, (iii) metasearch service business, and (iv) two-way market.

Relating to the horizontal business combination (online travel reservation service business), it is considered that Online Travel Agents (OTAs) compete with hoteliers for the number of users of the OTA's website or the volume of transactions through the website, and that the OTA's sales to hoteliers are based on the volume of transactions multiplied by a certain percentage. Moreover, it is considered that OTAs are competing for users by giving points to users based on the number of hotel operators or a certain percentage of transaction volume. Therefore, it is considered that the market share based on transaction volume can be used as an indicator of the competitive position of business operators in the two different service areas. When the market share is calculated, the combined market share of the online travel reservation service business is approximately 5% and the increment of HHI is approximately 6% as a result of the conduct in question. Therefore, it falls under the safe harbor standard for horizontal business combinations.

Concerning the horizontal business combination (online restaurant reservation service business), it is considered that the restaurant reservation service provider is exclusively competing with restaurants for customers based on the number of customers sent, and the restaurant reservation service provider is competing with users for customers based on the number or quality of registered restaurants.

For this reason, it is considered that the market share based on the number of customers sent can be used as an indication of the competitive position of the business operators in the two different service categories. When the said market share is calculated, the combined market share of the online restaurant reservation service business is approximately 10% due to the conduct in question, and the increment of the HHI is approximately 15%. Resultantly, the combined market share of the online restaurant reservation service business is approximately 10%, and the incremental share of HHI is approximately 15%.

As for the vertical business combination, Yahoo refused to supply metasearch services to competitors (OTAs, etc.) other than Ikkyu (hereinafter "input closure"). However, as described below, Yahoo has neither the ability nor the incentive to conduct the input closure; therefore, the issue of market closure and exclusivity is not expected to arise.

---

[24] https://www.jftc.go.jp/houdou/pressrelease/h28/jun/160608_2.html (Case 8) (in Japanese)

First, considering that there are several competitors other than Yahoo in each metasearch service industry, there are no specific legal restrictions on new entrants, no significant capital investment is required, and new entrants such as foreign companies have been observed in the past few years, OTAs can easily obtain services from other metasearch service providers. OTAs can easily receive services from other metasearch service providers. Therefore, it is considered that Yahoo cannot close the input.

Additionally, in the metasearch service business, (1) since the marginal cost of providing metasearch service is infinitely small, it is easily possible to increase the number of OTAs to be displayed, and the more OTAs are displayed, the more attractive the service becomes to users, and (2) Yahoo! (2) Yahoo's sales to Ikkyu account for only a small percentage of its total sales in the metasearch service business, and the disadvantage resulting from the loss of sales opportunities because of the closure of the input is significant, therefore Yahoo has no incentive to close the input.

Furthermore, after this action, the online travel reservation service business and Ikkyu online restaurant reservation service business can use the information on consumers' purchasing behavior obtained by Yahoo through its business activities such as Internet advertising, which may improve the business capability of the parties.

However, even though Yahoo has been in a position to use such information in conducting its own online travel reservation service and online restaurant reservation service businesses, there are several businesses in these business fields that have a higher market share than the parties.

More still, businesses other than the parties are considered to be able to obtain information on the purchasing behavior of consumers in various ways. Therefore, the conduct in question does not substantially restrict competition in the online travel reservation service business and online restaurant reservation service business. Therefore, we believe that this action does not substantially restrict competition in the online travel reservation service and online restaurant reservation service businesses. In conclusion, it is judged that the conduct in question does not substantially restrict competition in certain business fields.

2. M3 Corporation's acquisition of shares of Nihon Ultmarc (FY 2019)[25]

M3 Co., Ltd. is a company engaged in the business of operating and managing a drug information provision platform. A drug information platform refers to an Internet platform that provides doctors with information and advertisements related to the proper use of prescription drugs. Nihon Ultmarc is a company engaged in the business of providing medical information databases. A medical information database refers to a database that organizes and accumulates information (data) of medical institutions and doctors working in those institutions. In this case, M3 planned and executed to acquire all of the voting rights related to the shares of Nihon Ultmarc. Although this action did not meet the notification requirements, the JFTC

[25] https://www.jftc.go.jp/houdou/pressrelease/2020/jul/200722.html (Case 8) (in Japanese)

conducted a business combination review of this action because there was concern that this action would restrict competition.

