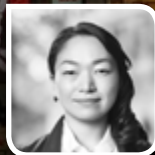


# RECENT DEVELOPMENTS IN COMPETITION LAW AND POLICY IN THE DIGITAL ECONOMY IN JAPAN



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In Japan, a new law for regulating digital platforms called the DP Act became effective on February 1, 2021. The discussion is going on whether to expand the scope of the DP Act to include digital advertisement. The JFTC recently proactively conducted merger reviews in the digital economy, such integrations of digital platforms and so-called killer acquisitions. Whether the JFTC will enforce an ASBP in transactions between digital platforms and consumers in accordance with the new guidelines is also one of the topics that we should be watching.

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## I. INTRODUCTION

Recently, the digital economy has grown massively worldwide, and people's lifestyles have changed accordingly. Such developments will most likely continue. Agencies around the world have been exploring options for greater regulation in the digital economy, including for digital platforms. Both innovation and competition are important. Can they coexist? How can we balance them?

This article discusses rules and principles which have been developed to promote transparency and fairness as well as free and fair competition in connection with digital platform businesses. A new Headquarters for Digital Market Competition ("Digital Headquarters") has been established to monitor the market and amendments have been made to the guidelines and policies of the Japan Fair Trade Commission ("JFTC") to clarify how mergers involving digital platforms will be evaluated, and how rules under the abuse of superior bargaining position ("ASBP") provisions of the Anti-Monopoly Act will apply to business-to-consumer transactions. The article will then detail the new rules applicable to digital platform businesses and describe issues for further market research, measures to strengthen the JFTC and likely future legal reform.

## II. 2018 CABINET DECISION TO PREPARE RULES FOR DIGITAL PLATFORMS AND BASIC PRINCIPLES

On June 15, 2018, the Government of Japan made a cabinet decision on growth strategy, which includes rules for the digital market, such as the need to prepare basic principles for digital platforms by the end of 2018. Accordingly, three major government agencies, including the JFTC, the Ministry of Economy, Trade and Industry ("METI") and the Ministry of Internal Affairs and Communications ("MIAC") jointly set up a "Study Group on the Improvement of the Trading Environment surrounding Digital Platforms" to discuss the current situation involving digital platforms. Based on the discussions at the study group, those agencies jointly issued a draft of interim report on November 5, 2018<sup>2</sup> and sought public comments. Thereafter an interim report was issued on December 12, 2018.<sup>3</sup> On December 18, 2018, they issued "Basic principles for developing rules to respond to the rise of digital platform-based businesses" ("Basic Principles").<sup>4</sup> The Basic Principles aim to achieve (i) transparency to ensure fairness and (ii) fair and free competition regarding digital platforms. In order to achieve such goals, the Basic Principles suggest conducting large-scale and comprehensive surveys to understand the reality of the business situation, and establishing a specialized organiza-

tion with diverse and advanced knowledge including digital technology and business to discuss new rules for transparency and fairness. They also suggested further considering merger review policies and procedures taking data and innovation into account, and the application of an ASBP to business-to-consumer transactions. The Basic Principles recognize the importance of giving due consideration to innovation in the digital market while some regulations would likely be required.

## III. 2019 CABINET DECISION ON SPECIFIC PLANS

On June 21, 2019, the Government of Japan further made a cabinet decision (i) to establish the Digital Headquarters under the Cabinet Secretariat to evaluate market competition in the global and rapidly developing digital market, (ii) to update rules for merger review by the end of 2019 in order to conduct review appropriately in accordance with developments in the digital market, and (iii) to review approaches to applying abuse of superior bargaining position to business-to-consumer transactions by summer of 2019, and (iv) to make efforts for submitting a bill on improving transparency of transactions of digital platform operators ("Bill for the DP Act") at the ordinary Diet session in 2020.

### A. Digital Headquarters

On September 27, 2019, the Digital Headquarters was established under the Cabinet's Secretariat in order to implement competition policies for promoting competition and innovation in the digital market in a timely and effective manner.<sup>5</sup> Under the Headquarters, the Digital Market Competition Council and the Digital Market Competition Working Group were established to discuss specific issues. In addition, the Trusted Web Promotion Committee was established in accordance with the Report on Mid-Term Vision in the Digital Market (see below) that was published on June 16, 2020.<sup>6</sup>

The Digital Market Competition Council and the Digital Market Competition Working Group discussed various issues, including

2 The draft is available only in Japanese (<https://www.jftc.go.jp/houdou/pressrelease/h30/nov/kyokusou/181105betten2.pdf>).

