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

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INTRODUCTION

Powerful digital platforms, represented by GAFA (Google, Apple, Facebook, and Amazon) have come to play an increasingly larger role in citizens' lives, ushering in public demands to rein in platforms' conduct. Digital platforms affect welfare of not only consumers (platforms' customers) but also their trading counterparts (suppliers to platforms). This is because platforms intermediate between the two-sided markets: the market for consumers and the one for product/service suppliers.

Several platforms, due to network effects coupled with scale merits, have achieved dominant positions (namely, market power) in the two-sided markets, inviting accusation that they anticompetitively exclude competitors, through leveraging their market power. This accusation squarely points to a key aspect of competition law—addressing anti-competitive exclusion, through enforcement of monopolization or abuse-of-dominance clauses. Yet, this aspect of competition law has already been amply discussed, bearing fruits in actual competition cases, particularly in EU, targeted at super platforms, represented by Google.

This paper takes up another target of competition law, so far not well covered—abuse in exploitative conduct, which, in case of digital platforms, concerns contractual terms deemed disadvantageous against platforms' suppliers as well as against consumers.

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Nevertheless, we have to first recognize that use of competition law to tackle exploitative conduct has met with oppositions. Most prominently, the US courts and antitrust agencies have consistently rejected utilizing antitrust laws for intervening in exploitative conduct by dominant companies. This rejection is based on the argument that lawfully acquired market power should be left free to be exploited, as long as the exploitation does not amount to anticompetitive exclusion; otherwise enterprises would be deprived of motivation to grow[1].

Not restricted to the US, opinions have also been expressed in EU against use of competition law to tackle exploitative conduct. First, reputable economists commissioned by the European Commission expressed: "To the extent that non-dominant platforms, in their regulatory role, can be expected to be disciplined by competition, no further reaching general rules would be needed."[2] Second, in UK, governmentally commissioned policy paper's authors expressed opinions against exploitative-abuse regulation: 'the pro-competition approach is to agree rules upfront, providing clarity to businesses in the market about the rules of the game.'; 'The approach [the policy paper] recommends is instead to use pro-competition policy tools to provide every chance for competition to succeed in digital markets.'[3]

These views against enforcement on exploitative-abuse hold strong theoretical cohesion, emanating from consumer welfare basis of competition law. Nevertheless, outside the US, use of competition law to tackle exploitation has become prevalent across EU, Japan, Korea, and China, all addressing exploitative conduct by dominant companies, or those with relative market power. Moreover, although restricted to grocery (agricultural goods and foods) sector, use of competition law to address unbalanced bargaining power between powerful grocery chains and suppliers has been implemented or contemplated in Australia and the UK.

This situation indicates that we cannot, now, simply denounce the enforcement on exploitative abuse by competition agencies; instead, we have to contemplate how to delineate boundaries of exploitative conduct against which competition agencies may take actions: in case of digital platforms, regarding contractual terms imposed by digital platforms on suppliers, as well as on consumers. This paper focuses on this point.

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.

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[1] See, for instance, Carl Shapiro, 'Protecting Competition in the American Economy: Merger Control, Tech Titans, Labor Markets', *Journal of Economic Perspectives*, Volume 33, Number 3 (2019), p 79 ('the goal of antitrust policy is to protect and promote competition. Antitrust is not designed or equipped to deal with many of the major social and political problems associated with the tech titans, including threats to consumer privacy and data security,… Addressing these major problems requires sector-specific regulation').

[2] Jacques Crémer et al, *Competition Policy for the Digital Era* (European Commission, 2019), p 69.

[3] Jason Furman, et al. *Unlocking digital competition Report of the Digital Competition Expert Panel* (gov.uk, 2019), p 56.

Nevertheless, recently, platforms' exploitation of users' data has surfaced as the target of competition law, as evidenced by German Bundeskartellamt's enforcement on Facebook,[4] as well as the recent announcement by the Japanese competition agency—JFTC-- on application of superior-bargaining-power clause (of the Japanese competition law—the AMA) to digital platforms' dealing with end-consumers.[5] Competition law enforcement on exploitation of consumers, in comparison with that of trading counterparts, presents a novel issue, regarding its relation to consumer protection rules. This paper discusses this issue as well.

