

Digital Competition 2021

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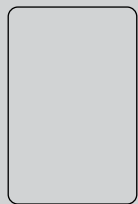
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Contributing editors

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Marcel Nuys**

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Lexology Getting The Deal Through is delighted to publish the first edition of *Digital Competition*, which is available in print and online at www.lexology.com/gtdt.

Lexology Getting The Deal Through provides international expert analysis in key areas of law, practice and regulation for corporate counsel, cross-border legal practitioners, and company directors and officers.

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Every effort has been made to cover all matters of concern to readers. However, specific legal advice should always be sought from experienced local advisers.

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LEGAL AND REGULATORY FRAMEWORK

Legislation

- 1 | What legislation governs competition in digital markets in your jurisdiction? Does the standard competition law framework apply or are there any special rules or exemptions?

The Antimonopoly Act (AMA) is the main law governing competition in digital markets in Japan. Although the Japan Fair Trade Commission (JFTC), which is the Japanese enforcement agency, considers the characteristics of digital markets when enforcing competition law, the general framework of competition law is the same and applicable to digital markets.

In addition to general competition law, the Japanese government has been discussing how to regulate anticompetitive and abusive activities by online platforms. The JFTC has taken many enforcement actions against online platforms, but the Japanese government considered whether any other additional regulation (ex ante regulation) is necessary. As a result, in 2020, the government proposed, and the parliament passed, the new Act on Improvement of Transparency and Fairness in Trading on Specified Digital Platforms (the Digital Platforms Act) to require certain online platforms (to be designated in ordinances) to take measures to ensure the fairness and transparency of their transactional relationships with their business partners. For example, the Digital Platforms Act requires certain online platforms to disclose to business partners main factors in determining the order of search results. This Digital Platforms Act is similar to the law adopted in the EU (Regulation (EU) 2019/1150 – regulation on promoting fairness and transparency for business users of online intermediation services). As this Act has not yet taken effect, it remains to be seen how vigorously it will be enforced. Additionally, the government announced that only e-commerce site operators and app stores will be subject to the provisions of the Act for the time being.

Enforcement authorities

- 2 | Which authorities enforce the competition law framework in your jurisdiction's digital markets?

The JFTC is the primary enforcer of the AMA in Japan. Since the JFTC is focused on investigating anticompetitive and abusive activities by online platforms in digital markets, in 2020 it established an investigation unit inside the JFTC solely dedicated to AMA enforcement against digital platforms.

By virtue of the new Digital Platforms Act, the Ministry of Economy, Trade and Industry (METI) has authority to enforce. When the METI finds problematic conduct that may constitute violation of the AMA, METI requests the JFTC to take any necessary measures against the conduct.

Regulatory guidelines

- 3 | Have the authorities in your jurisdiction issued any guidelines on the application of competition law to digital markets?

Yes, the JFTC has issued the following two guidelines on the application of the AMA to online platforms:

In December 2019, the JFTC issued a guideline on the application of abuse of superior bargaining position by online platforms in relation to obtaining personal information from consumers (the Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc). This was the first time that the JFTC officially announced that the regulation on abuse of superior bargaining position would be applied to business-to-consumer transactions, and mishandling of personal information by the platforms may constitute a violation of the AMA.

The JFTC also revised its Merger Guidelines to clarify how the JFTC conducts analysis on mergers in digital markets (eg, how the JFTC defines market in a multisided market and how the JFTC considers specific factors such as network effect and switching costs.)

Advisory reports

- 4 | Have any advisory reports been prepared in your jurisdiction on competition law issues in digital markets?

Yes, the JFTC has been active in analysing specific digital markets and has published a number of reports that summarise market practice and provide the JFTC's view thereof. The reports include the following:

- a report on market practices by e-commerce site operators (online malls) and mobile app stores. The report summarises the JFTC's position on some of the specific practices, such as MFN clauses, and unilateral changes in terms and conditions by online platforms. This report led to the enactment of the new Digital Platforms Act to ensure fairness and transparency of trade practices by online platforms;
- the JFTC is now conducting market analysis on digital advertisement markets and has issued an interim report on market practices in digital advertisement; and
- a market report on the fintech market (namely the cashless payment market). The report identifies hurdles that fintech companies have faced in the market relating to contracts with providers of financial infrastructures, and the JFTC provides that certain conduct by banks or other financial institutions can be a violation of the AMA.