3 The interim report is available only in Japanese ([https://www.jftc.go.jp/houdou/pressrelease/h30/dec/kyokusou/181212betten1\\_1.pdf](https://www.jftc.go.jp/houdou/pressrelease/h30/dec/kyokusou/181212betten1_1.pdf)).

4 The Basic Principles are available at <https://www.jftc.go.jp/houdou/pressrelease/h30/dec/kyokusou/181218betten1.pdf>.

5 "Establishment of Headquarters for Digital Market Competition" is available in English at [https://www.kantei.go.jp/jp/singi/digitalmarket/pdf\\_e/documents\\_190927.pdf](https://www.kantei.go.jp/jp/singi/digitalmarket/pdf_e/documents_190927.pdf).

6 The summary of the report is available in English at [https://www.kantei.go.jp/jp/singi/digitalmarket/pdf\\_e/documents\\_200616-2.pdf](https://www.kantei.go.jp/jp/singi/digitalmarket/pdf_e/documents_200616-2.pdf).

the Bill for the DP Act, competition in the digital market, digital advertisements, drafts of amendments to the JFTC guidelines with regard to merger and ASBP (see the next section). Whether the DP Act (see below) should apply to digital platforms that provide digital advertisements is still being discussed.

### ***B. Amendments to Merger Guidelines and Policies***

On December 17, 2019, the JFTC issued amended “Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination” (“Merger Guidelines”)<sup>7</sup> and “Policies Concerning Procedures of Review of Business Combination” (“Merger Policies”).<sup>8</sup> Previously, it issued proposed amendments to the Merger Guidelines and Merger Policies on October 4, 2019 and sought comments from the public by November 5, 2019.<sup>9</sup> The Merger Guidelines were originally prepared in 2004 and the Merger Policies in 2011, and the amendments this time were made pursuant to the Cabinet decision made on June 21, 2019 in order to conduct review appropriately in accordance with developments in the digital markets.

Amendments to the Merger Guidelines include, among others, the JFTC’s views about (i) characteristics of digital platforms, including multi-sided markets and a definition of relevant markets where competition is based on quality rather than price, (ii) exceptional situations where the JFTC conducts substantial review even when a transaction meets the safe harbor criteria, (iii) cases where the parties are conducting research and development for overlapping products/services, and (iv) vertical and conglomerate mergers.

The amended Merger Policies clarify that the JFTC will conduct review of merger cases, including for those notifications are not required, but when the transaction value is large (i.e. more than JPY40 billion which is approximately USD370 million) and are expected to affect domestic consumers. Further, the amended Policies suggest the parties consult with the JFTC voluntarily when the transaction value exceeds JPY40 billion and when one or more of the following factors is met: (i) when an acquired company has an office in Japan and/or conducts R&D in Japan, (ii) when an acquired company conducts sales activities targeting domestic con-

sumers, such as providing its website and/or pamphlet in the Japanese language; or (iii) when the total domestic sales of an acquired company exceed JPY100 million (approximately USD920,000).

### ***C. New JFTC Guidelines on Application of ASBP to Business-to-Consumer Transactions***

On December 17, 2019, the JFTC issued “Guidelines Concerning Abuse of Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc.” (“ASBP Guidelines for DP”).<sup>10</sup> In advance of finalizing the Guidelines, the JFTC issued a draft of the guidelines on August 29, 2019 and sought comments from the public by September 30, 2019.<sup>11</sup>

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 behavior 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.”

There is no such limit under the law, but up until then, the JFTC had applied ASBP only to business-to-business transactions, but not to business-to-consumer transactions. There had been, and there still are arguments whether the JFTC should apply ASBP to business-to-consumer transactions, and if yes, in what situations they shall do so because the scope of ASBP that can be applied could be too broad. The ASBP Guidelines for DP intend to provide clarity and predictability for the situations where conduct would be problematic in business-to-consumer transactions under the ASBP regulation, specifically for transactions where consumers provide information (e.g. personal information) to digital platforms.