The examination was conducted while holding hearings with relevant parties, such as the competing businesses of the companies concerned. As a result, the JFTC determined that the conduct does not substantially restrict competition, provided that the parties take measures to resolve the problems that they have proposed to the JFTC regarding the business of operating a platform for providing drug information to pharmaceutical companies as consumers and to doctors as consumers, which was judged to substantially restrict competition. The JFTC judged that this action would not substantially restrict competition. The examination of the conduct in question focused on the examination of vertical business combinations and mixed business combinations related to the medical information database provision business and the drug information provision platform operation business.

Problematic input closure was examined as follows. First, the ability to perform an input closure is discussed. Nihon Ultmarc, which is engaged in the medical information database provision business (upstream market), refuses to provide a medical information database to a competitor of the parties, which is engaged in the drug information provision platform operation business (downstream market) or provides a medical information database under disadvantageous conditions compared to those provided to the parties (hereinafter "refusal to provide"). This section examines the possibility that the refusal to provide a medical information database to a business operator in the downstream market may cause problems of market closure and exclusivity in the business of operating a drug information provision platform with pharmaceutical companies as consumers/physicians as consumers.

In the business of operating a platform for providing drug information (downstream market), it is guaranteed that the use of Nihon Ultmarc's Medical Database (MDB) does not violate regulations such as the Medical Equipment Law, and the use of the MDB enables the provision of targeted drug information based on the attributes of individual physicians. Therefore, pharmaceutical companies, which are consumers, place importance on the fact that the drug information provision platform is linked with MDBs as a criterion for selecting business partners. Furthermore, although the medical information database provision business is essential for pharmaceutical information platform operators to conduct their business, no operators can provide the same database level as Nihon Ultmarc’s MDB Ultmarcand there is no entity among major drug information platform operators that do not receive the Nihon Ultmarc MDB. Therefore, if Nihon Ultmarc refused to provide the MDB to a competitor of the parties engaged in the drug information provision platform operation business, there is a high possibility that the competitor's competitiveness would be reduced or that the competitor would be excluded from the drug information provision platform operation business. Also, a new entry into the drug information provision platform operation business likely becomes difficult. Therefore, the parties can conduct input closure.

Then, the incentives to close the inputs are discussed, and profits can be increased by reducing the competitiveness of the party’s competitors in the drug information provision platform operation

business, or by excluding such competitors from the drug information provision platform operation business. Therefore, parties have an incentive to close the inputs.

Therefore, after this action, (i) the closure of inputs, (ii) the sharing of confidential information, and (iii) the closure of the mixed-type market may cause the closure and exclusivity of the market in the business of operating a drug information provision platform with pharmaceutical companies as consumers/physicians as consumers. Moreover, there is no pressure to enter the drug information platform operation business with pharmaceutical companies as consumers/physicians as consumers. Therefore, the JFTC pointed out that the conduct in question would substantially restrict competition in the business of operating drug information provision platforms with pharmaceutical companies as consumers and physicians as consumers. (2) Prohibition of discriminatory treatment for the price of MDBs transaction conditions other than the price of MDBs and other measures to solve the problem.

Based on the premise that the parties take these measures to resolve the issues, it can be assessed that there is no problem of market closure or exclusivity due to the Acts. Therefore, it is recognized that Acts not substantially restrict competition in the business of operating a pharmaceutical information provision platform with pharmaceutical companies as consumers and doctors as consumers. It can be concluded that this action does not substantially restrict competition in the business of operating a drug information provision platform with pharmaceutical companies as consumers and doctors as consumers.

The JFTC concluded that the conduct in question would not substantially restrict competition in a certain trade field, provided that the parties take measures to resolve the issue.

3. Results of the examination concerning the management integration of Z holdings corporation and LINE corporation (August 4, 2020)[26]

The JFTC received from the Parties Group a notification of the plan for the acquisition of shares under the provisions of the Antimonopoly Act concerning the business integration of Z Holdings Co. As a result of the examination, it was recognized that it could not be said that the measures requested by the Party Group would substantially restrict competition in a certain trade field, and the examination was terminated with a notice to the effect that the Party Group would not be ordered to take exclusion measures.

This case has been extensively examined. In this section, we focus only on the part related to code settlement, which is related to data transactions. The code settlement business, Cashless Settlement, and Overview of Services Provided by the Parties' Group Cashless settlement refers to settlement using means of payment other than physical cash (paper money and coins), including (i) credit card payment, (ii) debit card payment, (iii) card-type electronic money payment, (iv) mobile electronic money payment, and (v) code payment.

