

Issues to address in coming months

On October 4, “Digital Market Competition Council” determined to address the **five issues** in coming months.

Amendments to Guidelines to Application of the Antimonopoly Act concerning Review of Business Combination

Revision of the Act on the Protection of Personal Information

Consideration of a Bill on improving transparency of transactions of digital platform operators

Competition Assessment on digital markets
- Digital Advertising Market

Guidelines concerning Abuse of a Superior Bargaining Position in transactions between digital platform operators and consumers

Upgrading rules for digital markets (Digital Market Competition Council (Oct. 4))

1. Amendments to Guidelines to Application of the Antimonopoly Act concerning Review of Business Combination

- In digital markets, **concentration of data** may possibly **lead to restraint of competition**, even by the **acquisition of a company with small market shares**.
- Currently, **way of thinking has not been clarified** regarding business combination review involving **the features of digital service**.
 - **Market Delineation**: it is judged by the degree to which a user substitutes product Y for X by an increase in **price**.
 - Way of thinking is unclear where **free goods** and services are provided, or where services constitute **multi-sided markets**.
 - **Competition restraint**: whether there will be competitive pressure after the business combination is judged from the **market shares** and other elements.
 - Elements of consideration are unclear, in case of an acquisition of a venture business, holding valuable data but having small amount of sales.
 - **Criteria for notification requirement**: Whether the **domestic total sales** exceed a certain extent
(however, even if an acquisition is not subject to notification, the JFTC can review it.)
 - It is unclear whether the JFTC will review a business combination, in case that an acquisition is not subject to notification.

Upgrading rules for digital markets (Digital Market Competition Council (Oct. 4))

1. Amendments to Guidelines to Application of the Antimonopoly Act concerning Review of Business Combination (Continued)

○ Direction of revision

- Market delineation: clarifying the way of thinking, regarding where **free goods and services** are provided, or where services constitute **multi-sided markets**.
- Competition restraint: clarifying the way of thinking, regarding potential for competition restraint through **network effects**, analysis on the **elimination of the possibility of new entry** and **evaluation methods on how competition will be affected by the data accumulation**.
- Addressing cases not subject to notification requirement: clarifying the criteria that the **JFTC reviews** business combinations not subject to notification requirement, (i.e. **acquisition price exceeds 40 billion yen** and other conditions are met), as well as clarifying that parties to such business combinations are **advised to consult** with the JFTC.

- The JFTC started public comments procedure on the revision of the guidelines on Oct. 4 and will reach **conclusions by the end of this year**, and will revise the guidelines, etc.

2. Consideration of a Bill on improving transparency of transactions of digital platform operators

- Digital platform operators exponentially increase the possibility for small and medium sized companies as well as venture businesses to have access to markets.
 - On the other hand, there is a **concern** that problems arise in **transactions between digital platform operators and business users** (ex **online malls**), such as;
 - (a) unilateral imposition of contract terms and rules,
 - (b) imposition of services and excessive cost burden, and
 - (c) excessive restriction of access to data.
 - As a **rule respecting autonomy** as much as possible in a manner that does not impede innovation while corresponding to a concern that **reality of transactions become opaque**, "bill on improving transparency of transactions of digital platform operators" (tentatively called) will be submitted to the next ordinary session of the Diet.
- <Reference> EU established the Regulation to require transparency of transactions mainly for online malls and application markets. (effective next summer)

2. Consideration of a Bill on improving transparency of transactions of digital platform operators (continued)

○ Direction of consideration

- Target: the large-scale online malls and application markets where many problems have been pointed out in some surveys
- Rules regarding information disclosure, etc.
 - (1) Disclosure of transaction conditions to business users
(Examples) reasons for rejection of transactions, main elements which decides display sequence, cases and conditions of giving preferences to their own products, and possibility of access to data
 - (2) Regular reports and publication of operational guidelines and operational situation, and implementation of monitoring and review
 - (3) As well as the above, should certain compliance items be included?
(It should be decided based on the result of the survey conducted by the JFTC (to be announced))
- Administrative measures: recommendation, improvement order, request for the JFTC to enforce the Antimonopoly Act where a case has a high possibility of violating the Act.
- Providing authority to conduct fact-finding surveys on digital platform operators in general to address issues in a faster way.

3. Guidelines concerning Abuse of a Superior Bargaining Position in transactions between digital platform operators and consumers

- There is an increasing concern that digital platform operators acquire and use consumers' personal information unduly.
- While the JFTC cases on abuse of a superior bargaining position have been concerned with BtoB to date, it was unclear how the prohibition on the abuse is applied to BtoC transactions.
- So, the JFTC is to publish the guidelines concerning abuse of a superior bargaining position under the Antimonopoly Act on the transactions between digital platform operators and consumers by the end of this year.
- In doing so, it would give consideration on;
 - whether categories of action regarding abuse of a superior bargaining position are clearly described,
 - whether these guidelines do not wither firms' proper utilization of data.

4. Revision of the Act on the Protection of Personal Information

- From the perspective of
 - an **increasing concern** about the **handling of personal information**,
 - need to strike a **balance** between **protection and use of personal information**,
 - ensuring of **equal footing** between **domestic and overseas business operators**,

review of the Act on the Protection of Personal Information will be finalized by the end of this year. The amendment of the Act will then be submitted to the next ordinary session of the Diet.
- **Direction of consideration**
 - Considering the way of **expanding personal rights**, with regard to request to business operators, etc. to **delete or cease the use of personal information**.
(Currently, it is limited to the case of utilizing personal information for unintended purposes, as well as to the case of acquiring it by wrongful means.)
 - Considering **more flexible way to utilize personal data** from the perspective of promoting innovation.(The necessity of **intermediate disciplinary rule** between personal information and anonymous processing information)
(Currently, only the anonymous processing information system is prescribed which requires strict processing.)
 - Considering the **extraterritorial application** of law enforcement and enforcement methods **to foreign business operators** are considered.
(Currently, "collection of reports and on-site inspection" and "order" to foreign business operators are not prescribed.)

5. Competition Assessment on digital markets

- Surveys have been already conducted in online malls and application markets, with attention paid to issues on BtoB transactions.
- In **selecting the digital markets** where we conduct competition assessment in the future, should we have the following viewpoint?
 - (1) digital markets which have **significant impact**
 - (2) digital markets where there is a **widespread social concerns**
- From the above perspectives, how about selecting digital advertising market (**including search and SNS, etc.** that are related to this market) to be evaluated, taking into account concerns about the acquisition and use of personal information, etc., as well as concerns about the adverse effect on competition by oligopolization which concentration of data gives rise to.

<Reference> Competition agencies are increasingly monitoring digital advertising market.

- European Commission: Google (AdSense) was imposed a fine of 190 billion yen in terms of prohibiting ad placement of competitors (March 2019) (pending)
- UK CMA: market study on the digital advertising market started. (July 2019)
- US Federal Trade Commission: Investigation of Facebook started. (July 2019)
- US Department of Justice: Investigation of Google started. (August 2019)