Most of the abusive conduct that the ASBP Guidelines for DP considers problematic as ASBP would concurrently violate the Act on the Protection of Personal Information (“APPI”).<sup>12</sup> Ac-

7 The tentative English translation of the Guidelines is available at [https://www.jftc.go.jp/en/legislation\\_gls/imonopoly\\_guidelines\\_files/191217GL.pdf](https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/191217GL.pdf).

8 The tentative English translation of the Policies is available at [https://www.jftc.go.jp/en/legislation\\_gls/imonopoly\\_guidelines\\_files/191217policy.pdf](https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/191217policy.pdf).

9 The tentative English translation of the JFTC press release on October 4, 2019 is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191004.html>.

10 The tentative English translation of the ASBP Guidelines for DP is available at [https://www.jftc.go.jp/en/legislation\\_gls/imonopoly\\_guidelines\\_files/191217DPconsumerGL.pdf](https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/191217DPconsumerGL.pdf).

11 The JFTC press release of August 29, 2019 is available only in Japanese at [https://www.jftc.go.jp/houdou/pressrelease/2019/aug/190829\\_dpfp.html](https://www.jftc.go.jp/houdou/pressrelease/2019/aug/190829_dpfp.html).

12 The tentative English translation of the APPI is available at <http://www.japaneselawtranslation.go.jp/law/detail/?id=2781&vm=04&re=01>.

According to JFTC's responses to the public comments on a draft of ASBP Guidelines,<sup>13</sup> the JFTC takes a position that conduct that does not violate the APPI would still violate the ASBP, but it is not that clear yet what kind of conduct would be involved, and what the companies should keep in mind for compliance purposes in addition to complying with the APPI.

#### ***D. Act on Transparency and Fairness of Specified Digital Platforms ("DP Act")***

On February 18, 2020, the METI submitted the Bill for the DP Act to the Diet.<sup>14</sup> The bill was passed on May 27, 2020 and promulgated on June 3, 2020. The DP Act became effective on February 1, 2021.

The DP Act was modeled after the European Commission's Regulation on platform-to-business relations ("P2B Regulation") which became effective in July 2019.<sup>15</sup>

The purpose of the DP Act is to contribute to the improvement of people's lives and the sound development of Japan's economy by promoting fair and free competition for the specified digital platform operators ("Specified DPOs"). As the basic principles of the DP Act, it provides that it is fundamental for digital platform operators ("DPOs") to voluntarily and proactively take initiatives to improve the transparency and fairness of digital platforms, and, as a result, it expects government involvement and other regulations to be minimum.

On December 22, 2020, the METI proposed a draft of cabinet order ("Cabinet Order"),<sup>16</sup> implementing regulations ("Imple-

menting Regulations")<sup>17</sup> and guidelines ("Guidelines")<sup>18</sup> for the DP Act and sought comments from the public by January 20, 2021. They became effective on February 1, 2021.<sup>19</sup>

The Cabinet Order provides two business categories and the thresholds of business size respectively; the Minister of the METI designates Specified DPOs among the DPOs that meet those two requirements. Two business categories identified by the Cabinet Order are: (i) the business of providing products to consumers by the Merchandise Providers<sup>20</sup> and (ii) the business of providing software or rights in software to consumers by the Merchandise Providers. For the thresholds for the business size is JPY 300 billion (approximately USD2.9 billion) for (i) and JPY200 billion (approximately USD 1.9 billion) for (ii), including Japanese sales by the Merchandise Providers and by a DPO.

Currently, online malls and app stores are subject to the DP Act, but digital advertisements are not. However, the Digital Headquarters continue to discuss digital advertisements and plan to publish a final report before spring 2021 (see below).

