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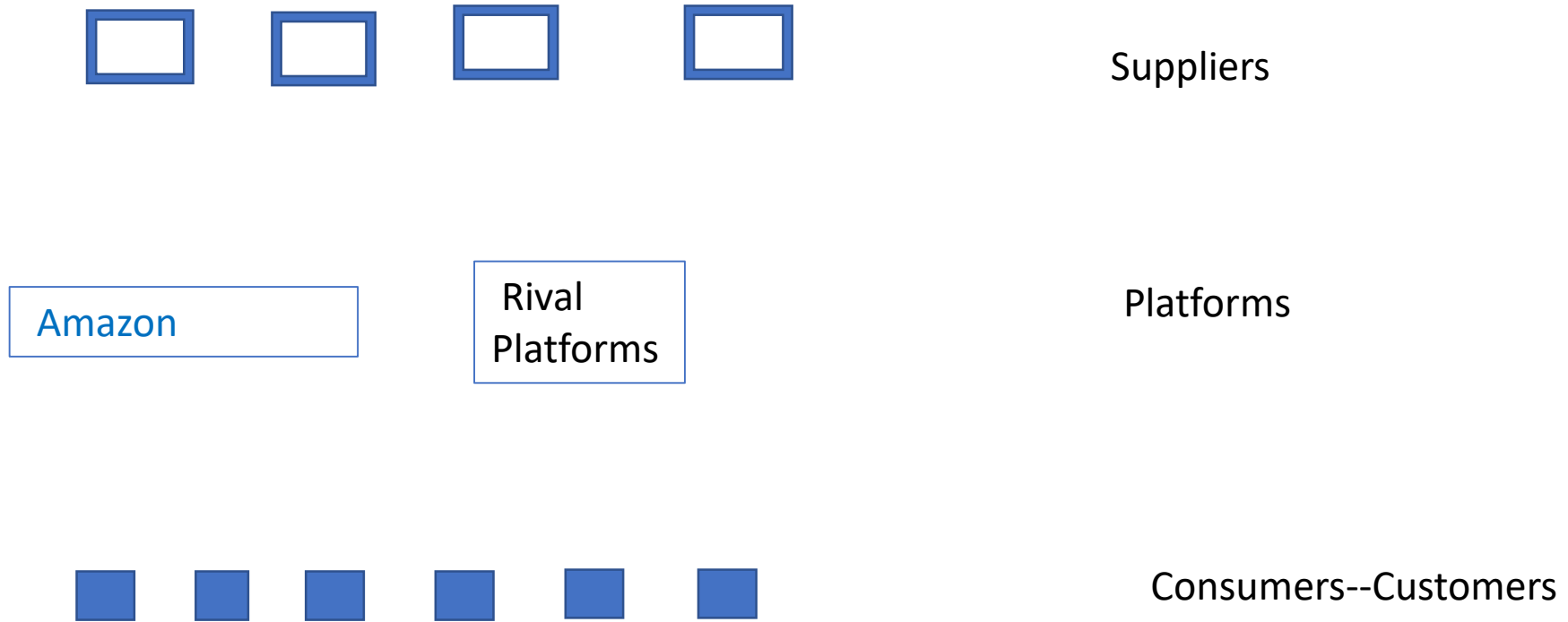
# Competition Law Enforcement on Exploitative Abuse by Digital Platforms: Japanese Approach in a Global Context

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# Platforms transacting in two-sided markets



# Abuse by **Dominant** Platforms in Two-sided markets

- P to B
- P to C
- Exclusionary Abuse
- **Exploitative Abuse**

# Criticism against Competition Law Enforcement on Exploitative Abuse

- **US** courts and antitrust agencies have consistently rejected utilizing antitrust laws for intervening in exploitative conduct by dominant companies.
- **Within EU**
  - Jacques Crémer et al, *Competition Policy for the Digital Era* (European Commission, 2019)
  - Jason Furman, et al. *Unlocking digital competition Report of the Digital Competition Expert Panel* (gov.uk, 2019)
- **This paper's objective:**

# Exploitative Abuse toward Trading-Counterparts—P to B

- Exploitative conduct by dominant firms has mostly concerned conduct toward trading-counterparts, most typically, suppliers to powerful grocery chains. This is because exploitation has been linked to **monopsony (or buyer) power of big retailers**
- Big grocery chains' bargaining power over their suppliers has been attributed to the **locked-in status of the suppliers toward powerful grocery chains.**
  - **European Commission** in its *2019 Unfair Trading Practices Directive*
  - Australia
  - UK

# Reining in buyers' power of powerful platforms— Japan: Superior Bargaining Position

- Japanese situation shows that there exists **little reason to limit this issue to grocery chains.**
- JFTC has extended the condemnation to wide range of industries, including **convenience stores**, and **banks**.
- Every industry where **large companies have bargaining power over their trading counterparts** may become target of bargaining-power abuse regulation.

# JFTC's Initiative in 2019 to tackle digital platforms' abuse on their suppliers.

- the Japanese competition agency (JFTC), in 2019, has commenced tackling digital platforms' abuse on their suppliers.
- JFTC, *Report regarding Trade Practices of Digital Platforms (Business-to-Business Transactions by Online Retail Platform and App Store)* (31 October 2019).