Of these cashless payment services, the Softbank (SBK) and Z holding (ZHD) groups provide

[26] https://www.jftc.go.jp/houdou/pressrelease/2020/aug/200804.html (in Japanese)

PayPay, while the NAVER and LINE groups provide LINE Pay. Since these services are positioned as (5) code payment services, we describe the code payment business in detail below.

The code settlement service is a service that allows consumers to pay for purchases recorded in the form of barcodes or Quick Response codes (QR codes) (hereinafter "codes") using a payment application on a smartphone. Code settlement services are services that provide consumers and merchants with a means of making payments by electronically reading the consumer's payment information recorded in the form of a barcode or QR code using a payment application on a smartphone.

Code settlement services can be used in either (i) a method in which a consumer makes a payment by scanning a code presented by a merchant with his or her smartphone (Merchant-Presented Mode [MPM]), or (ii) a method in which a code presented by the consumer on a smartphone payment application is scanned by the merchant using a code reader or similar device (consumer-presented mode [CPM]). The characteristics of the two methods are as follows: (i) the store presentation method requires only the installation of a board with the code displayed on it, and thus does not require any initial cost, and is relatively widely used in small and medium-sized stores, whereas (ii) the user presentation method may require modification of the POS system.

In examining the substantive restrictions on competition, two transaction fields are identified for the code settlement business: (i) the code settlement business with consumers as consumers and (ii) the code settlement business with merchants as consumers. In both transaction areas, the more consumers use a particular code settlement service in the transaction area (i), the more incentive there is for merchants to introduce such a service in the transaction area (ii). Conversely, the more merchants use a particular code payment service in the transaction area (ii), the more incentives there are for consumers to use that service in the transaction area (i). In this way, since the two business fields are mutually related to indirect network effects, the impact of this action on competition was examined based on such market characteristics.

In addition, the JFTC decided to evaluate whether the conduct would enable the parties to gain market dominance, particularly on the consumer side of the code settlement business, and whether it would enable the merchants to raise their merchant fees through the indirect network effect from the consumer side. The parties developed a structural estimation model to estimate the price elasticity of demand and the magnitude of the indirect network effect on the consumer and merchant sides and requested the data necessary for the analysis. The Party Group reported that it did not possess some of the data necessary for the analysis and, as an alternative, conducted an economic analysis of payment services focusing on the consumer side (hereinafter "Party Group Economic Analysis") using the data submitted in this case and submitted to the Committee. As an alternative measure, the Committee conducted an economic analysis of payment services focusing on the consumer side (hereinafter the “Economic Analysis of the Parties' Group") using the data submitted in this case and submitted it to the Committee. In this examination, the Committee also conducted its economic analysis by evaluating and verifying the economic analysis of the Parties' Group.

According to the results of the examination, the Committee believes that it is difficult to dispel the concern that there is a possibility that the Party Group may become dominant in the market at this time. Instead, the Party Group offered (i) periodic reports and consideration of necessary measures, and (ii) elimination of exclusive trading conditions, and on the assumption that the Party Group takes these measures it is recognized that the conduct does not substantially restrict competition in the code settlement business. The JFTC concluded that it could not be said that this action would substantially restrict competition in the code settlement business.

4. Findings

Concerning data transactions, the main enforcement actions were to point out problems based on the Antimonopoly Act to business combinations and to identify measures to resolve the problems. This is probably because the problems that can arise are more advanced than those in multifaceted markets, digital ecosystems, and e-commerce, and the market is not as mature as it could be. However, the fact that the JFTC's efforts to enforce competition policy in such a market has contributed to the development of the digital market is one of the unknown factors that support digitalization.

Up to this point, we have mainly examined competition policy approaches to the formation of digitalization from an analytical and inductive perspective. However, besides this structuralist approach, we would like to discuss innovation in the following section by deconstructing it, grasping the situation rather than the historical order, and organizing it as process-oriented management of competition policy in addition to static development and dynamic subject support.

IV. INNOVATION

Relating to innovation, we take a deconstructive approach rather than a structural approach, as in the past. Deconstruction here means not historically or hierarchically viewing competition policy, but reorganizing it from the perspective of static environment development (accumulation of knowledge such as patents) and dynamic subject support (stimulation of incentives such as competition) as necessary and sufficient conditions for realizing innovation.

This is not to explain the current system of innovation policy in historical order, but to position it within a certain structural framework and to grasp the current situation from a comprehensive bird's-eye view perspective that goes beyond that. The competition policy items related to innovation to be discussed can be listed as follows: one particularly important case, one announcement of a policy statement, two guidelines, and three indications of competition policy issues based on a survey of actual conditions.

