

Report of the JFTC/CPRC Study Group on Data and Competition Policy

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On June 6, 2017, the Japan Fair Trade Commission (“JFTC”) and the Competition Policy Research Center (“CPRC”)¹, jointly published their “Report of Study Group on Data and Competition Policy” (“Report”). The Study Group kicked off in January of this year. The stated purpose of the Study Group has been to discuss and analyze issues regarding data and competition policy under Japan’s Anti-Monopoly Act (“AMA”), given the critically important role of data in the modern economy. The Report reflects the Japanese government’s recent increased interest in competition policy in the data economy.

The JFTC/CPRC report finds that, while the collection and use of data can in principle be pro-competitive, they also can, in some cases, restrict competition and thus may run afoul of the AMA. Such situations can arise, for example, in the context of the collection of data by certain business combinations (e.g., mergers) or “unjust” conduct that excludes competitors.

The Report concludes that the competitive concerns associated with collecting and using data can basically be met using the current AMA regime, except in the merger context, where revisions were proposed. As discussed further below, the Report concluded that certain business combinations that should be subject to JFTC review – because the combined data from the businesses could later produce innovation or new products or services, potentially resulting in market power – might be missed because the thresholds triggering mandatory review were not met.²

The Report also notes two issues for future discussion; (i) digital cartels; and (ii) monopolization or oligopolization of a digital platform. The Report suggests that digital cartels should be analyzed in light of whether an “agreement” has been reached – i.e., whether there has been an “unreasonable restraint of trade” under the AMA. With respect to monopolization or oligopolization of a digital platform, the AMA currently only regulates “unfair” or “unjust” conduct by a monopolist or oligopolist, i.e., simply being a monopoly or an oligopoly is in and of itself legal. The Report says that discussion should continue as to what rules or regulations are suited to encouraging new entrants to the affected market(s).

Below we discuss the Report’s findings in further detail.

¹ The CPRC’s objection is to build and improve functional and sustainable cooperative platforms between the intellectual resources of outside researchers and practitioners and the JFTC in order to reinforce the theoretical foundations on which the JFTC enforces antitrust law and to look at competition policy from medium- and long-term perspectives.

² Under the current regime, pre-notification thresholds are based solely on the previous business year’s turnover.

Business Combinations

1) Market Definition

Defining the relevant product/service and geographic markets is a critical first step when it comes to analyzing a business combination under the AMA. The AMA and the JFTC Guidelines in principle start by looking at the relevant market(s) from the perspective of consumer's ability to purchase a substitute, and may also analyze the issues from the vantage point of supplier substitutability. Traditionally, substitutability is looked at using what is known as the SSNIP test – i.e., Small but Significant and Non-transitory Increase in Price. The Report highlights the fact that a digital platform is comprised of several layers of markets with different types of consumers or users (also referred to as a “multi-level market”), where “free” services might be provided in one market (e.g., social media service market) but compensation paid in a different market (e.g., online advertisement market). The SSNIP test, says the Report, is not necessarily applicable to this type of “free” market. The Report therefore suggests considering the substitutability of consumers and/or suppliers using another method, such as the SSNDQ (Small but Significant and Non-transitory Decrease in Quality) test, which focuses on functionality and quality rather than its price.

2) Amendment to Pre-Notification Requirements³

When determining whether or not a specific business combination is reportable, the JFTC currently looks only at the parties' Japanese turnover for the previous business year.⁴ When the parties' turnover does not meet the thresholds, therefore, JFTC pre-notification is not required even if the parties' turnover may dramatically increase after the business combination is consummated (i.e., if the following year's turnovers greatly exceed the thresholds for pre-notification), and even if such a business combination then exerts a substantial influence on the relevant market(s). The Report recognizes that it may take a while for data resources to be converted into increased turnover from innovation and/or sales of new products or services. In addition, the aggregated accumulated data may result in the parties being able to obtain or strengthen market power. The Report therefore suggests considering revision of the current pre-notification requirements to allow the JFTC to review certain important transactions that may be missed under the current system. The Report refers to a March 31, 2017 amendment to the German business combination regulations, which add the value of an acquired company as a factor in determining whether or not pre-notification will be required. Under such a system, pre-notification could be required even in a situation where the turnover of the interested parties do not meet the thresholds.

