Interaction Between Competition Law and Information Law in Japan

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Introduction

Information law and competition law have received much attention in the context of the discussion of the platform business. In Japan, the Anti-Monopoly Law (Act No. 54 of 1947, AMA), which regulates anti-competitive conduct and aims to promote free and fair competition, has been attracting attention as a tool for ensuring the fairness of the use of personal and industrial information.

The Use of Data by Online Platforms

Data "Collection"

There are concerns about acquiring and utilizing personal information by platforms such as social networking services and Internet search services, whose business model is to provide services to consumers free of charge in exchange for acquiring or utilizing their personal information. The Japan Fair Trade Commission (JFTC) issued Guidelines on Abuse of Superior Bargaining Position in Transactions between Online platform Operators and Consumers Who Provide Personal Information under the AMA on December 17, 2019 (hereinafter referred to as Superior Position on Consumers Guidelines).

The acquisition and utilization of personal information by online platforms are subject to regulation by Article 2(9)(v) (prohibition of abuse of dominant position) of the law, which is also subject to regulation by the Personal Information Protection Law. In addition, the acquisition and use of information that is *not* personal information are also regulated by the AMA, as the AMA covers collection and handling of non-personal data and personal data. There is no limitation in this regard.

The AMA seeks to promote fair and free competition, and it is enforced from a different perspective than the Personal Information Protection Act. The Superior Position on Consumers Guidelines suggests that a superior position is recognized, for example, when an online platform effectively influences the quality or price of its service. In addition, the scope of the regulation of abuse of a superior position is limited by the superior position requirement, which is not found in the Personal Data Protection Law.

Refusal to Data "Access"

The data that a platform obtains from users and holds may be essential for other operators to develop and provide services. For example, a hotel or a restaurant may post information on multiple reservation platforms about available rooms and seats. In such a case, the business needs to avoid double-booking, but the management of reservations (and cancellations) is quite burdensome for the firm. Reservation management agency services, therefore, have become widely used.

It is essential for reservation management service providers to have real-time access to reservation and cancellation information on various reservation sites. However, reservation information is collected and held by reservation site operators, who accept users' reservations. The operators of these reservation sites invest large sums of money to ensure security against information leakage.

From the perspective of competition law, there is a debate as to whether there are cases in which reservation site operators should be obliged to provide data to reservation management service providers. The issue here is who is the owner of the information. Reservation management agencies appear to be legitimately allowed by hotels and restaurants to manage information that hotels or restaurants *own*, while reservation management service providers' use of information may be undue "free-ride" on the data that

reservation site operators *own*. Viewed from another perspective, consumers may not want any companies to use their reservation information because it is their *own* information.

From an information law perspective, the European GDPR (General Data Protection Regulation) guarantees individuals the right to data portability, while Japan's Personal Information Protection Act does not have a corresponding concept yet. Establishing data portability rights would likely facilitate data distribution and enable data transactions, thereby developing a foundation and preconditions for the more straightforward application of competition law.

Data "Acquisition"

Online platforms are said to be striving to collect data, and one way to do so is to acquire the companies that own the data. However, such acquisitions would raise a concern that allowing the acquisition of companies for the purpose of data acquisition may lead to the acquisition of a dominant position.

In addition, if a company unilaterally changes, to the disadvantage of consumers, the terms of an online platform's service when integrating the two services of the two companies, this would likely be seen as a violation of the purpose of the Personal Information Protection Act; such a practice would also be viewed as problematic from the perspective of competition law. This would be regarded as a decrease in the quality of service and would therefore cast doubt on the legitimacy of the acquisition.

The JFTC requires the parties to submit a notification to the JFTC to examine large-scale corporate acquisitions that exceed specific criteria. However, in practice, it may not be easy for the JFTC to conduct a detailed assessment of the potential impact of acquisitions.

Transparency of the Algorithm

Japan's government conducted a study on regulation of platforms, and the study resulted in promulgating the Act on Enhancing Transparency and Fairness of Online platforms (promulgated on June 3, 2020). The Act aims at improving the transparency and fairness of transactions in light of concerns that online platforms may not sufficiently indicate the reasons for changing their terms and conditions, as well as criticisms that they do not adequately respond to users' requests and complaints.

The government designated five "Online Platform Providers" (hereafter referred to as Specified Digital PFs), i.e. Amazon, Google, Apple and two domestic platform operators, and required these Specified Digital PFs to disclose their contracts' terms and conditions and notify the counterparties of transactions in advance of any changes. As an illustrative example, the order of products on websites is vital for users to find the most suitable products quickly through a simple search. The Act, therefore, requires the Specified Digital PFs to disclose the significant criterion used to determine the order of listing. That said, since online platform operators actively compete to determine the most appropriate order of products by analyzing consumers' order history and other data, the Act gave up requiring full disclosure of the algorithms in order not to harm innovation.

"Fairness" in Japan's Competition Law

As mentioned above, the fairness of competition is an essential principle of the AMA. However, excessive enforcement of antitrust laws may lead to the excessive stifling of innovation and may also harm the purpose of the Personal Information Protection Law. Therefore, it will be critically important for businesses, courts and the JFTC to reach a common understanding of the definition of fairness through thorough discussions via analysis of specific cases.

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