The first is an exceptionally important case, which concerns the decision against Qualcomm Incorporated (Binding transaction involving a license agreement for Code Division Multiple Access (CDMA) cell phone handsets).

The second is the basic principle of developing rules in response to the rise of platform-type

businesses. This is a policy statement announced jointly by three Japanese ministries: The Ministry of Economy, Trade, and Industry, the JFTC, and the Ministry of Internal Affairs and Communications.

The third is the publication of two guidelines, the first being the "Antimonopoly Law Perspective on Abuse of Superior Bargaining Position in Transactions between Digital Platform Providers and Consumers Who Provide Personal Information." The second was the announcement of the revision of the "Operational Guidelines of the Antimonopoly Act Concerning the Examination of Business Combinations".

The fourth is, as a suggestion of competition policy issues based on an investigation into the actual situation, (i) report into the actual situation of trading practices of digital platform operators (in the field of digital advertising) (Interim Report), and (ii) report on the survey on trade practices of digital platform operators (business-to-business transactions in online malls and application stores), and (iii) report on the competition policy issues for the improvement of financial services using FinTech.

First, we explain that (1) the decision in the Qualcomm case and (2) the publication of the basic principles for the development of rules in response to the rise of platform-type businesses have static aspects, which clarify the view of competition authorities on efforts to accumulate knowledge such as patents, although they are not limited to digital technology. This summarizes how knowledge accumulation measures have been considered from the innovation perspective. Subsequently, we also position (2) the publication of the basic principles for the development of rules to deal with the rise of platform-type businesses, and (3) the revision of the JFTC's Consumer Superiority Guidelines and Business Combination Guidelines as dynamic measures to support actors to compete and obtain legitimate incentives. We see that by doing these things, the government is trying to secure incentives for business ingenuity. Based on these preparations, we confirm that, contrary to this hierarchical dichotomous metaphysical system, competition policy initiatives for innovation are a process in itself, and ensure the necessity of gazing at others (differentials) that cannot be recovered by dichotomies. This is also touched upon in (2) the publication of the basic principles, (3) the formulation and publication of the guidelines, and (4) the statement of the basic stance in the JFTC's investigation report, and is intended to show that the competition authorities are working toward a process.

A. Hearing Decision Against Qualcomm

The JFTC, which initiated trial proceedings against the respondent Qualcomm Incorporated on January 5, 2010 and has since had trial examiners conduct trial proceedings against the respondent, issued a decision on March 13, 2021, to revoke the cease-and-desist order against the respondent[27].

In agreeing to grant a license to a domestic manufacturer and seller of terminals for the intellectual property rights of CDMA mobile wireless communications owned or to be owned by the respondent, the respondent did not grant a license to the intellectual property rights owned or to be owned

[27] https://www.jftc.go.jp/houdou/pressrelease/2019/mar/190315.html (in Japanese)

by the domestic manufacturer and seller of terminals. In agreeing to collectively grant a license to a domestic terminal manufacturer/seller for the intellectual property rights owned or to be owned by the domestic terminal manufacturer/seller, the domestic terminal manufacturer/seller is forced to grant a license to the domestic terminal manufacturer/seller free of charge, and is forced to promise that the domestic terminal manufacturer/seller not assert rights based on the intellectual property rights owned or to be owned by the domestic terminal manufacturer/seller. This falls under Article 2(9)(iv) of the Antimonopoly Act before the amendment by the 2009 Amendment Act (Act No. 51 of 2009) (Article 13 of the former General Designation and violates the provisions of Article 19 of the Antimonopoly Act [hereinafter the "Infringement"]).

There were three points of contention in this case, but we focus on Point 1 in particular, on which the decision was made. Issue 1 is as follows: whether the conclusion of the License Agreement, which stipulates that this free license clause is likely to impede fair competition as it restrains the business activities of domestic manufacturers and sellers of terminals (fair competition impeding nature) and falls under Paragraph 13 of the former General Designation.

To determine whether this violation falls under Paragraph 13 of the former General Designation, it is necessary to determine whether the restraint on the business activities of the domestic terminal manufacturers and sellers by the provision of the Free License Clause in the License Agreement, concluded by the respondent with the domestic terminal manufacturers and sellers is likely to impede fair competition. The court said that it was necessary to determine whether or not the provision of the Gratuitous License Clause in the License Agreement concluded between the domestic terminal manufacturers and sellers could inhibit fair competition.