Unfair Trade Practices and Private Monopolization

The Report discusses the application of the AMA to the collection and/or use of data in the modern economy. The Report says that data collection will generally not violate the AMA, unless (i) the data was collected by unfair or illegal methods; or (ii) such data collection could restrict competition (e.g., by promoting collusion with competitors). The Report recognizes that while in principle it is at a company's discretion how it uses data (as is the case with traditional products and services), the use of data can violate the AMA when it meets the elements of a specific prohibition under the AMA (e.g., Exclusionary Conduct as Private Monopolization). The Report cites some (non-exhaustive) examples regarding the collection and use of data that could be considered to be violations of the AMA.

1) Example of data collection that is considered to be an “Abuse of Superior Bargaining Position” or “Trading on Restrictive Terms”

Abuse of Superior Bargaining Position (“ASBP”) is a type of Unfair Trade Practice that is somewhat akin to exclusionary private monopolization under the AMA, abuse of dominance in the EU and monopolization in the US. However, ASBP has the distinctive character of not requiring market power or dominance. Rather, any company with relative superior bargaining position is subject to the ASBP prohibitions, and it would be a violation of the AMA for a superior party to act in an “abusive” manner towards an inferior counterparty. The

³ The AMA prohibits any business combination that restricts competition substantially in a relevant market, regardless of whether the thresholds have been met. However, past practice suggests that it is very unlikely that the JFTC would actually review a business combination that does not meet pre-notification requirements.

⁴ The thresholds depend on the specific type of business combination (e.g., merger or share acquisition) at issue.

Report suggests that it may be possible to commit an ASBP where a superior party asks an inferior counterparty to provide it with all of data and technology produced by a joint research and development endeavor, for example. The Report also says that such a request could be also considered to be “Trading on Restrictive Terms” (which is also an unfair trade practice) where it restrains competition to the extent that it can be deemed an “impediment to competition”.

2) Example of data use that is considered to be “Exclusionary Conduct as Private Monopolization,” “Refusal to Deal” or “Interference with Competitor’s Transaction”

The Report states that, in principle, a company has the discretion to decide who to deal with, and that this does not fundamentally change when it comes to data. However, the Report also suggests that there may be exceptional circumstances where certain uses of data can be considered to be “Exclusionary Conduct as Private Monopolization” or a “Refusal to Deal” (e.g., where refusal to allow access to certain data excludes competitors from the relevant market), or “Interference with a Competitor’s Transaction;” when such conduct unjustly interferes in a transaction between a counterparty (i.e., who seeks to access the party’s accumulated data) and the party’s competitor. Further, the Report says, joint refusal by multiple parties to allow access to the collected data is more likely to be illegal than when a single party refuses to allow access to certain data.

Conclusion

The Report emphasized that the collection and use of data must be done in the context of fair and free competition. While recognizing that the collection and use of data itself promotes competition and creates innovation, the Report points out that issues like business combinations that could potentially lead to monopoly, and unjust data “hoarding”, among others should be addressed under the AMA. The Report concludes that while there are competitive concerns that can arise in various situations where data is being collected and/or used, that these can for the most part be addressed without amending the AMA. The exception is in the context of a proposed further discussion of pre-notification requirements for business combinations. It is premature to draw conclusions from the Report about any specific future enforcement by the JFTC in the realm of “big data”. However, the Report should put companies for whom data collection and/or usage is an integral part of their business on notice that the agency is now looking at the interaction between data and competition policy, and that risks of enforcement are increasing.

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