

New JFTC Report on Competition Policy Challenges in the Mobile Phone Market

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On June 28, 2018, the Japan Fair Trade Commission (“JFTC”) published a report on competition policy challenges that are arising in the mobile phone market (the “2018 Report”). The 2018 Report includes research and analysis of (i) consumer behavior in the mobile phone market, and (ii) interconnection charge system, which is among the most important factors for competition in the mobile phone market, in addition to (iii) follow-up research on an earlier related report issued on August 2, 2016 (the “2016 Report”).

The 2016 and 2018 Reports discuss business practices in the mobile phone market mainly from the perspective of promoting the entry of mobile virtual network operators (“MVNOs”) into the market. The 2018 Report recognizes the mobile phone market as an oligopoly, with only three major Mobile Network Operators (“MNOs”). It further recognizes that because mobile phones have become so essential in peoples’ lives, encouraging and maintaining competition in the mobile phone market is important.

An MNO is a telecommunications business operator that provides mobile communication services and has set up and/or operates its own wireless station. NTT Docomo, KDDI Group and Softbank, with a joint total of approximately 90% market share, are the MNOs mentioned in the 2018 Report. An MVNO is a telecommunications business operator who (i) provides mobile communication services using an MNO’s mobile communication services, and (ii) has neither set up nor does it operate its own wireless station. As it is essential for MVNOs to use or connect to an MNO’s service, connection charges and conditions between MNOs and MVNOs are extremely important to the question of whether MVNOs can be competitive in the mobile phone market. Under current circumstances, the three MNOs have bargaining leverage over the MVNOs and lack incentives to provide services to the MVNOs. The 2018 Report suggests implementing a system that incentivizes MNOs to provide their services to MVNOs, ultimately resulting in increased competition in the mobile phone market. The 2018 Report concludes that the JFTC will continue working with the Ministry of Internal Affairs and Communications to improve the system.

In the 2018 Report’s section following up on research on the mobile phone market done in the 2016 Report, the 2018 Report identifies various business practices that may raise concerns under the Anti-Monopoly Act (the “AMA”), including: (1) “Bundled” sales of connections and devices, (2) So-called “Two-Year” Tied Contracts,¹ (3) So-called “Four-Year” Tied Contracts,² (4) SIM Locks,³ and (5) the Second-hand device market.

¹ Contract where an MNO discounts monthly connection charges when a user commits to a two-year contract, and must pay a cancellation fee if s/he wishes to terminate the contract during the two-year contract period. This “Two-Year” Tied Contract is automatically continued unless an user expresses his/her intent to terminate after two years.

² Contract where an MNO cuts a device’s price in half when the user enters into a four-year contract. Under such a contract, when monthly payments for the device are made 24 times out of 48 times and (i) the device is to be returned to the MNO and (ii) the user enters into a new four-year contract with a new device, the remainder of the device’s payments are discharged.

³ A SIM Lock is a restriction build into certain mobile phone by their manufacturers that allows service providers to limit the use of these phones to specific networks. A SIM-free or “unlocked” phone is one without any SIM limitations.

The Report warns that bundled sales of connections and devices could constitute private monopolization under the current circumstances where the three MNOs, with a joint total of approximately 90% market share, make bundled sales of connections and devices, if such conduct makes it difficult for other companies to continue their business activities or for new market entrants to start their business activities. As to “Two Year” and “Four Year” Tied Contracts and SIM Locks, the Report suggests that they may give rise to risks of private monopolization and the unfair trade practice of interference in a competitor’s business. Further, the Report states that an MNO restricting the buyer of a second-hand device from reselling that device in Japan may violate the AMA, such as by dealing on restrictive terms and/or interfering in a competitor’s business, when it has the effect of excluding an MVNO from the market. In addition, the Report warns that multiple instances of conduct that collectively increase consumers’ switching costs will increase the risk of running afoul of the AMA, including such violations as private monopolization and interference with a competitor’s business.

Notably, while the Economic Research Office in the Economic Affairs Bureau of the JFTC was in charge of the 2016 Report, the Coordination Division in the Economic Affairs Bureau of the JFTC was put in charge of the 2018 Report, implying that the JFTC may be prepared to take a more aggressive enforcement posture in the mobile phone market. The Coordination Division is in charge of promulgating guidelines, including the Guidelines concerning Activities of the Agricultural Cooperative Association, which the JFTC uses as the basis for enforcement actions.

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