The basic structure of this license agreement, in which the free license clause is stipulated, is a cross-license agreement in which the licensee grants a license to the intellectual property right owned by the respondent, and the domestic terminal manufacturer and seller also grant a non-exclusive license to the intellectual property rights owned by the respondent. It is reasonable to recognize that the non-dispute clause for the licensee also has a nature similar to a cross-license agreement, as it allows other licenses of the respondent who have the same clause as the domestic terminal manufacturer and seller to use the intellectual property rights held by each other). Because, in principle, the conclusion of a cross-license agreement itself is not considered to impede fair competition, for the license agreement to be found to have a possibility of adversely affecting the order of fair competition, it is necessary to find that the license agreement in question impedes the willingness of domestic manufacturers and sellers of terminals to conduct research and development. For the Examiner to find that the license agreement is likely to have an adverse effect on the fair competition order, it is necessary to have some concrete proof based on evidence, so that the license agreement is likely to impede the willingness of domestic manufacturers and sellers to conduct research and development.

The Investigator found that [1] the scope of application of the license agreement is broad, [2] the

license agreement has the nature of a free license, and [3] the license agreement is unbalanced. However, as described in a through c below, all of them lack the grounds.

As for the other points, a. regarding the point that the scope of application of the license without charge clause is broad, there is no evidence sufficient to admit that the scope of the intellectual property right subject to the granting of a license is different from the ordinary one and is particularly broad. b. With regard to the point that the license has the nature of a license without charge, it is said that there is no evidence sufficient to admit that the respondent holds or holds the license without charge. As for the point that the license is like a free license, given that the licensee is granted a license to the intellectual property rights that the respondent owns or owns, it is not reasonable to interpret the license agreement, which has the nature of a cross-license, by taking out only this free license clause and interpreting it as an obligation of a domestic manufacturer and seller of terminals without any consideration. It is not reasonable to interpret the license agreement, which has the nature of a cross-license, as requiring domestic manufacturers and sellers of terminals to take out the license agreement without any consideration, and the license agreement cannot be evaluated as a free license agreement without consideration by this interpretation. Furthermore, relating to the point c) of imbalance, it is not clear from the evidence whether the differences in the value of the intellectual property rights held by each of the domestic terminal manufacturers and sellers are such that there should be any difference in the content of the License Agreement in which the Gratuitous License Clause is stipulated. It was concluded that because there was no difference in the content of the agreement among the domestic handset manufacturers and sellers did not indicate that the degree of restriction and the content of the free license terms were unreasonable to the extent that it could be inferred that there was a possibility that they would inhibit the willingness of some domestic handset manufacturers and sellers to conduct research and development.

In conclusion, given the respondent's possession of industrial property rights that are essential for the third-generation mobile wireless communication standard, it is presumed that the respondent had a strong position in the market related to the technology of CDMA cell phone terminals (the market to be examined in this case). In the process of concluding the license agreement with domestic terminal manufacturers and sellers, it can be considered that there was room for some kind of conduct that should be regulated by the Antimonopoly Law. However, as stated in the above (a), there is no sufficient evidence to find that the respondent's conclusion of the license agreement with the domestic terminal manufacturer and seller, which stipulates the free license clause constitutes a transaction with restrictive conditions as pointed out in the cease-and-desist order, and that the cease-and-desist order cannot be issued against the respondent based on the above.

B. Basic Principles For Developing Rules In Response To The Rise Of Platform-Type Businesses

The Ministry of Economy, Trade, and Industry, the JFTC, and the Ministry of Internal Affairs and Communications formulated the basic principles for the development of rules in response to the rise of

platform-type businesses on December 18, 2018[28]. Under the Fourth Industrial Revolution, digital platformers, who use Information communication technology and data to provide third parties with a wide variety of service "venues," have become a leader of innovation that continues to create innovative businesses. They are important to the Japanese economy and society, as they dramatically increase the possibilities of market access for businesses, including small and medium-sized enterprises, and improve the benefits for consumers. Conversely, digital platforms, which play a role in multifaceted markets with multiple user groups, are likely to expand through network effects, low marginal cost, economies of scale, and other characteristics and are likely to become monopolized and oligopolized.

Based on this recognition of the current situation, the following issues should be addressed: (I) legal evaluation of digital platforms, (II) promotion of appropriate development of platform businesses, (III) realization of transparency to ensure fairness of digital platforms, (IV) realization of fair and free (V) consideration of rules for the transfer and opening up of data, (VI) establishment of balanced, flexible and effective rules, and (VIII) international application of law and harmonization.

