

New JFTC Guidelines regarding: Abuse of Superior Bargaining Position for transactions between Digital Platforms and Consumers

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On August 29, 2019, the Japan Fair Trade Commission (“JFTC”) published a draft of new “Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc.” (“New Guidelines”) to seek comments from the public. The due date for the comments is 6:00 p.m. on Monday, September 30, 2019.¹

The draft of the New Guidelines was prepared in accordance with the June 21, 2019 Cabinet decision on the growth strategy, including preparing new JFTC guidelines for application of abuse of superior bargaining position (“ASBP”) to business-to-consumer (“B2C”) transactions with regard to digital platform businesses.

ASBP is a type of prohibited single firm conduct (e.g., private monopolization or unfair trade practices). ASBP is somewhat analogous to “abuse of a dominant position,” but unlike prohibitions on behaviour by dominant firms, ASBP does not require market power. ASBP exists when a party in a relative superior bargaining position – as opposed to a dominant position – engages in abusive conduct that runs the risk of being an “impediment to competition.”

The draft of the New Guidelines has been prepared to provide clarity and predictability for the situations where conduct would be problematic in B2C transactions under the ASBP regulation, specifically for transactions where consumers provide information (e.g., personal information) to digital platforms. Up until now, the JFTC has applied ASBP only to business-to-business transactions, but not to B2C transactions, although there was no such limit under the law.

The draft of Guidelines provides the basic concept of ASBP in context of B2C transactions. It now clarifies that consumers are subject to abusive conduct by a superior party. Further, it states that abusive conduct by a superior party against consumers is found when consumers have no choice, but to accept the detrimental treatment by a digital platform in order to use the service provided by such a digital platform. In this context, whether it is necessary for the consumers to deal with the digital platform is considered.

¹ JFTC’s public release dated August 29, 2019 is available at https://www.jftc.go.jp/houdou/pressrelease/2019/aug/190829_dpfp.html (in Japanese) and <https://www.jftc.go.jp/en/pressreleases/yearly-2019/August/190829.html> (in English). The draft of Guidelines is available at https://www.jftc.go.jp/houdou/pressrelease/2019/aug/190829_dpfp2.pdf (in Japanese) and <https://www.jftc.go.jp/en/pressreleases/yearly-2019/August/190829rev.pdf> (in English).

In addition, the draft of Guidelines provides seven examples in total, including four examples where obtaining information (e.g., personal information) would be problematic and three examples where utilizing information (e.g., personal information) would be problematic under the ASBP regulation. Here are summaries of those examples.²

Obtaining Information

Case 1: Digital Platform A coerced consumers to provide personal information without properly informing the purpose of use.

Case 2: Digital Platform B coerced consumers to provide personal information beyond the scope that it informed the consumers (e.g., it obtained personal information from consumers explaining that it would use for the purpose of “sales of goods,” but included information not necessary for the purpose it informed, such as their gender and/or occupation).³

Case 3: Digital Platform C coerced consumers to provide personal information despite the situation where it had not taken precautions necessary and appropriate for information security management.

Case 4: Digital Platform D coerced consumers, who have been using its service on a continual basis, to provide additional information that is irrelevant to the service consumers are provided by D.

Utilizing Information

Case 5: Digital Platform E used personal information for “targeting advertisement” for which it obtained from the consumer informing the purpose of use was “sales of goods.”

Case 6: Digital Platform F provided personal information to a third party without consent from the consumers it obtained the information from.

Case 7: Digital Platform G used personal information despite the situation where it had not taken precautions necessary and appropriate for information security management.

The JFTC is seeking comments from the public. Comments must be provided in Japanese. The due date is 6:00 p.m. on Monday, September 30, 2019.

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² Please see concrete examples in the draft of Guidelines (see footnote 1).

³ It would not be problematic if Digital Platform B acquired explicit consent from the consumers.