Part 1 deals with digital platforms' exploitative abuse on their suppliers, namely abuse in the platform to business (P to B) transaction. Part 2 deals with digital platforms' exploitative abuse on consumers (P to C), with emphasis on distinction between competition law and consumer protection measures. Conclusion summarizes the policy implications.

I. How to Address Platforms' Exploitative Abuse on their Suppliers

Big grocery chains have long been accused of abusing their bargaining power over their suppliers, through imposing on them unfair contractual terms, as most recently has been proclaimed by the European Commission in its 2019 Unfair Trading Practices Directive.[6] Big grocery chains' bargaining power over their suppliers has been attributed to the locked-in status of the suppliers toward powerful grocery chains. Australia showcases this apprehension.[7] Such apprehension on big-box grocery chains, is shared by several European countries, including the UK, prompting the European Commission to set up the Unfair Trading Practice Directive, in order to avoid fragmented regulations across EU.

A. Reining in buyers' power of powerful platforms

The same issue, in Japan, has been treated as abuse of 'superior bargaining position' (abbreviated as SBP) by big purchasers against their suppliers. Japanese situation shows that there exists little reason to limit this issue to grocery chains,[8] since Japanese competition

[4] Bundeskartellamt, Press release（02 July 2019, 'Bundeskartellamt prohibits Facebook from combining user data from different sources'.

[5] JFTC, Guidelines on Abuse of Superior Bargaining Position over Consumers who Provide Personal Information to Digital Platforms（17 December 2019), Japanese original available at https://www.jftc.go.jp/houdou/pressrelease/2019/dec/191217_dpfgl.html (accessed 24 May 2020).

[6] European Commission, Directive 2019/633 on Unfair Trading Practices In Business-to-Business Relationships in the Agricultural and Food Supply Chain (25 April 2019) (herein after '2019 Unfair Trading Practices Directive').

[7] Allan Fels and Mathew Lees, 'Unconscionable Conduct in the Context of Competition Law with Special Reference to Retailer/Supplier Relationship within Australia', Chapter 14 in *Abusive Practices in Competition Law*, Fabiana Di Porto and Rupprecht Podszun eds. (Edward Elgar, 2018).

[8] The EU 2019 Unfair Trading Practices Directive limits its target to grocery sector, reasoning that "Within the agricultural and food supply chain, significant imbalances in bargaining power between suppliers and buyers of agricultural and food products are a common occurrence. Those imbalances in bargaining power are likely to lead to unfair

agency (JFTC) has extended the condemnation to wide range of industries, including convenience stores,[9] and banks.[10] Indeed, theoretically, every industry where large companies have bargaining power over their trading counterparts may become target of bargaining-power abuse regulation.

It was only a matter of time, therefore, before digital platforms have come to be accused of abusing their bargaining-power over their suppliers, who suffer from inferior bargaining position against powerful platforms, due to these suppliers' difficulty in finding sales outlets of equivalent size outside the major platforms. On this basis, the Japanese competition agency (JFTC), in 2019, has commenced tackling digital platforms' abuse on their suppliers.[11]

B. Should competition agencies become regulators of exploitative conduct?

Powerful enterprises' dealing with small-and-medium enterprises (SMEs) have been condemned as exploitative, when they impose disadvantageous or unfair contractual terms on SMEs. Thus, regulation on exploitative conduct has become equivalent with regulation on unfair trading practices (abbreviated as UTPs). Nevertheless, UTPs need not be regulated by competition agencies; they may more aptly be regulated by public agencies assigned to protect SMEs.

Indeed, European Commission's 2019 Unfair Trading Practices Directive does not stipulate that the Directive be enforced by competition agencies, but leaves it to member states to designate relevant agencies. 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 rein in UTPs.

The reason is institutional: competition agencies are equipped with powerful enforcement tools backed by power to impose sanctions; in contrast, agencies to protect SMEs generally have weaker enforcement tools. Then, once it is admitted that competition agencies should tackle UTPs, it becomes difficult to limit the targeted areas, since competition law covers all industries, and populism-oriented pressure is exerted on competition agencies toward protecting SMEs.