For example, regarding innovation, the principles include: "As industries and businesses are becoming increasingly platform-based, it is necessary to promote the further development of platform businesses in Japan so that innovation can be generated (Principle II)" and "The content of the rules for data transfer and release should be as follows (Principle V), " "Therefore, we consider the appropriateness of data transfer/opening rules by taking into account various perspectives, such as the approach to the rights of individuals to manage and access their data, and the approach to create a competitive environment in which innovation can continuously occur. " (Principle 5)" and "In each of the above considerations, while giving due consideration to innovation in the digital field, to ensure the effectiveness of the rules sufficiently and appropriately, we build effective rules, taking into account flexible methods such as joint regulations that combine self-regulation and legal regulations " (Principle VI)" and so on.

C. Two JFTC Guidelines Related to Innovation

The first is the publication of the "Antimonopoly Law Perspective on Abuse of a Superior Bargaining Position in Transactions between Digital Platform Providers and Consumers Who Provide Personal Information. The second was the announcement of the revision of the "Operational Guidelines of the Antimonopoly Act Concerning the Examination of Business Combinations".

1. Antitrust Law Perspective on Abuse of a Superior Bargaining Position in Transactions between a Digital Platform Operator and Consumers Who Provide Personal Information, etc.[29]

The JFTC, in its "Basic Principles for the Development of Rules to Respond to the Rise of Platform

[28] https://www.meti.go.jp/press/2018/12/20181218003/20181218003.html (in Japanese)

[29] https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/191217DPconsumerGL.pdf

Businesses" compiled on December 18, 2018, stated that "it is important to ensure fair and free competition in the digital market, including the application of regulations on the abuse of a dominant position concerning consumers who provide data related to themselves in exchange for services. We examine the operation of the Antimonopoly Law and related systems to ensure fair and free competition in the digital market. This guideline was formulated because the Antimonopoly Law of Japan has been amended as follows. To further ensure the transparency of the Act's operations and improve the predictability of digital platform operators by clarifying the concept of restrictions on the abuse of a dominant position in transactions between digital platform operators and consumers who provide personal information. To further ensure transparency in the application of the law and improve the predictability of digital platform operators by clarifying the concept of the Antimonopoly Law, we decided to formulate the "Concept under the Antimonopoly Law Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers Who Provide Personal Information, etc." and published it on December 17, 2019.

2. Revision of the "operational guidelines of the Antimonopoly act concerning the review of business combinations" (December 17, 2019)[30]

The JFTC formulated the "Guidelines for application of the Antimonopoly Law to the review of business combinations" to indicate the approach to the application of the Antimonopoly Law to the review of business combinations, and has also formulated the "Policy and Procedures for Reviewing Business Combinations" to clarify the procedures for reviewing business combination plans. In recent years, there has been an increasing need to respond appropriately to business combination cases in the digital field. Therefore, we decided to revise the Business Combination Guidelines and the Policy for Business Combination Procedures, and published a draft revision on October 4, 2019, considered the opinions received and published the revised version on December 17, 2019.

For example, in the delineation of certain fields of trade, the concept of a multifaceted market, which is a characteristic of digital services, is clearly stated. In other words, a certain field of trade is defined for each consumer group, and if the platform mediates transactions among different consumer groups and the indirect network effect is strong, a certain field of trade that includes each consumer group may be defined in a multilayered manner. It also specifies the concept of the case where competition is based on quality rather than price. This means that if the quality of a certain product in a certain region deteriorates, or if the cost borne by consumers in receiving a certain product in a certain region rises, the extent to which consumers shift their purchases of the product to other products or regions may be considered for the product and region in question. Also, in the area of innovation, there is a need to consider the extent to which consumers switch their purchases of the product in question to other products or regions.

Furthermore, regarding innovation, the concept of a business combination by a company engaged

[30] https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/191217GL.pdf

in research and development (R&D) was also specified. In other words, if the goods and services under R&D by the parties are expected to be highly competitive among the parties after being supplied to the market, the competition among the parties after R&D that would have been realized in the absence of the business combination is reduced compared to the case where there is no business combination. Moreover, there is a significant impact on competition because of a decrease in the willingness of the parties to engage in R&D. Furthermore, the concept of refusal to supply data to other companies in cases where the data could be traded in the market was also specified. In the case of a vertical business combination between Company A in the upstream market, which possesses competitively important data, and Company B in the downstream market, which provides services utilizing such data; Company A's refusal to supply data to competitors of Company B may result in the closure and exclusivity of the downstream market. In addition, not only data but also competition-important input goods such as intellectual property rights should be judged per the data concept.