#### **IV. MARKET RESEARCH REPORT**

In accordance with the 2018 Cabinet decision to conduct large-scale and comprehensive surveys to understand the reality of the business situation in the digital market, various market surveys have been conducted including (i) a Report regarding Trade Practices on Digital Platforms (Business-to-Business transactions on online retail platform and app store) on October 31, 2019 by the JFTC,<sup>21</sup> (ii) an Interim Report regarding Digital Advertising

13 The JFTC's responses are available only in Japanese at [https://www.jftc.go.jp/houdou/pressrelease/2019/dec/191217\\_dpfgl\\_12.pdf](https://www.jftc.go.jp/houdou/pressrelease/2019/dec/191217_dpfgl_12.pdf).

14 The METI issued a press release in Japanese on February 18, 2020 which is available at <https://www.meti.go.jp/press/2019/02/20200218001/20200218001.html>.

15 P2B regulation is available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R1150>.

16 Draft of ordinance is available only in Japanese at <https://public-comment.e-gov.go.jp/servlet/PcmFileDownload?seqNo=0000211688>.

17 Draft of implementing regulations is available only in Japanese at <https://public-comment.e-gov.go.jp/servlet/PcmFileDownload?seqNo=0000211692>.

18 Draft of guidelines is available only in Japanese at <https://public-comment.e-gov.go.jp/servlet/PcmFileDownload?seqNo=0000211690>.

19 The Cabinet Order, Implementation Regulations and Guidelines are available in Japanese at [https://www.meti.go.jp/policy/mono\\_info\\_service/digitalplatform/index.html](https://www.meti.go.jp/policy/mono_info_service/digitalplatform/index.html).

20 The Merchandise Provider is defined as a person or business that uses digital platforms for the purpose of providing products or services under Article 2, Paragraph 3 of the DP Act.

21 The JFTC press release on October 31, 2019 in English is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191031.html>; summary of the report in English is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191031Summary.pdf>; tentative English translation of the report is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191031Report.pdf>.

on April 20, 2020 by the JFTC,<sup>22</sup> (iii) an Interim Report on the Evaluation of Competition in the Digital Advertising on June 16, 2020 by the Digital Market Competition Council,<sup>23</sup> and (iv) a Report on Medium-Term Vision on Competition in the Digital Market on June 16, 2020 by the Digital Market Competition Council.<sup>24</sup>

Interestingly, both the JFTC and Digital Headquarters issued an interim report on digital advertisement respectively. They apparently plan to issue a final report respectively before spring 2021.

In addition to the above, the JFTC has actively conducted market surveys in various areas including a market survey on transactions related to common point services, for which it issued a report on June 12, 2020.<sup>25</sup> The JFTC considers that common point services function as a digital platform that connects consumers and merchants, and have an impact on people's lives in terms of consumers' choice of products and services, and the economic activities of retailers, etc.

The JFTC is also active with regard to business practices involving startups. It issued an Interim Market Survey Report on Business Practices of Startups on June 30, 2020<sup>26</sup> and a finalized Market Survey Report on Business Practices of Startups on November 27, 2020.<sup>27</sup> In addition, on December 23, 2020 the JFTC and METI jointly issued proposed Guidelines regarding Business Collaboration with Startups and sought public comments until January 25, 2021.

On December 24, 2020, the JFTC, Secretariat of the Growth Strategy Council at the Cabinet, Small and Medium Enterprise

Agency and the Ministry of Health, Labour and Welfare jointly issued proposed "Guidelines re: Creating Safe Working Environments for Freelancers." They sought public comments by January 25, 2021.

On December 24, 2020, the Competition Policy Research Center ("CPRC") of the JFTC announced a list of proposed issues to be discussed at the Study Group on Competition Policy for the Data Market ("Study Group"), and asks for public comments by March 12, 2021 (the due date was originally set as January 15, 2021, but was extended). The Study Group was established on November 13, 2020 to discuss measures to stimulate competition more actively in data driven businesses from the perspective of competition policy. In the rapidly changing digital age, competition is shifting from "cyberspace," where online platform-type businesses provide services, to a so-called "Second Stage" where businesses are expected to compete in the "fusion of cyber and physical," using data analyzed in cyberspace to enhance businesses in the physical space, such as automated driving, medical and nursing care, and agriculture.<sup>28</sup>

