

JFTC/CPRC Report re: Business Alliances under the Japan Anti-Monopoly Act

August 2019

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On July 10, 2019, the Japan Fair Trade Commission (“JFTC”)’s research center, Competition Policy Research Center (“CPRC”) published a report (“Report”) that organizes and analyzes antitrust law issues with respect to business alliances.¹ The Report includes guidance on how business alliances across industries that jointly collect and/or utilize data (“Data-Linked Business Alliances across the Industries”) are reviewed and analyzed under the Anti-Monopoly Act (“AMA”).

Business collaboration in a certain type, including a merger, share acquisition, business transfer, split and/or joint share transfer (“Merger”) is subject to a notification with the JFTC when it meets certain requirements (e.g., Japanese turnover), and is subject to review by the JFTC (“JFTC Merger Review”). The JFTC provides its position on how the JFTC analyzes influence on competition by a Merger in its “Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination” (“Merger Review Guidelines”).² Any other type of business collaboration that is not subject to the JFTC Merger Review (“Business Alliances”) is to be reviewed by a perspective whether it would be problematic under the AMA, including cartel regulation. Unlike JFTC Merger Review, there are no guidelines where the JFTC provides, in a systematic way, its position on how the JFTC analyzes influence on competition by such a Business Alliance.³ The Report was prepared to organize existing JFTC views regarding Business Alliances and to analyze issues involving new trends, including Data-Linked Business Alliances across the Industries.

The Report is mainly comprised of six sections, including (i) introduction and purpose of the Report, (ii) current JFTC positions, including various guidelines and consultation cases, (iii) differences between Business Alliances and Mergers, (iv) issues regarding Business Alliances, including information exchange associated with Business Alliances, commonalization of cost structure, and influence on innovation, (v) framework of view

¹ The JFTC/CPRC Press Release on July 10, 2019 in Japanese is available at <https://www.jftc.go.jp/houdou/pressrelease/2019/jul/190710.html>, and its English translation is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2019/July/190710.html>. The Report is available in Japanese at https://www.jftc.go.jp/cprc/conference/index_files/190710gyoumuteikei1.pdf. English translation is not available as of August 8, 2019, but the JFTC plans to provide an English translation of the entire Report in the future.

² JFTC English translation of the guidelines is available at https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/110713.2.pdf.

³ The JFTC mentions its positions regarding Business Alliances in pieces in some guidelines (e.g., Guidelines Concerning Joint Research and Development under the Antimonopoly Act). The JFTC also issues its analysis for some Business Alliance cases in the Collection of Consultation Cases (<https://www.jftc.go.jp/dk/soudanjirei/gyomuteikei/index.html> (only in Japanese)).

under the AMA towards Business Alliances, including a distinction with a hard-core cartel, and (vi) framework of view under the AMA towards Data-Linked Business Alliances across the Industries.

The Report admits that Business Alliances, including Data-Linked Business Alliances have pro-competitive influence in many cases. At the same time, it points out that concerns about collection and utilization of data in connection with competition law and policies have been discussed recently around the world. This article will introduce some examples of framework of view under the AMA towards Data-Linked Business Alliances across the Industries mentioned in Section 6 of the Report.⁴

The Report points out that recently, businesses have come to collaborate together across the industries utilizing various data. For example, development of an automated car requires map data that reflects geographical map as well as other information, including location of the car and traffic jam in a real-time basis. Therefore, businesses from various industries, including map, measurement, equipment and automobile manufacturers provide data to jointly develop the project.

The Report explains that situations where Business Alliances would be problematic under the AMA include (i) when the parties of a Business Alliance have market power exclude other businesses by exercising its market power, or the parties of Business Alliances with market power enter into an agreement that restricts competition, or (ii) when a Business Alliance formulates market power by artifact conduct that deviates from normal competition method during the course of collecting and/or accumulating data.⁵

The Report provides some examples of artifact conduct that deviates from normal competition method.⁶

Conduct that increases network effect by unfair methods

- Achieving customers by centralizing data collection sources using unfair methods (e.g., unjust tying or unjustifiable rebate).
- In a platform business, providing conditions (e.g., considerations for platform services) for customers in a certain category, that is an origin of increasing indirect network effect, more favorable than it should be, by using the benefit a Business Alliance received from customers in a different category as a result of conducting abuse of superior bargaining position.
- Collecting data from customers by unfair method (e.g., violation of Act on the Protection of Personal Information), or by misusing customers' limit of knowledge and literacy where customers would not have provided data if they understood the situation correctly (e.g., making customers provide data without letting them read or understand a private policy where a Business Alliance intentionally created such a situation).
- Inducing customers by deceptive method (e.g., padding a number of service users).

Conduct that centralizes data collection sources by locking in customers and/or allied parties using unfair methods

- Restricting customers from using services provided by a Business Alliance's competitor (e.g., requiring single-home access without a good reason, imposing unreasonable restraint on open API and/or API connection, implementing unnecessary specifications and/or technologies to disturb interoperability of data).
- Increasing the switching cost substantially by creating an unreasonable sunk cost (e.g., requiring substantial amount of investment on plant and equipment for joint research and development, that is difficult to convert for a different use, without a rationality).

At the end of the Report, it emphasizes the importance of active innovation and proposes to have further discussion about influence on innovation by Business Alliances under the AMA.

⁴ PP39-62 of the Report

⁵ P43 of the Report

⁶ PP46-49 of the Report

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