This is in this context that European Commission set up the 2019 Unfair Trading Practices Directive as a directive specific to grocery (or agricultural product) sector. The Commission limited the area of UTP regulation to grocery sector, in order not to spread regulation of UTPs to all the industries, even though EU competition law is equipped with the clause to regulate exploitative abuse-- Article 102 TFEU. Still, member states are free to choose

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trading practices when larger and more powerful trading partners seek to impose certain practices or contractual arrangements which are to their advantage in relation to a sales transaction." -- EU 2019 Unfair Trading Practices Directive, para 1.

[9] JFTC Remedy Order against Seven-Eleven Japan Co., Ltd (22 June 2009), 56 (2) Shinketsushu 6.

[10] JFTC Remedy Order against Mitsui-Sumitomo Bank (12 December 2005), 52 Shinketsushu 436.

[11] JFTC, *Report regarding Trade Practices of Digital Platforms (Business-to-Business Transactions by Online Retail Platform and App Store)* (31 October 2019), translation available at https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191031.html (accessed 25 May 2020)..

agencies assigned to enforce the Directive, and many states would choose to put the enforcement task to each state's competition agency.

C. Digital platforms' bargaining power over their suppliers

Competition law enforcement on exploitative abuse has been endorsed as one aspect of regulation on dominant enterprises. Focus on dominance is derived from competition law's objective of protecting competition; without this focus, competition law would become a general tool to intervene in any kind of business practices, deemed unfair, transforming competition agencies to super agencies in charge of whole range of business conduct.

Yet, dominance (namely, market power) held by powerful enterprises is often hard to prove, leading to underenforcement by competition agencies. This problem has been solved by the drafter of the Japanese competition law (the AMA), through delineating enterprises targeted by the law's exploitative-abuse clause as those with 'superior bargaining position (SBP)', which may be short of market power. SBP essentially means 'relative market power', which was also adopted by German competition law (§ 20 ARC)[12]. The Japanese SBP and German 'relative market power' commonly addresses dependency of small-and-medium suppliers to large purchasers.

Dependency of suppliers to large purchasers is caused by investments sunk by the suppliers in order to meet specific needs of the purchasers, making the suppliers 'locked-in' to the purchasers. True, locked-in situations may be treated within the framework of market power, as famously shown by Kodak decision by the US Supreme court, which held that purchasers of Kodak copy-machines were "locked-in" to the Kodak machines.[13] But, locked-in which results in market power may be found only in a small number of cases, as shown by 'post-Kodak' decisions in the US.[14]

Adoption of SBP (alternatively, "relative market power"), then, functions to mitigate burden on competition agencies to prove market power held by big purchasers.[15] Yet, the other side of the coin is that the SBP clause brings a risk of overregulation, since those suppliers encountering only a small degree of discomfort in shifting their sales outlets may still be recognized by competition agencies to have suffered from SBP abuse by big purchasers.

As a counterpoint to this argument of overregulation, JFTC, in its recent initiative to tackle SBP of digital platforms, explains why digital platforms are specifically prone to acquire SBP: those digital platforms that has accumulated big data brings about switching costs for

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[12] §20 (1), (2) Act against Restraint of Competition (ARC): See F.W. Popp, 'Unilateral conduct by non-dominant firms: a comparative reappraisal', Chapter 10 in *Abusive Practices in Competition Law*, Fabiana Di Porto and Rupprecht Podszun eds. (Edward Elgar, 2018).
[13] *Eastman Kodak Co. v. Image Technical Services, Inc*. 504 U.S. 451, 476 (1992).
[14] For instance, *Queen City Pizza, Inc. v. Domino's Pizza, Inc*. 124 F. 3d 430, 440 (3d Cir.1997).
[15] See Toshiaki Takigawa, 'Restraining Bargaining Power through Competition Law: Superior Bargaining Position Regulation in Japan as Compared with the EU', Chapter 11 in *Abusive Practices in Competition Law*, Fabiana Di Porto and Rupprecht Podszun eds. (Edward Elgar, 2018), ('JFTC's stance of distinguishing "superior bargaining position" from market power has resulted in identifying SBPs whenever SMEs encountered slight degrees of hardship in switching their dealings from the alleged abusers… to other retailers'.)