Advance compliance guidance

- 5 | Can companies active in digital markets ask the competition authority for advance guidance on competition law compliance before entering into an agreement or determining a pricing strategy?

Yes, companies active in digital markets can ask the JFTC whether a certain agreement or strategy complies with the AMA by utilising the 'prior consulting system'. Although this is not designed solely for companies in digital markets, any companies, including in the digital industry, who want to obtain advance guidance from the JFTC can utilise this system.

There are two methods of prior consultation to the JFTC. One is a formal prior consultation system, where a company consults with the JFTC and receives a written answer from the JFTC. At the end of the consultation, the JFTC will publish the written answer and disclose the identity of the company. The JFTC has publicised detailed procedures for this formal prior consultation system. According to the JFTC, the JFTC will provide its response to the consultation within 30 days from receipt of the consultation. When the JFTC requests additional information or documents, the 30-day period will start from the date of receipt of all requested information and documents.

The other method is an informal consultation, in which the JFTC will provide an oral answer at the end of the consultation, and the identity of the company will not be disclosed. In practice, most companies prefer this method as their identities remain confidential.

Regulatory climate and enforcement practice

- 6 | How would you describe government policy and the competition authorities' general regulatory and enforcement approach towards digital companies in your jurisdiction?

The Japanese government has been concerned about abusive and anti-competitive practices by large digital companies. This has resulted in numerous enforcement actions by the JFTC into large digital companies. Also, this sentiment has led to the enactment of the new Digital Platforms Act to regulate online platforms.

The vigorous enforcement of the AMA against large digital companies is expected to continue. The Chairman of the JFTC, Mr Kazuyuki Sugimoto has repeatedly announced that the JFTC will continue to actively investigate into potential AMA violation by large digital companies, including online platforms.

HORIZONTAL AGREEMENTS

Special rules and exemptions

- 7 | Do any special rules or exemptions apply to the assessment of anti-competitive agreements between competitors in digital markets in your jurisdiction?

Although the JFTC will consider characteristics of digital markets compared to other industries when enforcing the AMA, no special rules or exemptions apply to the assessment of anticompetitive agreements between competitors in digital markets.

Access to online platforms

- 8 | How has the competition authority in your jurisdiction addressed horizontal restrictions on access to online platforms?

The JFTC has taken many enforcement actions against restrictions on access to online platforms. Its recent enforcement actions include the following: in 2018, the JFTC reached an agreement with a private

rental home platform to remedy its potential anticompetitive conduct. The JFTC showed its concern on an agreement between the platform and room providers, restricting room providers' ability to provide information through the API to the platform's competitors.

Algorithms

- 9 | Has the competition authority in your jurisdiction considered the application of competition law to the use of algorithms, in particular to algorithmic pricing?

The JFTC has not yet addressed how the JFTC applies the AMA to the use of algorithms, in particular to algorithmic pricing. In July 2020, the JFTC established a study group by inviting scholars to consider this issue and it remains to be seen whether this will result in any policy documents which might clarify the JFTC's view.

Data collection and sharing

- 10 | Has the competition authority in your jurisdiction considered the application of competition law to 'hub and spoke' information exchanges or data collection in the context of digital markets?

The JFTC has not yet considered the application of competition law to 'hub and spoke' information exchanges or data collection in the context of digital markets. In general, under the AMA, 'hub and spoke' types of cartel can be illegal and there is no reason to prevent the JFTC from enforcing against similar practice in digital market.

Other issues

- 11 | Have any other key issues emerged in your jurisdiction in relation to the application of competition law to horizontal agreements in digital markets?

The JFTC has not yet taken enforcement actions against horizontal agreements in digital markets. Its enforcement actions primarily focus on vertical restraint and unilateral conduct by large online platforms.

