

Unclassified

English - Or. English

24 May 2023

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Algorithmic competition – Note by Japan

14 June 2023

This document reproduces a written contribution from Japan submitted for Item 5 of the 140th OECD Competition Committee meeting on 14-16 June 2023.

More documents related to this discussion can be found at
<https://www.oecd.org/competition/algorithmic-competition.htm>

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1. Introduction

1. With regard to whether or not the setting or operation of an algorithm violates the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 1947; hereinafter referred to as the “Antimonopoly Act”), in March 2020, the Japan Fair Trade Commission (hereinafter referred to as the “JFTC”) published a report of a market survey on restaurant portals (hereinafter referred to as the “Report”)¹, which pointed out that such act by restaurant portals may violate the Antimonopoly Act.
2. Subsequently, a restaurant operator whose restaurants are listed on a restaurant portal filed a civil suit (hereinafter referred to as the “Case”) in May 2020, alleging that the setting or operation of an algorithm by the portal operator violated the Antimonopoly Act. In the course of the trial of the Case, the JFTC submitted its opinion (hereinafter referred to as the “Opinion”)² to the court. In 2022, the court held that the act violated the Antimonopoly Act as an abuse of superior bargaining position.
3. This note first introduces the contents of the Report and then, based on the Opinion and the facts known publicly, gives the summary and notable points of the Case.

2. Introduction of the Report

4. As a general policy, the JFTC conducts a market survey on the state of business activities in a specific field from the perspective of the Antimonopoly Act or competition policy and publicizes the results as a report, and if any problematic trade practices are observed, it encourages enterprises to make voluntary improvements in the report.
5. In light of the facts that a lot of consumers use restaurant portals when searching for restaurants, that it is getting more important for restaurants to do business with restaurant portals, and that they are serving as a platform to connect consumers with restaurants and the influence is growing, the Report was prepared and published based on the results of a market survey conducted with the aim of ascertaining whether there are any problems such as possible violation of the Antimonopoly Act or undesirable practices under competition policy with regard to restaurant portals.
6. The Report points out that if, for example, a restaurant portal in an influential position in the market arbitrarily sets or operates rules (algorithms) without reasonable grounds and thereby treats a specific restaurant differently from other restaurants, such as by lowering the rating (score) of the restaurant, and such different treatment causes substantial competitive disadvantage to a specific restaurant, directly and materially affects its competitive function, and adversely affects the fair competition among restaurants, it could constitute a violation of the Antimonopoly Act as discriminatory treatment.
7. The Report also points out that, if a restaurant portal in a superior bargaining position to a restaurant, without justifiable grounds, sets or operates a rule (algorithm) that goes beyond the normal rules (algorithm) and applies only to a specific restaurant, lowering

¹ <https://www.jftc.go.jp/houdou/pressrelease/2020/mar/200318.html> (Japanese)

² JFTC’s Decisions and Orders Vol. 68, 271 (Japanese)

the rating (score) of the restaurant, thereby disadvantaging the restaurant unjustly in light of normal business practices, e.g. by causing the restaurant to change its contract plan to one that is favorable for the restaurant portal, it could constitute a violation of the Antimonopoly Act as an abuse of superior bargaining position.

8. As stated in 1 above, the Report was published in March 2020, followed by the filing of the Case in May 2020. According to a news report, the president of the plaintiff in the Case said that they would not have filed the lawsuit if the JFTC had not made the Report public³.

3. Outline of the Case

9. The defendant operates a Japanese restaurant portal (hereinafter referred to as the “Website”). The Website, listing restaurant names, locations, menus, reviews and ratings, is used by consumers to select restaurants and known as one of the most influential restaurant portals in Japanese⁴.

10. The plaintiff runs Korean restaurants in Japan that are listed in the Website.

11. Restaurants listed in the Website consist of member restaurants which have a contract with the defendant and non-members which don’t. Member restaurants are further divided into paid members with payment obligation and free members without it. All of plaintiff’s restaurants are paid members of the defendant.

12. Alleging that, on or around May 21, 2019, the defendant set or operated an algorithm (hereinafter referred to as the “Algorithm”) to revise down the ratings of chain restaurants just on the basis that they are chains in relation to the calculation method of ratings given to each restaurant in the Website, the plaintiff filed the civil lawsuit with Tokyo District Court (hereinafter referred to as “the Court”) on May 22, 2020, seeking an injunction against the operation of the Algorithm based on Article 24 of the Antimonopoly Act⁵ and compensation for damages based on the Civil Code, on the grounds that such act constituted discriminatory treatment or abuse of superior bargaining position, which are types of unfair trade practices prohibited under the Antimonopoly Act.