The concept of extinction of the possibility of new entry by acquiring start-up companies, that have important input goods such as data, is also clarified. This means that if Company A, which is already doing business in a certain market, conducts a mixed business combination with Company B, which is not doing business but has important input goods such as data and is expected to become a strong competitor if it enters the market by itself or through a business combination with another company, the possibility of new entry by Company B is eliminated. The effect on competition is greater in the case of a mixed business combination with Company B, which is expected to be a strong competitor if it enters the market after making a mixed business combination than in the case where it does not.

D. Three Reports

1. Report on the survey on trade practices of digital platform providers (business-to-business transactions in online malls and application stores) (October 31, 2019)[31]

The JFTC decided to conduct this fact-finding investigation to clarify whether any practices may cause problems under the Antimonopoly Act and competition policy about transactions in online malls and app stores, where problems are often pointed out. Among the practices discussed in this report, the following issues are of particular concern: (i) how operators change their terms and conditions, (ii) whether they use the transaction data of users for their direct sales, and (iii) whether they give preferential treatment to themselves or their affiliates by manipulating search algorithms. We continue to monitor these issues closely, as they include issues unique to digital platforms, and the structure of the market and the level of technology are constantly changing.

To improve the competitive environment surrounding digital platforms, it is necessary to not only enforce the Antimonopoly Act, but also to consider and respond to various aspects, such as appropriate

[31] https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191031.html

regulations under the Business Law, the introduction of a mechanism to realize the transfer and opening of data, and the appropriate protection of personal information. The JFTC participated in the deliberations of the newly established Digital Market Competition Council and actively work in collaboration and cooperation with relevant ministries and agencies to improve the competitive environment. Furthermore, the Committee continues to grasp the actual situation in other digital platform fields and organize the thinking of antitrust law and competition policy.

2. Reports on competition policy issues for the improvement of financial services using FinTech (April 21, 2020)[32]

In recent years, in the financial sector, where services have been provided mainly by banks and other financial institutions, there have been cases in which FinTech companies have entered the market to provide financial services such as household account book services for individuals, accounting services for small and medium-sized enterprises (SMEs) and sole proprietors, and cashless payment services using QR codes. Such new entrants, including those from different industries, utilizing new technologies are expected to stimulate competition among businesses, promote innovation such as the creation of new services, and improve convenience for users. In this regard, if there are factors that hinder such new entrants and their business activities after entering the market, there is a risk that these expected effects are limited. For this reason, the JFTC conducts a fact-finding survey including (1) household account book services and (2) cashless settlement using QR codes to ascertain issues in terms of competition policy.

3. Survey on Trade Practices of Digital Platform Operators (in the field of digital advertising) (Interim Report) (April 28, 2020)[33]

The perspectives for future investigations and examinations are as follows: First, on transactions with business operators, whether (i) digital platform operators are causing unfair disadvantages to business operators who have no choice but to use the platform by unilaterally changing the content of contracts and (ii) whether digital platform operators are causing unfair disadvantages to business operators who compete with their own business by unilaterally changing the content of contracts. (2) Whether digital platform operators unfairly exclude advertising intermediaries that compete with their own business, and (3) whether digital platform operators unfairly restrain business activities by restricting the distribution of digital advertisements that do not go through the platform.

Second, concerning transactions with consumers, we elucidate the status of information utilization from the perspective of whether the acquisition of personal information on digital platforms provided by digital platform operators or the use of such acquired personal information may be problematic

---

[32] https://www.jftc.go.jp/houdou/pressrelease/2020/apr/200421.html (in Japanese)

[33] https://www.jftc.go.jp/houdou/pressrelease/2020/apr/200428_1.html (in Japanese)

as an abuse of a dominant position.

Third, from the competition policy perspective, besides the use of information by digital platform operators to ensure transparency of transactions, from the development of a fair competitive environment for information distribution perspective, the Government of Japan also monitors the competitive relationship between media companies using digital platforms and media companies in a competitive relationship with these media companies, and these companies' efforts.