VERTICAL AGREEMENTS

Special rules and exemptions

- 12 | Do any special rules or exemptions apply to the assessment of anti-competitive agreements between undertakings active at different levels of the supply chain in digital markets in your jurisdiction?

Although the JFTC will consider characteristics of digital markets compared to other industries when enforcing the AMA, no special rules or exemptions apply to vertical agreements in digital markets.

Online sales bans

- 13 | How has the competition authority in your jurisdiction addressed absolute bans on online sales in digital markets?

The JFTC clarified its view in its Guidelines Concerning Distribution Systems and Business Practices (Distribution Guidelines). According to the Distribution Guidelines, restricting supply channels to sell products (including online sales) will be a violation of the AMA if the restriction has the 'effect to maintain price' of the products at issue. Moreover, even if the restriction has any price maintenance effect, if the restriction provides a reasonable ground to sell the products properly and the restriction is imposed in an indiscriminatory manner, the restriction is allowed. For example, if a medical device manufacturer sells its products through retailers to consumers and the products need to be

adjusted based on each consumer's needs and if adjustment can only be made with the customer's physical presence, restricting retailers not to sell its products online would comply with the AMA.

Because an absolute ban on online sales usually has a price maintenance effect on a product, the JFTC has kept a close eye on this kind of practice. For example, the JFTC has recently taken an enforcement action under the commitment procedure to halt an online sales ban by contact lens manufacturers.

Resale price maintenance

14 | How has the competition authority in your jurisdiction addressed online resale price maintenance?

The JFTC has taken numerous enforcement actions against resale price maintenance by famous brand manufacturers and online resale price maintenance is no exception. For example, in 2019, the JFTC issued cease-and-desist orders against two manufacturers of child-care products who sold products through both high street shops and the internet and which obliged retailers to sell the product with the 'proposed price' set by the manufacturers.

Geoblocking and territorial restrictions

15 | How has the competition authority in your jurisdiction addressed geoblocking and other territorial restrictions?

The JFTC publicised its view in the Distribution Guidelines, which categorise territorial restrictions into the following three categories:

- responsible territory: setting a certain responsible territory to each distributor and obligating it to make active sales efforts within this territory. This does not usually have a price maintenance effect and thus in principle complies with the AMA;
- strict territorial restrictions: prohibiting a distributor from conducting sales activities outside of its territory. If this restriction has a price maintenance effect, it is illegal under the AMA; and
- restriction on passive sales: prohibiting a distributor from taking on any customers outside of their territory. This is also judged by the standard of a 'price maintenance effect' but generally the restriction on passive sales has greater effect on price than strict territorial restriction as it prohibits sales to customers who choose the distributor at their discretion.

Platform bans

16 | How has the competition authority in your jurisdiction addressed supplier-imposed restrictions on distributors' use of online platforms or marketplaces and restrictions on online platform operators themselves?

The JFTC has been vigorously pursuing anticompetitive conduct by suppliers, including bans on online sales.

Targeted online advertising

17 | How has the competition authority in your jurisdiction addressed restrictions on using or bidding for a manufacturer's brand name for the purposes of targeted online advertising?

Although the JFTC has not addressed restrictions on the practice of online advertising, the Japanese government has been looking into this market closely to see whether any abusive or anticompetitive practices are prevalent, as digital advertisements have grown significantly as an alternative way of advertising for many companies. In April 2020, the JFTC issued an interim market report on digital advertisement practices, in which the JFTC mentioned it continues to check whether

there are any anticompetitive activities such as whether digital platforms that involve distribution of advertisement abuse their position and impose unreasonable conditions on advertisers; whether the digital platforms active in distribution and intermediaries make exclusionary actions against other intermediaries; and whether the digital platforms prohibit or restrict advertisers from using other types of advertisement.

Most-favoured-nation clauses

18 | How has the competition authority in your jurisdiction addressed most-favoured-nation clauses?