## V. STRENGTHENING JFTC ORGANIZATION

On April 1, 2020, the JFTC established a new office at the Economic Affairs Bureau; the Office of Policy Planning and Research for Digital Markets. It conducts large-scale, comprehensive and thorough surveys of the digital market, further promotes understanding of the reality of transactions in the digital market, and collects a wide range of information on the digital market with the cooperation of external experts.<sup>29</sup> In addition, a Senior Investigator in charge of digital platforms was added.<sup>30</sup>

22 The JFTC press release on April 28, 2020 (tentative English translation) is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2020/April/200428.html>; one-page summary (tentative English translation) is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2020/April/2004281Sheet.pdf>; 12-page summary (tentative English translation) is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2020/April/20042812Sheets.pdf>; the report (tentative English translation) is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2020/April/20092901.pdf>.

23 Summary (tentative English translation) is available at [https://www.kantei.go.jp/jp/singi/digitalmarket/pdf\\_e/documents\\_200616-1.pdf](https://www.kantei.go.jp/jp/singi/digitalmarket/pdf_e/documents_200616-1.pdf).

24 Summary (tentative English translation) is available at [https://www.kantei.go.jp/jp/singi/digitalmarket/pdf\\_e/documents\\_200616-2.pdf](https://www.kantei.go.jp/jp/singi/digitalmarket/pdf_e/documents_200616-2.pdf).

25 The JFTC press release on June 12, 2020 is available only in Japanese at <https://www.jftc.go.jp/houdou/pressrelease/2020/jun/200612.html>; report is available only in Japanese at [https://www.jftc.go.jp/houdou/pressrelease/2020/jun/200612\\_2.pdf](https://www.jftc.go.jp/houdou/pressrelease/2020/jun/200612_2.pdf).

26 The JFTC press release on June 30, 2020 is available only in Japanese at <https://www.jftc.go.jp/houdou/pressrelease/2020/jun/200630.html>; report is available only in Japanese at [https://www.jftc.go.jp/houdou/pressrelease/2020/jun/200630\\_2.pdf](https://www.jftc.go.jp/houdou/pressrelease/2020/jun/200630_2.pdf).

27 The JFTC press release on November 27, 2020 is available only in Japanese at <https://www.jftc.go.jp/houdou/pressrelease/2020/nov/201127pressrelease.html>; two-page summary in Japanese is available at [https://www.jftc.go.jp/houdou/pressrelease/2020/nov/201127pressrelease\\_3.pdf](https://www.jftc.go.jp/houdou/pressrelease/2020/nov/201127pressrelease_3.pdf); 18 page summary in Japanese is available at [https://www.jftc.go.jp/houdou/pressrelease/2020/nov/201127pressrelease\\_4.pdf](https://www.jftc.go.jp/houdou/pressrelease/2020/nov/201127pressrelease_4.pdf); report is available only in Japanese at [https://www.jftc.go.jp/houdou/pressrelease/2020/nov/201127pressrelease\\_2.pdf](https://www.jftc.go.jp/houdou/pressrelease/2020/nov/201127pressrelease_2.pdf).

28 The JFTC press release on November 13, 2020 is available only in Japanese at [https://www.jftc.go.jp/houdou/pressrelease/2020/nov/201113\\_2.html](https://www.jftc.go.jp/houdou/pressrelease/2020/nov/201113_2.html).

29 April 1, 2020 Briefing by the Secretary General of the JFTC is available only in Japanese at [https://www.jftc.go.jp/houdou/teirei/2020/apr\\_jun/kaikenkiroku200401.html](https://www.jftc.go.jp/houdou/teirei/2020/apr_jun/kaikenkiroku200401.html).

30 The JFTC press release on August 30, 2020 is available only in Japanese at <https://www.jftc.go.jp/houdou/pressrelease/2019/aug/190830yosanyoukyuu.html>.

## VI. PROSPECTIVE NEW DEVELOPMENTS IN 2021

As mentioned above, the DP Act became effective quite recently on February 1, 2021. The scope of digital platform businesses subject to the DP Act is currently limited to two types of businesses as mentioned above, which does not include digital advertisements. The JFTC and Digital Headquarters continue to conduct research on digital advertisements, and plan to issue a final report respectively before spring 2021. In addition, the Study at the CPRC/JFTC is expected to publish the results of their discussion on competition policy for the data market. ■

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