the platforms' suppliers, due to their being locked in to the platforms. This enable those platforms to have SBPs toward their suppliers.[16] More specifically, those suppliers that rely largely on a single platform cannot switch to other platforms due to a large number of customers that the platform holds, obliging the suppliers to deal with the platforms even under disadvantageous contractual terms.[17]

Nevertheless, digital platforms may easily become target of SBP-abuse regulation even without these plausible reasons, since 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[18] This is a tautology, which effaces the role of SBP as the concept to limit a range of companies targeted by the abuse clause. Thus, JFTC, equipped with the SBP clause, may now be regarded as having transformed itself from competition agency to general overseer of unfair trade practices.[19]

SBP, or 'relative market power' (in the European parlance), consequently, cannot delimit the targets of its regulation. This point was realized by the drafters of the EU 2019 Directive; as a remedy, the Directive adopted a numerical threshold: "[the Directive] should apply to the business conduct of larger operators towards operators who have less bargaining power. A suitable approximation for relative market power is the annual turnover of the different operators."[20]

By contrast, JFTC's new initiatives on digital platforms has not adopted any numerical threshold. Actually, JFTC could not adopt one, given that the new initiatives are only a subset of JFTC's general Guidelines on SBP abuse[21], which has not set up any numerical threshold for identifying SBP.

D. Standards for Identifying Abusive Exploitation

Given the tautological nature of the standard for identifying SBP, the crucial point in the SBP regulation is the standard for identifying abusiveness in trading terms, contracted between big buyers and their suppliers.

1. Need to go beyond unreasonableness standard

This standard has been set up by JFTC in its original SBP Guidelines. But, the standard ends up delineating abusive terms as those which cause 'unreasonable' damage to the suppliers.[22]

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[16] JFTC, *Report regarding Trade Practices of Digital Platforms,* supra note 11, p 7.
[17] JFTC, ibid, p 22.
[18] JFTC Guidelines Concerning Abuse of Superior Bargaining Position under the Antimonopoly Act (30 November 2010) (hereinafter "SBP Guidelines"), translation available at https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/101130GL.pdf (accessed 25 May 2020), II-1 (SBP means that the trading party is unable to avoid accepting such a request that is disadvantageous to the party). This idea has been repeated in several SBP cases, most recently, JFTC *Toys "R" Us* Hearing decision (4 June 2015), 62 Shinketsushu 119.
[19] See Takigawa, supra note 15.
[20] European Commission, 2019 Unfair Trading Practices Directive, supra note 6, para 11.
[21] JFTC SBP Guidelines, supra note 18.
[22] See Takigawa, supra note 15; also see Masako Wakui and T.K. Cheng, 'Regulating abuse of superior bargaining position under the Japanese competition law: an anomaly or a

Unreasonableness, in the same way as fairness, is a subjective concept, failing to delineate boundaries of regulation. 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[23] notes a complaint by suppliers to digital platforms, regarding platforms' calculating fees based on summation of a product's price and transportation charge: those suppliers have felt it unfair to pay a fee on transportation charge, because the charge is for the transaction between platforms and transportation companies, with no involvement of the suppliers.[24] In defense to this complaint, a platform explained that setting up a fee based on only a product's price would tempt suppliers to set their products' prices at an exceeding low level, while setting transportation charge exceedingly high, thus artificially lowering transaction fees.[25]

2. JFTC's 2019 Report on digital platforms' trading practices

Realizing that the general standard on SBP abuse is too ambiguous, JFTC in its 2019 Report on digital platforms' trading practices[26] 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. For the terms-change procedures to be judged as fair, platforms are required to, 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.[27]

This standard which focuses on negotiating procedure is generally more sensible and reasonable than those standards targeting substance of trading terms. Nevertheless, the JFTC Report does not state that procedural fairness trumps substance of trading-terms. Therefore, even after the new JFTC standpoint, vagueness of standards on unfair trading terms persists. It is, therefore, 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. In this regard, JFTC might emulate the EU 2019 Directive, which prioritizes negotiation-procedural fairness.[28]

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necessity?', *Journal of Antitrust Enforcement* (2015), p 7 ('A retailer's abusive practice can cause an unreasonable or unexpected disadvantage to the supplier in various ways. Thus, the factors that need to be taken into account in the evaluation will vary by the type of practice.').

