THE JAPANESE EXPERIENCE IN THE LEGAL REGULATION OF DIGITAL PLATFORM COMPETITION

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Abstract. This thesis examines the rapidly evolving field of digital platforms and the mechanisms of their legal regulation under Japanese law. It primarily elucidates the developmental stages of legal norms within competition law and highlights the specific characteristics of the contemporary legal regulation of digital platforms.

Key words: Digital platforms, competition law, JFTC, economy, monopoly, superior bargaining position, fair competition

The Japan Fair Trade Commission (JFTC) has recently been active in profoundly examining the stance it should adopt regarding developments in the digital economy, particularly the platform economy. This process was initiated by Kazuyuki Sugimoto, the then Chairman of the JFTC, in his 2016 New Year's address. In this address, Sugimoto acknowledged that the digital economy, specifically the platform economy, had fundamentally transformed business models, and emphasised the necessity of seriously considering the extent to which the Act on Prohibition of Private Monopolisation and Maintenance of Fair Trade (hereinafter referred to as the AMA) should be applied by the JFTC.[1]

After participating as an observer in the Ministry of Economy, Trade and Industry's (METI) Study Group on Network Systems for the Fourth Industrial Revolution, the JFTC published a series of reports concerning the digital and platform economies. In June 2017, the initial study regarding the relationship between data and competition policy was presented. From 2018 onwards, focus shifted towards digital platforms. In collaboration with METI and the Ministry of Internal Affairs and Communications, the JFTC issued a notice summarising the core principles enabling the development of digital platforms. These principles were more general in character and were not restricted solely to competition law. Building upon this foundation, the JFTC continued its research into digital platforms and achieved significant progress in 2019. Within a short span of three months, the JFTC accomplished the following:

Published its views on applying "abuse of superior bargaining position" norms to transactions between digital platform operators and consumers;

Gathered public opinion on proposed amendments to the existing guidelines for reviewing business combinations (mergers), taking platforms into account;

Issued a report concerning trade practices on digital platforms.[2]

As one of the most comprehensive documents, the "Report on Trade Practices on Digital Platforms" serves as an intriguing source for deeper analysis. In the concluding section of this report, the JFTC outlined potential solutions against anticompetitive conduct that may arise in the digital market. In Japan, the primary focus in protecting the digital market from anticompetitive practices is directed at three areas: the abuse of a superior bargaining position, the foreclosure of competitors' transactions, and

[1] Digital platforms, Competition law, and Regulation. Comparative perspectives/Copyright © Kalpana Tyagi, Anselm Kamperman Sanders, Caroline Cauffman, and Contributors severally 2024. P27-40.
[2] Ex-ante versus Ex-post in Competition Law Enforcement: Blurred Boundaries and Economic Rationale - Patrice Bougette, Oliver Budzinski, and Frédéric Marty. GREDEG WP No. 2024-1https://ideas.repec.org/s/gre/wpaper.html

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trading under restrictive terms. All three scenarios are categorised as “unfair trade practices” under the AMA.

Relying on unfair trade practices implies that other monopolisation provisions within the AMA do not apply here. For external observers, such an approach might appear somewhat unusual, given that the JFTC characterises the digital market as oligopolistic—namely, a market dominated by a few large participants; however, applying "unfair trade practices" when dealing with cases in the platform economy offers distinct advantages. This is because these norms ensure state intervention even at a stage when market dominance has not yet fully crystallised. If dominance already exists, it facilitates swift enforcement measures.

Competition law was introduced to Japan after the Second World War under pressure from the United States. As part of efforts to democratise the Japanese economy, the Allied Powers, with the United States acting as the primary driving force, mandated that Japan draft and enact a competition law. When the initial drafts failed to align with American conceptions of antitrust law, the Supreme Commander for the Allied Powers engaged an American lawyer to draft the bill. Although the Japanese government retained the opportunity to review the drafts and introduce amendments, the Antimonopoly Act (AMA) was ultimately adopted as a unique synthesis of various competition statutes operating in the US.

As noted above, the Japanese Antimonopoly Act (AMA) was established based on US antitrust laws. The original text of the AMA contained provisions against “unreasonable restraint of trade” based on Section 1 of the US Sherman Act, “private monopolization” based on Section 2, and merger control rules. Considering that the JFTC was established as the sole competition authority in Japan, having just a single norm against unreasonable restraint of trade and private monopoly within the AMA would have been sufficient.[3]

However, another norm based on Section 5 of the US Federal Trade Commission Act (FTC Act) was also incorporated into the original text of the AMA. This section essentially encompassed all conducts prohibited under Sections 1 and 2 of the Sherman Act. Consequently, the AMA acquired a distinctive structure whereby offenses related to both the Sherman Act (Sections 1 and 2) and the FTC Act (Section 5) fell under the regulation of a single competition authority—the JFTC. Since all core offenses of the AMA were covered under Article 3, Article 19 (the norm prohibiting unfair trade practices) was practically a redundant component in the law. This situation is easier to comprehend when compared with the structure of European Union competition law. For instance, within the EU's TFEU, Article 101 corresponds to Section 1 of the Sherman Act, whilst Article 102 corresponds to Section 2 of the Sherman Act. Therefore, European law lacks a norm analogous to Section 5 of the US FTC Act, as the European Commission operates as the sole competent authority for enforcing competition law.

Thus, both Article 3 and Article 19 of the AMA cover numerous ex-post infringements, resulting in an overlap between them. For this reason, the scholar Murakami considers the inclusion of Article 19 an outright error, describing it as the “original sin” of the AMA. He argues that Article 19 caused significant confusion in the subsequent enforcement of the AMA and gave rise to specific normative and theoretical dilemmas.[4]

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[3] Ex-ante versus Ex-post in Competition Law Enforcement: Blurred Boundaries and Economic Rationale - Patrice Bougette, Oliver Budzinski, and Frédéric Marty. GREDEG WP No. 2024-1https://ideas.repec.org/s/gre/wpaper.html

[4] Digital Economy, Sustainability and International Economic Law Editors: Lei Zhang, Xiaowen Tan and Pinguang Ying. Published by Bentham Science Publishers Pte. Ltd. Singapore. All Rights Reserved. First published in 2023.

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Firstly, in its initial decisions following the enactment of the AMA, the JFTC declared that the threshold for illegality under Article 19 (the probability or risk of impeding fair competition) was substantially lower than that of Article 3. This is because prohibition under Article 3 requires a "substantial restraint of competition in a particular market". Once the JFTC assumed full authority over the enforcement of the AMA in 1953, the "unfair trade practices" norm became the most frequently utilised tool against unilateral conduct. Concurrently, the "private monopolization" rule in Article 3 of the AMA was applied a mere six times between 1953 and 1992.

This evolution certainly diverges from the history and structure of US antitrust law, where "unfair methods of competition" played merely a secondary role. In Japan, this phenomenon is known as the "incipiency doctrine".[5] According to this doctrine, the prohibition of unfair trade practices is justified because it eliminates harmful effects on competition at an early stage—just as they begin to manifest—preventing them from developing into severe restraints on competition.

Secondly, from 1953 onwards, the framework of unfair trade practices established by the JFTC came to include new conducts not directly related to market competition, such as the "abuse of superior bargaining position". As a result, the prohibition of unfair trade practices drifted considerably from general competition law, increasingly resembling a type of "unfair competition law" that regulates daily transactions and commercial practices within business operations.

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