# Competition agencies: Are they Suitable to Tackle Unfair Trade Practices?

- Powerful enterprises' dealing with small-and-medium enterprises (SMEs) have been condemned as exploitative, when they impose disadvantageous or **unfair** contractual terms on SMEs.
  - Regulation on **unfair trading practices** (abbreviated as UTPs).
- UTPs need not be regulated by competition agencies; they may more aptly be regulated by public agencies assigned to protect SMEs.
- Still, as long as exploitative abuse continues to be regulated by competition law (which is the case in many countries, outside the US), **competition agencies receive strong pressure to reign in UTPs.**
- **The reason is institutional.**



# Dominance or Dependency: SBP and 'Relative market power'

- **Japan:** Delineating enterprises targeted by the AMAs exploitative-abuse clause as those with '**Superior Bargaining Position (SBP)**'
- **Germany:** '**Relative market power**'
- Adoption of SBP (alternatively, "relative market power") functions to mitigate burden on competition agencies to prove market power held by big purchasers.

# SBP, or 'relative market power' cannot delimit the targets of its regulation

- JFTC has identified SBPs whenever JFTC identified unfair contractual terms, through reasoning that **the fact that a supplier was obliged to accept a disadvantageous contractual-terms shows SBP status** of the retailer

# Standards for Identifying Abusive Exploitation

- JFTC in its original SBP Guidelines:
  - the standard ends up only delineating abusive terms as those which cause **'unreasonable' damage to the suppliers.**
- A subjective standard ends up backing **citizens' intuitive support for small-and-medium suppliers**, when the suppliers complain against trading terms contracted with big purchasers.
- **Viewing from the side of big purchasers**, they often have legitimate reasons for such contractual terms.
  - For instance, the JFTC Report on trade practices of digital platforms notes a complaint by suppliers to digital platforms, regarding **platforms' calculating fees based on summation of a product's price and transportation charge**

# JFTC's 2019 Report focuses on Procedural Fairness

- It set up more concrete standards, focusing on **procedural fairness in contracting** between platforms and suppliers, on occasions when platforms change their trading terms (including fees) toward suppliers
  - first, **notify in writing** to their suppliers on changes in trading terms
  - second, in case those **suppliers express their opinions on the changes**, platforms need to take these into consideration, at the same time, placing ample time before implementing the changes in contract.
- It is hoped that JFTC adopt a view that **as far as trading-terms (including fees) have been fairly and transparently negotiated** between platforms and their suppliers, JFTC usually refrains from intervening in substance of trading-terms.
  - JFTC might emulate the EU 2019 Directive, which prioritizes negotiation-procedural fairness

# Platforms' Exploitative Abuse on Consumers' Data--P to C

- Bundeskartellamt's enforcement on [Facebook](#).
- JFTC has announced its new policy of applying the SBP clause to platforms' terms toward consumers:
  - [JFTC, Guidelines on Abuse of Superior Bargaining Position over Consumers who Provide Personal Information to Digital Platforms](#) (17 December 2019).
- Why [focus on Consumers' Data](#)?
  - Platforms' business model of giving consumers free services in exchange of obtaining consumers' data, from which platforms elicit profits, prominently, through making their targeted advertising more personal and accurate.

# Competition law or consumer protection law for addressing abusive terms on consumers

- Exploitative abuse on consumers have **already been addressed by consumer-protection rules**: regarding consumers' data protection, by GDPR in EU, and rules inspired by GDPR in countries outside EU.
- It is not only **JFTC** that protects consumers through application of competition law's exploitative-abuse clause; **Bundeskartellamt**, regarding its Facebook decision, presents another prominent example. By contrast, the **Italian** authority applied its consumer protection law.

# Japan and Germany share a common institutional characteristic

- Both countries have **powerful competition agencies**, coexisting with relatively weak consumer-data protection agencies.
- As a backdrop, abusive conduct of powerful digital-platforms has become a **prominent political and social issue**.

# Platforms' bargaining power over consumers

- Superior bargaining position (or Relative Market Power) clause is not effective in limiting the targets of the regulation.
- JFTC posits that SBP is identified when 'consumers are **obliged to accept the disadvantageous treatment from digital platforms** for the sake of continuing to utilize the services offered by the platforms.'
- JFTC might set up market-share thresholds, or, at least, quantitative volume thresholds.



# Identification of exploitative-abuse in platforms' conduct on Users' Data

- In case of **AMA's SBP clause**, exploitation is identified in trading terms which are “**unreasonably disadvantageous**” to customers.
  - Competition agencies need to explain more in detail about standards, based on which exploitation is identified in platforms' handling of users' data.
- By putting up the data protection rules, namely GDPR, **Bundeskartellamt** has avoided the criticism oriented to vagueness of exploitative abuse.
- By contrast to EU, **Japan** has not yet strengthened its data protection to the level equivalent with GDPR.

# JFTC 2019 Guidelines on digital platforms: Modalities of Data Purchase/Use

- its 2019 Guidelines on digital platforms, JFTC listed a limited number of terms (or modalities) on data use (set up by platforms) as abusive, although the statement leaves room for JFTC to identify abusive terms outside the listed terms:
  - (i) Purchase or use of personal data, **without informing consumers** of the purchase/usage objective.
  - (ii) Purchase or use of personal data, which **surpass the degree necessitated** for the use objective, at the same time **without gaining users' consent**.
  - (iii) Purchase or use of personal data, without taking necessary **measures for securing safety**.
  - (iv) Having client consumers offer to the platforms economic benefits or additional personal information, in addition to the personal information which consumers are offering to the platforms as a compensation for the free services given by the platforms.

# JFTC's new Guidelines performs as virtual Guidelines on protection of personal data

- JFTC has thus assumed the role of personal data protection agency.
- Current set up can only be rationalized as an **interim measure before the personal-data protection rule would be strengthened and be enforced by the Japanese data-protection agency: Personal Information Protection Commission.**

- Thank you very much!

- *(Please read the full paper.)*

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