[23] JFTC, *Report regarding Trade Practices of Digital Platforms*, supra note 11.

[24] Ibid, p 31

[25] Ibid, p 31

[26] Ibid.

[27] Ibid, p 30, p 35.

[28] European Commission, 2019 Unfair Trading Practices Directive, supra note 6, para 16 ('it is appropriate to distinguish between practices that are provided for in clear and unambiguous terms in supply agreements … between parties and practices that occur after the transaction has started …, so that only unilateral and retrospective changes to those clear and unambiguous terms of the supply agreement are prohibited. However, certain trading practices are considered as unfair by their very nature …').

E. How to delimit areas to be regulated by the exploitative-abuse clause of competition law

Populist sentiment tends to prompt governmental agencies to intervene in trading terms, in order to secure fairness. However, such pervasive intervention ends up undermining free market order.[29]

SBP abuse clause (and similar clauses on relative market power, or dependency) of the competition law portends risk of pervasive intervention in business dealings. In order to minimize this risk, enforcement on SBP abuse should be used only as the last resort, when SMEs have no other means for resolving their conflicts with large scale merchants.

Furthermore, competition agencies, including JFTC, need to minimize interventions, through focusing on trading-term changes made after conclusion of a contract.[30] Moreover, trading-term changes need to be left free, as long as conditions of changes have been contracted in writing between platforms and their suppliers.[31]

II. How to Address Platforms' Exploitative Abuse on Consumers' Data

Exploitative abuse has mostly been addressed by competition agencies with regard to terms imposed by buyers on their suppliers, for addressing monopsony power (buyers' bargaining power). But exploitative abuse may also be addressed with regard to terms offered to consumers (customers). As an example, European commission has once applied Article 102 TFEU to a producer's pricing on consumers.[32]

It is not surprising, therefore, that several competition agencies have started to tackle exploitative-abuse by digital platforms against consumers. The most conspicuous example is Bundeskartellamt's enforcement on Facebook's handling of consumers' data.

As to Japan, JFTC has long eschewed applying the AMA's exploitative abuse clause--SBP clause--to terms offered to consumers; instead, applying exclusively to terms offered to trading-counterparts (mostly, suppliers to big retailers). This is because JFTC has regarded the SBP clause as a tool to address vertical relationship between powerful purchasers and small-and-medium suppliers.

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[29] See Popp, supra note 12, pp 243-44 ('If one would have to regulate comprehensively all aspects of the contractual relationship, ……is not desirable in a free market economy.').
[30] See Wakui and Cheng, supra note 22, p 28 ('In the cases where the JFTC did take formal measures, the offending entrepreneur had imposed on the supplier some economic burden that was not specified in the contract.').
[31] This is a policy stated in the European Commission, 2019 Unfair Trading Practices Directive, supra note 6.
[32] *United Brands Company v. Commission of the European Communities*, Court of Justice of the European Union, Case 27/76 (1978).

However, times have changed: in step with the Government-wide drive[33] to rein in powerful platforms, JFTC has announced its new policy of applying the SBP clause to platforms' terms toward consumers.[34] In parallel with Bundeskartellamt's enforcement on Facebook, JFTC's new initiative focuses on digital platforms' handling of consumers' data.

Competition law's exploitative-abuse clause covers whole range of abusive terms which businesses impose on consumers; yet, as to digital platforms, terms on handling of consumers' data occupies a central stage. This is due to 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.

A. Which to Choose: Competition law or consumer protection law for addressing abusive terms on consumers

Application of the competition law clause on abuse to platforms' terms toward consumers (as opposed to suppliers) invites criticism that exploitative abuse on consumers have already been addressed by consumer-protection rules: regarding consumers' data, by GDPR in EU, and rules inspired by GDPR in countries outside EU.

