

JFTC issues draft guidance on platform abuse of consumer data

Charles McConnell
30 August 2019



Digital platforms have a superior bargaining position over consumers if the use of their services requires that consumers provide their data and accept any negative consequences, Japan's antitrust watchdog has said.

Japan's Fair-Trade Commission issued draft guidelines yesterday on the abuse of a superior bargaining position as it relates to transactions between digital platform operators and consumers who provide their data.

"A digital platform operator has a superior bargaining position over consumers who provide personal information ... when the consumer, even though suffering detrimental treatment from the digital platform operator, is compelled to accept this treatment in order to use the

services provided by the digital platform operator,” the JFTC wrote in an English-language summary of the guidelines.

The JFTC has prioritised the digital economy recently. The competition authority established a study group on competition and data that published a report in 2017 outlining basic principles for how the Antimonopoly Act may apply to competition harms from data, and has conducted a market study on competition and digital platforms.

At GCR Live Singapore in March, the agency’s director of international affairs Kazuhiro Hara said it was considering whether the collection of data from consumers is an abuse of dominance or superior bargaining position. Reports surfaced last month that the JFTC was set to issue guidelines that said the non-consensual use of consumer data constitutes an abuse.

Historically, the JFTC applied the competition law’s prohibition on abuse of superior bargaining position only to business-to-business transactions. To cover the collection of personal data from consumers, the JFTC said in an English translation of the draft guidelines that personal information “is used in the digital platform operator’s businesses and thus has economic value.”

“Therefore, when it is found that consumers provide personal information, etc, in exchange for the use of the services provided by a digital platform operator, then such consumers obviously fall within the definition of a ‘counterparty (in continuous transactions)’ of the digital platform operator,” the agency wrote.

In the summary, the competition watchdog yesterday gave four specific examples of when a platform’s conduct will constitute an abuse of its superior bargaining position. Other conduct that disadvantages consumers might also violate the Antimonopoly Act, the JFTC said.

Platforms in a superior bargaining position that acquire personal information without telling consumers why it is being collected will risk running afoul of the country’s competition rules, the JFTC said.

The same will hold true if such platforms acquire or use personal information “beyond the scope necessary to achieve the purpose of use”, the JFTC said. As an example, the watchdog pointed to platforms that provide consumers’ data to third parties without first obtaining consent.

Another way that the platforms may violate competition law is by acquiring and using personal information without taking the necessary and appropriate precautions for using and managing that data.

And finally, a platform with a superior bargaining position that forces “consumers in continuous use of services to provide [economically valuable] personal information ... in addition to the compensation provided in exchange for the use of services,” will violate the country’s antitrust law, the JFTC said.

Reactions

Kentaro Hirayama at Hirayama Law Offices in Tokyo said that the new guidance is similar to but not exactly the same as the EU's regulations against the exploitative abuse of a dominant position, "because the Japanese 'superiority' regulation does not require dominance".

"The 'abuse of superior position' regulation does not require dominance or market power and only looks at superiority between two parties of each transaction," Hirayama explained. The guidelines make it clear that "the key factor would be 'necessity to transact'", he added, noting that the guidance marks the first time that the JFTC has submitted in writing that the "existence of market power would generally mean an existence of superiority."

Hirayama predicts that the new guidance "will likely pave the way to coordinated and simultaneous investigations" by Japan's antitrust watchdog and the European Commission's Directorate-General for Competition – as well as the authorities in EU member states – on global platform operators.

He noted that the JFTC has traditionally applied the law only to business-to-business transactions. But the watchdog has made it clear with its draft guidance that it will also enforce against violations regarding business-to-consumer transactions, as Germany's Federal Cartel Office has against Facebook – a decision that a court suspended this week, however.

The new guidance is in line with the government's study on platform business, Hirayama said, noting that the JFTC, the Ministry of Communications and Internal Affairs, the Ministry of Economy Trade and Industry and an expert panel convened by those three have already published a joint report.

There will be an overlap of enforcement, given that the Personal Information Protection Commission of Japan has already been regulating abusive conduct regarding personal information, Hirayama pointed out.

One issue not covered by the JFTC in its guidelines is the calculation of administrative fines, which must be calculated based on the sales between the superior party and any counter parties that have been impacted by the abusive conduct, Hirayama noted.

The JFTC may not be able to impose any fines on platforms that do not exchange money for the consumers' provision of their personal information, he said. Further, the burden of analysing the "sales" data might be high, Hirayama suggested, as the JFTC may have to go through the transactions of millions of consumers to determine who has been affected by abusive behaviour.

Baker McKenzie partner Akira Inoue in Tokyo said the "long-awaited draft guidelines clarify the factual circumstances under which collection of personal data will be regarded as an abuse of superior bargaining position and subject to an administrative fine."

Interested parties have until 30 September to submit comments on the draft guidance, which will likely be finalised and published before the end of this year. The JFTC also is soliciting information more generally from businesses and consumers about their use of digital platforms.