The JFTC has been very active in eliminating most favoured nation (MFN) clauses regarding prices and other conditions in digital markets. The recent cases published by the JFTC include the following:

- in 2017, the JFTC reached an agreement with an online marketplace operator to remedy its potential anticompetitive conduct, including an MFN clause in its agreement with shops; and
- the JFTC initiated an investigation against online travel agencies (OTAs) regarding potential AMA violation. The conduct at issue was an MFN clause between OTAs and hotels. In 2019, one of the OTAs subject to the investigation utilised the commitment procedure and reached an agreement with the JFTC to exclude MFN clauses from agreements with hotels.

The JFTC also identifies similar practice in its advisory reports, such as MFN clauses by restaurant booking platforms, which can be a violation of the AMA.

Multisided digital markets

19 | How has the competition authority in your jurisdiction addressed vertical restraints imposed in multisided digital markets? How have potential efficiency arguments been addressed?

The JFTC in the Distribution Guidelines stipulates how it analyses vertical restraint imposed in multisided digital markets.

The JFTC analyses vertical restraints based on a rule of reason approach, whereby the JFTC considers both anticompetitive effect (eg, restraint of intra-brand competition) and pro-competitive effect (eg, enabling new entry and achieving better quality service). For conduct by digital platforms specifically, the JFTC mentioned in the guidelines that network effect, both direct and indirect, needs to be considered when analysing the platforms' market position, which is one of the main factors in determining anticompetitive effect.

Based on this framework, efficiency that will be achieved by a certain type of vertical restraint will be considered as one of the factors to determine pro-competitive effect by the vertical restraint.

Other issues

20 | Have any other key issues emerged in your jurisdiction in relation to the application of competition law to vertical agreements in digital markets?

The JFTC generally follows the path set by other competition agencies like the European Commission and enforces the AMA aggressively against vertical agreements in digital markets. The following are some of the recent key matters enforced by the JFTC:

- it was reported that an app store operator had engaged in exclusionary conduct against its rival online game providers. The JFTC investigated the practice wherein the app store excluded the rival's app from its app store so that no revenue would be lost to the rival. No enforcement action has been officially announced yet; and

- the JFTC reached an agreement with a smartphone manufacturer to eliminate certain anticompetitive clauses in its contractual relationship with mobile network operators (MNOs). Using its strong market presence, the smartphone manufacturer imposed various restrictions on MNOs, such as a minimum purchase requirement, requiring the MNO to subsidise customers when selling the manufacturer's smartphone.

UNILATERAL ANTICOMPETITIVE CONDUCT

Establishing market power

- 21 | What are the relevant criteria for establishing market power in digital markets in your jurisdiction? Is there any concept of 'abuse of economic dependence' where a company's market power does not amount to a dominant position?

Japan takes a somewhat unique approach to regulating unilateral conduct and vertical restraint. The regulation of private monopolisation (articles 2-5 and 3 of the AMA) prohibits a business operator from excluding or controlling others to substantially restrain competition in the market. This regulation generally corresponds with unilateral conduct regulation in other countries, where substantial market power is a requisite. In this type of conduct, the JFTC takes the view in its guidelines that market share is only one of the factors to determine substantial restraint of competition, and the JFTC also considers other factors such as barrier to entry (how easy new entry can be achieved), bargaining power of the customers, and efficiency. Having said that, the JFTC announces as its enforcement policy that it prioritises enforcement against conduct by companies having more than 50 per cent market share.

In addition to private monopolisation, the AMA also regulates unilateral conduct by companies that do not have market power but can influence competition in the market. This regulation is called 'Unfair Trade Practices' and regulates companies with market share of 20 per cent or more, according to the Distribution Guidelines.

Moreover, the AMA prohibits 'abuse of superior bargaining position' that corresponds with 'abuse of economic dependence' where absolute market dominance is not necessary for violation to be found. There have been many cases where the JFTC identified abusive activities by large digital companies.

Abuse of market power

- 22 | To what extent are companies with market power in digital markets subject to the rules preventing abuse of that power in your jurisdiction?