JFTC should be well aware of this criticism, because JFTC ceded its consumer protection function (engaged through the AMA affiliated law on false advertising) to the newly inaugurated Consumer Affairs Agency in 2009. Indeed, this criticism was expressed in public comments to the JFTC's draft Guidelines on digital platforms, to which JFTC responded by stating that exploitative abuse on consumers enables the abuser to transfer the resulting profit to resources for combatting the abuser's rivals, leading to exclusionary effects, thus legitimizing application of the AMA.[35]

However, this logic is exactly the same as the one used by JFTC for legitimizing enforcement on exploitative abuse in its original SBP Guidelines. Then, just in the same way as the logic in the SBP Guidelines, the connection of exploitative abuse to exclusionary effect is too remote, with JFTC automatically identifying exclusionary effect whenever it identifies exploitative conduct.

Automatically connecting exploitative conduct to exclusionary effect results in legitimizing SBP-clause application to whole range of abusive terms, imposed by businesses on consumers. This radically broadens JFTC's task, going well beyond competition issues, extending its task to whole range of consumer protection issues.

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[33] See JFTC Press release 'JFTC's Guidelines on SBP Abuse against Consumers by Digital Platforms', Annex 2 'JFTC views on respondents' comments' (17 December 2019) (mentioning that the JFTC Guidelines was issued in the wake of the Governmental decision, on June 2019, stating that applicate SBP clause under the AMA to digital platforms' dealing with consumers is to be set on or before summer of 2019), Japanese original available at https://www.jftc.go.jp/houdou/pressrelease/2019/dec/191217_dpfgl_12.pdf (accessed 27 May 2020).

[34] JFTC Guidelines on Digital Platforms, supra note 5.

[35] JFTC Press release, Annex 2, supra note 33, which cites footnote 4 of the draft Guidelines.

True, JFTC has announced its new policy specifically aiming it at digital platforms. But, there exists no reason to limit the application to digital platforms[36]; instead, same policy, logically, may be extended to whole range of consumer protection issues.

Looking globally, 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, rather than competition law, for addressing the data privacy issue.[37] Different treatments across countries reflect different institutional settings across countries, regarding relative strength of consumer protection regime over competition one.

Among these countries, Japan and Germany share a common characteristic: both countries have powerful competition agencies, coexisting with relatively weak consumer protection agencies. Regarding personal data protection, Japan does have its data protection agency--Personal Information Protection Commission--, but it is a young agency with relatively weak enforcement tools; on the other hand, JFTC is a well-established agency with ample staff equipped with powerful enforcement tools, in particular, the power to impose substantial fines on culprits. This is in parallel with the situation in Germany; Bundeskartellamt is a powerful agency, coexisting with no specific agency for protecting personal data.[38]

As a backdrop of this phenomenon, abusive conduct of powerful digital-platforms has become a prominent political and social issue in several of developed countries, prompted by citizens' demand to governments for public action. Then, in countries where powerful competition agencies coexist with weaker consumer protection agencies, it is natural that the competition agencies are urged to act, and those agencies equipped with exploitative-abuse clauses cannot reject the call for action, since exploitative abuse, logically, covers whole range of abuse on consumers.

In case of Japan, JFTC has taken the lead, among governmental agencies, in addressing abuse by digital platforms, although, at the first stage, restricting its action to exclusionary abuse, through the AMA's monopolization clause, together with unfair-trade-practices clauses oriented to exclusionary conduct. At the second stage, however, JFTC has commenced applying the AMA's exploitative-abuse clause—SBP clause—to digital-platforms abuses on their suppliers—hitherto observed domain of SBP clause.

Then, more recently, as the third stage, reining in digital platforms has become a Government-wide mandate in Japan, within which JFTC has naturally become an indispensable player, with the Government prompting JFTC to widen the coverage of the AMA's SBP clause to abuse on consumers.[39]

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[36] JFTC, itself, admits that abuse against consumers is addressed by SBP clause in areas other than digital platforms: JFTC Press release, Annex 2, supra note 33.

[37] See Marco Botta and Klaus Wiedemann, 'The Interaction of EU Competition, Consumer, and Data Protection Law in the Digital Economy: The Regulatory Dilemma inn the Facebook Odyssey', The Antitrust Bulletin, Vol. 64(3) (2019), p 428 ('the Italian case has been decided under consumer, rather than competition law').