13. In the course of the trial, the Court sought an opinion from the JFTC based on Article 79, paragraph 2 of the Antimonopoly Act⁶, and the JFTC submitted the Opinion to the Court on September 2021.

³ <https://diamond.jp/articles/-/312183?page=2> (Japanese)

⁴ According to the Website, as of October 2022, it was a restaurant portal with the largest number of restaurants listed.

⁵ Article 24 of the Antimonopoly Act provides that a person whose interests are infringed upon or likely to be infringed upon by an unfair trade practice and who is thereby suffering or likely to suffer extreme damage is entitled to seek the suspension or prevention of such infringements. For an overview of this system and the related information, see Japan's contribution paper on “Relationship Between Public and Private Antitrust Enforcement” submitted for the WP3 on June 2015. (https://www.jftc.go.jp/en/int_relations/oced_files/PUBLICANDPRIVATE.pdf)

⁶ Article 79, paragraph 2 of the Antimonopoly Act stipulates that the court may ask for the opinion of the JFTC with respect to necessary matters including the application of the Antimonopoly Act in the case concerned.

14. The Court delivered a judgement⁷ on June 16, 2022, granting a portion of the damages sought by the plaintiff⁸. It held that the defendant's act falls under the abuse of superior bargaining position and violates the Antimonopoly Act⁹. The defendant has appealed to the Tokyo High Court¹⁰, and the appellate court judgement has not yet been issued at the time of writing.

4. Outline of the Opinion

15. The points of the Opinion concerning abuse of superior bargaining position are as follows¹¹.

4.1. Statutory Provisions

16. Article 19 of the Antimonopoly Act stipulates that an enterprise must not employ an unfair trade practice, which is defined under Article 2, Paragraph 9 of the Antimonopoly Act, as an act “falling under any of the following items: ... (v) engaging in any act specified in one of the following by making use of one's superior bargaining position over the counterparty unjustly, in light of normal business practices[,]” and the item (v) above cites as one of the specific types of the conduct, among others, “(c) establishing or changing trade terms or executing transactions in a way disadvantageous to the counterparty[.]”

17. The act stipulated in Article 2(9)(v) is generally called “abuse of superior bargaining position”.

4.2. Reasons why Abuse of Superior Bargaining Position is regulated

18. Abuse of superior bargaining position is regulated by the Antimonopoly Act because such conduct would impede transactions based on a free and independent decision of the transacting party, harming the basis of free competition, and put the transacting party in a disadvantageous competitive position against its competitors, while putting the party having superior bargaining position in an advantageous competitive position against its competitors, and such conduct poses the risk of impeding fair competition¹².

4.3. Interpretation of Legal Requirements

19. Legal requirements of abuse of superior bargaining position are as follows:

1. “by making use of one's superior bargaining position over the other party,”

⁷ <https://corporate.kakaku.com/press/release/20220616> (Japanese)

⁸ The Court dismissed other claims, including a request for an injunction.

⁹ For example, <https://business.nikkei.com/atcl/gen/19/00131/061600030/> (Japanese)

¹⁰ <https://corporate.kakaku.com/press/release/20220616b> (Japanese)

¹¹ Some explanations have been supplemented and the order of explanations has been changed in drafting this contribution paper.

¹² A similar explanation is given in Section 1 of Chapter I of the JFTC's Guidelines on Abuse of Superior Bargaining Position (2010). https://www.jftc.go.jp/en/legislation_gls/imonopoly_guidelines_files/101130GL.pdf

2. “unjustly in light of normal business practices,” and
 3. Engaging an act falling under any items of Article 2(9)(v).
20. Regarding (iii) above, while there are multiple categories of acts falling under Article 2(9)(v), the acts at issue in this case is “establishing or changing trade terms or executing transactions in a way disadvantageous to the counterparty.” (Article 2(9)(v)(c))

4.3.1. “by making use of one’s superior bargaining position over the other party”

21. In order for a firm (Firm A) to have a superior bargaining position over the other party (Firm B), the Firm A does not need to have a dominant position in the market nor an absolutely superior position equivalent thereto; it is sufficient if the Firm A has a relatively superior position to the Firm B. “Firm A has a superior bargaining position to the Firm B” refers to a case in which the Firm B has no option but to accept a substantially disadvantageous request etc. by the Firm A because difficulty in continuing business with the Firm A would lead to a serious problem in sustaining the ongoing business of Firm B¹³.