Japan regulates abusive conduct under the prohibition of 'abuse of superior bargaining position.' Article 2-9(5) defines what constitutes abusive acts very broadly. For example, setting unfavourable contractual terms unilaterally can fall within the scope of abusive conduct.

In digital markets, the JFTC has enforced against abusive conduct by large online platforms as follows:

- in March 2020, the JFTC requested the court to order an interim measure on abusive activities by a large Japanese marketplace operator. The marketplace operator unilaterally decided that shops were not allowed to charge shipping fees to consumers who use the marketplace and the JFTC argued that this unilateral imposition of shipping fees on shops constituted an abuse of superior bargaining position by the marketplace against shops. The JFTC dropped its request as the marketplace decided to postpone this decision, but the investigation is still ongoing; and
- in 2019, the JFTC investigated an online marketplace operator which unilaterally decided to impose the cost of a new reward point

program available to customers. Upon the initiation of the JFTC's investigation, the operator withdrew this decision, and the JFTC disclosed that it ceased the investigation.

Data access

- 23 | How has the competition authority in your jurisdiction addressed concerns surrounding access to data held by companies with market power in digital markets?

In 2018, the Competition Policy Research Centre (CPRC), a research institute under the JFTC, published its Data and Competition Policy Report. The report acknowledges the importance of data in digital competition, and that the foreclosure effect of holding large amounts of data can be an issue of competition law. Then the report mentioned that smaller competitors should be allowed to access the enormous data held by dominant online platforms if the data is essential to conducting business in the market and if the platform has allowed access in the past but refuses to do so without any reasonable ground other than excluding competitors; or customers have a right to access the data but the platforms unreasonably withhold the data, thereby excluding competitors.

The Japanese government has also had a concern regarding data collection by large digital platforms that hinders new entry. In May 2019, the study group established by the Cabinet Office issued a report on data portability.

Data collection

- 24 | How has the competition authority in your jurisdiction addressed concerns surrounding the collection of data by companies with market power in digital markets?

In December 2019, the JFTC released its guidelines on the relationship between online platforms and their users or consumers regarding handling of personal information and other data. According to these guidelines, the JFTC officially takes the position that the regulation on abuse of superior bargaining position applies to the relationship between online platforms and users on the consumer side, and collection of personal information or other information from the consumers can be regarded as abusive conduct (eg, collecting information from consumers without informing consumers of the purpose). It is important to note that the JFTC makes it clear that data collection practice complying with privacy law in Japan does not necessarily mean the JFTC will not take any action, and the JFTC will analyse the practice from a competition law perspective.

Leveraging market power

- 25 | Has the competition authority in your jurisdiction adopted any decisions involving theories of harm relating to leveraging market power in digital markets, such as through tying, bundling or self-preferencing?

Although the JFTC has not yet made a decision on this point, as already mentioned, the JFTC generally takes the position that the same theory of competition law will be applied to digital market practices, with necessary modifications to consider the characteristics of digital markets. Thus, when analysing leveraging practices by digital platforms, the JFTC would apply the relevant provisions of the AMA (eg, prohibition of Private Monopolisation and prohibition of tying as Unfair Trade Practices) and its Guidelines.

Other theories of harm

26 | What other types of conduct have been found to amount to abuse of market power in digital markets in your jurisdiction?

In principle, the same theory will be applied to assess abusive conduct in digital markets, and we have not seen any novel theories of harm specific to anticompetitive conduct in digital markets.

MERGER CONTROL

Merger control framework

27 | How is the merger control framework applied to digital markets in your jurisdiction?

In principle, the general merger control framework applies to mergers in digital markets, but recent changes in guidelines added some rules applying specifically to digital markets as follows: on procedural aspects, in December 2019, the JFTC revised its guidelines, requesting that certain transactions in digital markets below the notification threshold should be reported voluntarily to the JFTC. Although the legal notification threshold, based on the domestic turnover of the merging parties, remains the same, in response to the concern that an anticompetitive effect can arise when acquiring a company without significant turnover, the JFTC requests the transaction to be reported voluntarily when the total consideration for the acquisition exceeds ¥40 billion and the acquisition is expected to affect domestic consumers.