[38] Botta and Wiedemann, ibid, p 440 ('In Germany, unfair commercial practices that affect consumers can only be enforced in civil courts by qualified institutions, associations, and chambers of industry and commerce').

[39] See JFTC Press release, Annex 2, supra note 33.

For JFTC, natural reaction is to meet with the Governmental prompt (in correspondence with public demand), in utilizing the SBP clause to protect consumers from abuse by powerful platforms. However, utilizing the SBP clause for protection of consumers accompanies risk of overreach by JFTC, at the sacrifice of its core task—enforcing on collusions, mergers, and exclusionary conduct. Therefore, JFTC, and other countries' competition agencies facing similar situation, should be careful to limit exploitative-abuse regulation to those consumer-protection areas where competition agencies are obliged to enter, due to lack or weaker capacity of consumer protection agencies.

B. Platforms' bargaining power over consumers

In the same way as with the case of abuse on suppliers, abuse on consumers may be addressed by the SBP clause (or relative-market-power clauses) of the competition law only when the abuser manifests bargaining power over consumers. Bargaining power requirement needs to be interpreted as a mitigating device for lessening burden on competition agencies for proving market power of the abusers.

Generally, higher hurdle should be set to prove bargaining power of platforms over consumers, as opposed to over suppliers, since consumers have less reason to stick to a single platform, in face of several alternatives. Indeed, German Higher Regional Court, in the Facebook decision (regarding the interim measure) rejected Bundeskartellamt's finding of Facebook's relative market power over consumers.[40]

As to JFTC, in its December 2019 Guidelines on digital platforms, it has put up two reasons for recognizing consumers' dependence on a few super platforms. First, consumers suffer from disadvantageous trading terms against businesses, due to information asymmetry, leading to discrepancies in bargaining power.[41] Nevertheless, this statement is true for whole range of businesses, leading to implication that the SBP clause would be applied widely to businesses, not restricted to digital platforms.

Second, 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.'[42] This explanation appears to limit SBP identification to cases of "locked in" status of consumers. But, the explanation is too loose to set any limitation on finding SBP, since "locked in" status is identified whenever consumers feel suffering from disadvantageous trading terms while continuing to use the service of the platform. This explanation by JFTC is tautological, in the same way as the general definition of SBP, given by the JFTC Guidelines on SBP clause.[43]

Then, as with the general SBP Guidelines, this new policy statement on digital platforms has put no limits on identification of SBP regarding digital platforms; whenever JFTC identifies

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[40] See C. Cauffman et al. (Cleary Gottlieb) 'German Court Divorces GDPR and Competition Law in Facebook Appeal' (29 August 2019), available at https://www.clearycyberwatch.com/2019/08/german-court-divorces-gdpr-and-competition-law-in-facebook-appeal/ (accessed 17 May 2020).
[41] JFTC Guidelines on Digital Platforms, supra note 5, p 3
[42] JFTC Guidelines on Digital Platforms, supra note 5, p 4
[43] JFTC SBP Guidelines, supra note 18.

unreasonably disadvantageous terms on consumers, JFTC automatically recognizes SBP with the abusive platforms.

Yet, it is desirable to limit the scope of SBP abuse regulation applied to digital platforms, in order to give smaller platforms areas of safe harbors, thus mitigating risk of overreach by JFTC. For this purpose, JFTC might set up market-share thresholds, or, at least, quantitative volume thresholds, following European Commission's adoption of numeric in its Guidelines on abuse in agricultural products sector.[44]

C. Identification of exploitative-abuse in platforms' conduct on users' data

Due to platforms' business model of giving free services to consumers in exchange of obtaining their data, exploitative-abuse on consumers mostly concerns platforms' handling of users' data. Still, description of exploitation is inherently ambiguous, since, in case of the AMA's SBP clause, exploitation is identified in trading terms which are "unreasonably disadvantageous"[45] to customers. Competition agencies need to explain more in detail about standards, based on which exploitation is identified in platforms' handling of users' data.

