

Digital platforms will soon face more regulatory scrutiny in Japan

Big Tech as well as other global companies will likely have to modify their business models

By Toshio Dokei, Arthur M. Mitchell and Hideo Nakajima

Japan's growing e-Commerce market continues to benefit both businesses, which are able to reach more customers and reduce costs, and consumers, who enjoy convenience and tailored online experiences. But the expansion of digital platforms has also raised concerns, including those related to consumer privacy, transparent and fair trade practices, and antitrust law.

Regulators around the world are focusing on these issues. Earlier this year, the EU enacted a regulation intended to increase transparency and fairness in transactions conducted over digital platforms with EU consumers. In the US, under political pressure, the Department of Justice, Federal Trade Commission and state attorneys general are investigating many of the trade practices of major digital platforms.

While regulation will affect Big Tech, nearly every global business has online components that will face scrutiny. Potentially conflicting rules in the EU, US and Japan will intensify compliance challenges.

KEY REGULATORY DEVELOPMENTS IN JAPAN

By early 2020, Japan is expected to introduce transparency and fairness legislation similar to the EU's recently enacted law. This legislation will set rules on practices including adequate disclosure of platform terms and conditions, contractual changes, ease of access to data, data portability and data interoperability.

In addition, the Japan Fair Trade Commission (JFTC) is expected to use Antimonopoly Act (AMA) enforcement measures to regulate certain aspects of digital platform businesses. For example, on



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August 29, the JFTC released draft guidelines that would extend the abuse of superior bargaining position theory to business-to-consumer (B2C) transactions.

JAPANESE COMPETITION LAW

Japan's AMA regulations regarding abuse of superior bargaining position, are different from abuse of monopoly power (in the US) and abuse of dominant bargaining power (in the EU). The Japanese concept does not require absolute market power or dominance. Rather, a company may have superior bargaining position in relation to its competitors. As a result of this lower standard, companies may face even greater antitrust scrutiny.

THE AMA AND B2C TRANSACTIONS

To date, Japan has only applied the abuse of superior bargaining position concept to business-to-business (B2B) relationships. The draft guidelines provide several examples to show how the JFTC might try to review B2C transactions by focusing on the provision of personal information to digital platforms in exchange for services, and the circumstances under which antitrust concerns may arise absent express consent for the use of such information.

Given that much uncertainty still surrounds the grounds for, and specifics of, applying antitrust law to B2C transactions, industry representatives and legal counsel will seek clarifications through the public comment procedure before September 30.

Current enforcement practice may require adjustments to address the issues raised by B2C transactions. For example, calculating fines in antitrust cases involving vast numbers of consumers who do not pay for services will be difficult. However, the JFTC is empowered to issue cease and desist orders.

THE AMA AND KILLER ACQUISITIONS

The competitive impact of Big Tech mergers, particularly "killer acquisitions," has also raised antitrust concerns in jurisdictions around the world, including Japan. A killer acquisition occurs when an incumbent company acquires a smaller, innovative target in order to eliminate it as a competitor. The JFTC is assessing whether killer acquisitions should be subject to its review.



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Applying antitrust law to killer acquisitions may prove difficult. The JFTC's merger control jurisdiction is based on turnover thresholds applicable to both companies. Yet in the case of killer acquisitions, the acquired companies are typically startups with little or no turnover. The JFTC has the authority to investigate such a merger, but would have no way of knowing it was taking place unless the current guidelines are amended. To date, only Germany and Austria have introduced reporting thresholds designed to capture these transactions, but it is too early to tell whether they will have the intended effect.

A BALANCING ACT

Adjustments to antitrust laws will be required to apply them in these new contexts. For example, antitrust enforcement cases can take years to resolve. Given the rapid pace of technological advances, antitrust agencies should be encouraged to develop expedited processes. In addition, regulators should take a flexible approach, applying the laws on a case-by-case basis. Finally, Japanese authorities will take great care to balance the interests of consumers and smaller businesses with the need to create a regulatory framework that does not put a damper on innovation.

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