E. Findings

In terms of the positioning of these policies, (1) the decision in the Qualcomm case, which clarified the view of competition authorities on efforts to accumulate knowledge such as patents, and (2) the publication of basic principles for the development of rules in response to the rise of platform-type businesses, although not limited to digital, have static aspects. In other words, in the Qualcomm case decision, the basic structure of a license agreement is as a cross-license agreement, and the main content is that the conclusion of a cross-license agreement itself is not considered to be inhibiting fair competition in principle. This is full recognition of the knowledge accumulation nature of cross-licensing. Furthermore, in the basic principles for the development of rules in response to the rise of platform-type businesses, digital platformers have become the bearers of innovation that continue to create innovative businesses and the benefits of such innovation have dramatically increased the possibility of market access for businesses including SMEs. For consumers, there are indications that this leads to an increase in their benefits, and we can see an awareness of the possibility of appropriate distribution.

However, there are also references to dynamic development, such as approaches to develop a competitive environment in which innovation is constantly occurring besides the accumulation of such knowledge and to consider various perspectives. This is particularly true of the JFTC's Consumer Preference Guidelines and revised Business Combination Guidelines, which are highly competition-conscious and support competition and the acquisition of legitimate incentives as dynamic subject support measures. It is believed that these measures are intended to secure incentives for business ingenuity.

Although not limited to digital technology, the views of competition authorities on addressing knowledge such as patents have been clarified by (i) the decision in the Qualcomm case in Japan and (ii) the publication of the basic principles for developing rules in response to the rise of platform-based businesses. This supports the realization of innovation based on the accumulation of knowledge. Innovation has a static aspect of development in that it has a part based on accumulation, and this shows how to foster this necessary condition in competition policy. In addition, (ii) the publication of basic principles for the development of rules to deal with the rise of platform-type businesses and (iii) the revision of the JFTC's Consumer Preference Guidelines and Business Combination Guidelines are intended to support competition and obtain legitimate incentives. This provides a reason for innovation to be promoted that stimulates ingenuity and secures legitimate gains. It positions innovation as a dynamic measure that aims

to develop, and it shows how to foster this sufficient condition in competition policy. Furthermore, with (ii) the publication of the basic principles and (iv) the statement of basic policy in the JFTC's research reports, we believe that it is clear that innovation is a process itself. It provides the necessary and sufficient conditions, and the policy shows the importance of the process itself.

V. CONCLUSION

This study has systematically and critically examined the application of Japanese competition law, or antitrust law, in digital markets in a way that promotes competition and innovation. The study focused on the enforcement of Japanese competition law in digital markets from four perspectives: (i) multifaceted markets, (ii) digital ecosystems, (iii) E-Commerce, and (iv) data markets. We discussed Japan's competition policy initiatives in the digital market, focusing on JFTC's law enforcement in each of these areas. We then discuss four perspectives on recent competition policy toward innovation: (i) the Qualcomm case in Japan, (ii) basic principles for developing rules in response to the rise of platform-type businesses, and (iii) two guidelines of the JFTC (Abuse of Superior Bargaining Position in Transactions between Digital Platform Providers and Consumers Who Provide Personal Information, and Revision of Business Combination Guidelines), and (iv) three research reports.

This study adopted a structuralist approach and a deconstruction approach. We categorized and systematically organized the competition authorities' enforcement in digital markets in a specific and inductive manner. We then took a multifaceted view of the competition authorities' efforts on innovation and deconstructed it, so to speak. Innovation is a process itself, and it is necessary to look at the differentials, which cannot be recovered by dichotomies.

These efforts of Japan's competition policy toward digital technology highlight its complementary nature. We believe that this excellent feature applies to the general discussion and reveals the content of competition law that should be applied. That is, competition is not essential for dynamic growth; however, it achieves efficient resource allocation in the market. In the difficult task of searching for the balance between investment and consumption to achieve the optimum growth path in the digital market, while ensuring fairness, Japanese competition policy is considered to have an excellent effect in ensuring the balance, to the extent that it is not aggressively targeted and decisively enforced.

The implication of this study for the study of competition law and policy is that it provides a concrete example of the structuralist and deconstructionist approaches to competition policy approaches to digital markets. The methodology has not been explored in-depth in competition law and policy research in the past, but this study makes a significant contribution to an important area. Moreover, the content implications of this study can be considered an important contribution in that it clarifies the importance of complementary approaches to competition law in digital markets, and identifies specific enforcement methods that aim for fair and free competition through balance.

One possible limitation of this study is that it is only a commentary on the enforcement of

Japanese law. However, the methodology and contents discussed in this study are not limited to law enforcement in a specific country region but can be widely applied, and it is hoped that such analysis is promoted in the future, so it is considered to have significance beyond a certain limit.