The JFTC also revised its Merger Guidelines, clarifying how the JFTC analyses mergers in multisided markets. The following are some of the major points in the revision:

- the JFTC makes it clear that it will define each layer of customers as a market, and, when indirect network effect is found in multisided markets, the overall market including multiple layers of customers can be defined; and
- the JFTC also clarifies that network effect needs to be considered in merger analysis. If the product or service at issue is single home, the anticompetitive effect will be higher than that in multi-home product or services. When the network effect is strong and switching the cost of customers is large, the JFTC will determine that the bargaining power of the customers is weak.

Prohibited mergers

28 | Has the competition authority prohibited any mergers in digital markets in your jurisdiction?

No, the JFTC has not yet prohibited any mergers in digital markets. In a recent merger between LINE Corporation (operator of the most famous messaging app in Japan) and Z Holdings (operator of the search engine and portal site, Yahoo! in Japan), two large digital companies in Japan, the JFTC conducted an in-depth review identifying potential issues in one of the overlapping areas, and gave a conditional clearance.

Market definition

29 | How has the competition authority in your jurisdiction addressed the issue of market definition in the context of digital markets?

Traditionally, the JFTC defines the market (both the product market and the geographic market) based on demand-side substitutability, applying the SSNIP test. The JFTC also considers supply-side substitutability as one of the factors for market definition. This general framework does not change when assessing market definition in the digital market. However, in its revised guidelines the JFTC points out some of the factors to be considered when defining a market. The guidelines read that the JFTC

may consider 'the characteristics of its content, such as the type and function of the available service, the qualities such as sound and image provided, communication speed, and the level of security, as well as the user-friendliness from the viewpoint of usable languages and devices.'

'Killer' acquisitions

30 | How has the competition authority in your jurisdiction addressed concerns surrounding 'killer' acquisitions in digital markets?

In order to capture potential 'killer' acquisitions in a merger notification regime, the JFTC revised its guidelines to request mergers in digital markets short of the notification threshold to be reported voluntarily. The JFTC also clarifies that it will consider competitive concerns when a company acquires another company whose product is still in the research and development stage but could possibly compete with the acquirer's product after the product launch.

Substantive assessment

31 | What factors does the competition authority in your jurisdiction consider in its substantive assessment of mergers in digital markets?

The JFTC in its revised guidelines adds numerous factors to be considered in mergers in digital markets. These include taking into account products and services in the R&D stage and considering the aggregate data held by the parties when assessing effect on competition.

Remedies

32 | How has the competition authority in your jurisdiction approached the design of remedies in mergers in digital markets?

Because not many mergers in digital markets have been under scrutiny by the JFTC yet, it is too early to tell the JFTC's approach or preference on a type of remedy in digital market mergers. It is the JFTC's position that remedies need to be enough to address the anticompetitive concerns of the merger, so the JFTC will continue to consider appropriate remedies on a case-by-case basis, whether or not the merger involves digital markets.

In the *LINE/Z Holdings* merger, the two players have strong presence in the QR code payment market, but at the time of the JFTC's review, the market is not mature enough to assess the competitive effect of the merger properly. Thus, to enable the JFTC to check on competitive concerns of the merger in the future, the JFTC requires the parties to provide annual reports for three years on the situation of the QR code payment market, and the level of fee charged by the parties to users.

UPDATE AND TRENDS

Recent developments and future prospects

33 | What are the current key trends, legislative and policy initiatives, recent case law developments and future prospects for the enforcement of competition law in digital markets in your jurisdiction?

Mr Sugimoto, Chairman of the JFTC, will finish his term in 2020, and the legal community will take a closer look at how this leadership change will affect the JFTC's enforcement trend. Nonetheless, we expect the JFTC will continue to apply the AMA to anticompetitive or abusive conduct in digital markets aggressively, as ensuring fair competition in digital markets has been one of the government's major initiatives.

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