1. Bundeskartellamt's Facebook case

In the Facebook case, Bundeskartellamt has put up as the reason for finding Facebook' handling of users' data as exploitative, the fact that it is 'in violation of the European data protection rules'[46]. By putting up the data protection rules, namely GDPR, Bundeskartellamt has avoided the criticism oriented to vagueness of exploitative abuse.

However, the GDPR, has its regulatory agencies, having no need to be enforced by competition agencies. Still, Germany, among EU member countries, may have special institutional reasons for the competition agency taking the role of a data-protection agency.

2. JFTC's 2019 Policy statement on digital platforms

By contrast to EU, Japan has not yet strengthened its data protection (enforced through the Act on the Protection of Personal Information[47]) to the level equivalent with GDPR.

This is in this backdrop that the Japanese government urged JFTC to tackle data protection issues through application of the exploitative abuse clause—the AMA's SBP clause. One may interpret that Japanese government is not yet ready to enact GDPR-equivalent data protection rule; instead, as an interim measure, it is calling on JFTC to address the issue.

Then, in order to amend the vague definition of exploitative abuse—trading terms which inflict "unreasonable damage" to the abusers' trading counterparts[48]--, JFTC is required to explain about conditions under which data-related terms offered by platforms would be identified as inflicting 'unreasonable damage' to consumers.

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[44] European Commission, 2019 Unfair Trading Practices Directive, supra note 6.
[45] JFTC SBP Guidelines, supra note 18.
[46] Bundeskartellamt Press Release, supra note 4, at footnote **Error! Bookmark not defined.**.
[47] Act No. 57 of 2003, translation available at http://www.japaneselawtranslation.go.jp/law/detail/?id=2781&vm=04&re=01 (accessed 27 May 2020).
[48] JFTC SBP Guidelines, supra note 18.

Indeed, in 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. These listed terms are as follows:[49]

(i) Purchase or use of personal data, without informing consumes 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.

These listed items all concern modalities of data purchase/use, and are sensible ones to be prohibited. These behaviors are mostly prohibited by the EU GDPR. Thus, JFTC's new Guidelines performs as virtual Guidelines on protection of personal data. JFTC has thus assumed the role of personal data protection agency. This accompanies risk of overreach, to the sacrifice of the competition agency's key role of protecting competition. Current set up can only be rationalized as an interim measure until the personal-data protection rule would be strengthened and be enforced by the Japanese data-protection agency: Personal Information Protection Commission.

Conclusion

Application of competition law's exploitative-abuse clause to digital platforms targets abuse in two-sided markets that platforms intermediate: first, platforms' abuse on their trading-counterparts (suppliers); second, abuse on consumers (customers).

Platforms' abuse on their trading-counterparts is one variation of buyers' power (monopsony power) abuse. Buyers' power, from the consumer-oriented view of competition law, needs to be regulated through exclusionary abuse clause, not through exploitative abuse clause. Yet, outside the US, it has become prevalent for competition agencies to protect small-and-medium suppliers from big retailers, through application of exploitative abuse clauses. Therefore, now, it has become important to set limitation on application of exploitative-abuse clause to digital platforms. For this objective, abuse needs to be identified mostly on procedural fairness; as long as contractual terms are negotiated transparently between platforms and their trading-counterparts, competition agencies refrain from intervening in substance of trading terms. Indeed, JFTC's new Report on digital platforms focuses on procedural fairness.

As compared to protection of small-and-medium suppliers, protection of consumers (customers of digital platforms) through application exploitative-abuse clause brings about risk of competition agencies' taking the role of consumer protection agency, at the sacrifice

[49] JFTC Guidelines on Digital Platforms, supra note 5, p 7 (for data acquisition); p 9 (for data use).

of competition agencies' key role of protecting competition. Regarding digital platforms, their abuse against consumers concerns almost exclusively platforms' handling of consumers' data. Therefore, in countries equipped with strong data protection rules (particularly EU member countries with GDPR) and data protection agencies, there exists no rationale for competition agencies taking the role of data-protection agency. Yet, in those countries, where data protection rules and data protection agencies are lacking or weak, competition agencies might assume the role of data protection agency, as an interim measure. The recently adopted JFTC's new Guidelines on digital platforms can be rationalized only in this context.