22. In determining the existence of superior bargaining position,
- the degree of dependence by Firm B on the transactions with Firm A,
 - position of Firm A in the market,
 - the possibility of Firm B switching its business partner to a firm other than Firm A, and
 - other concrete facts indicating the necessity and importance for Firm B to deal with Firm A are comprehensively considered.

23. In the following cases, as it becomes more necessary for the Firm B to deal with the Firm A, difficulty in continuing business with the Firm A is likely to be a serious problem in sustaining the ongoing business of Firm B.

- The degree of dependence by Firm B on the transactions with Firm A is high.
- Firm A’s market share is large or has a high ranking.
- It is difficult for Firm B to start or increase transactions with enterprises other than Firm A.
- Investments has been made by Firm B in association with the transactions with Firm A.
- Firm B’s transaction value with Firm A is high
- Firm A’s business scale is expanding
- Transacting with Firm A improves the credibility of goods or services handled by Firm B.
- Firm A’s business scale is substantially larger than that of Firm B

24. In cases where the Firm A is found to have a superior bargaining position to the Firm B, if the Firm A engages in a transaction while unjustly disadvantaging the Firm B, such act is usually recognized as an act “making use” of the superior bargaining position.

¹³ Section 1 of Chapter II of the JFTC’s Guidelines on Abuse of Superior Bargaining Position (supra note 12).

4.3.2. “Unjustly in Light of Normal Business Practices”

25. “Unjustly in Light of Normal Business Practices” is synonymous with “the risk of impeding fair competition” (4.2 above), and means that the basis of free competition, in which transactions should be conducted at the free and independent decision of transacting parties, is harmed.

26. In determining whether an act is carried out “unjustly in light of normal business practices,” it should be considered whether such act has the character of suppressing the counterparties' independence against their will.

27. In determining whether or not there is the “risk of impeding fair competition,” factors to be considered include, among others, the degree of disadvantage that the act causes to the counterparties and the extensiveness of the act. For example, the following factors are taken into consideration: (a) whether the actor organizationally disadvantages a large number of counterparties, or (b) when just a limited number of counterparties are disadvantaged, whether the degree of disadvantage is high or such act, if left unchallenged, is likely to spread to others.

28. If an act poses a risk of impeding fair competition, it is not justified even if the actor had a business management need or rationale for doing so.

29. “[N]ormal business practices” are those endorsed from the viewpoint of maintaining and promoting fair competition, and an act is not immediately justified merely because it complies with actual business practices in existence.

4.3.3. “Establishing or changing trade terms or executing transactions in a way disadvantageous to the counterparty”

30. “Executing transactions” refers to the various types of treatment that are not trade terms but are actually carried out in connection with the transaction. “Disadvantage” generally includes (a) disadvantage that cannot be calculated in advance to the counterparty and (b) disadvantage that exceed the scope as deemed reasonable considering relevant factors including the direct benefits to be acquired by the transacting party. Of these, (a) occurs when the actor breaches the trade terms agreed between the parties after the contract is concluded, or when the parties do not sufficiently discuss the terms of the disadvantageous burden beforehand and therefore the terms are not clear to the counterparty.

4.4. Opinion as to whether the Defendant’s Act Meets the Requirements

4.4.1. Existence of Superior Bargaining Position

31. In this case, among the above 4.3.1 (a) - (d), (a) (the degree of dependence by Firm B on the transactions with Firm A), (b) (position of Firm A in the market), and (c) (the possibility of Firm B switching its business partner to a firm other than Firm A) seem to have been asserted to some extent by both parties, but (d) (other concrete facts indicating the necessity and importance for Firm B to deal with Firm A) do not seem to have been explicitly asserted. In this regard, those factors including the plaintiff’s transaction value with the defendant, the defendant's growth potential in the future, securing the plaintiff’s credibility by doing business with the defendant, and the difference in the business scale between the parties should be taken into consideration in determining whether the defendant has a superior bargaining position.

4.4.2. Existence of “the risk of impeding fair competition”

32. The plaintiff alleges that setting or operating the Algorithm is “an act of disadvantageous modification carried out secretly and unilaterally without letting chain restaurants know” and “harming the basis of free competition, in which transactions should be conducted based on the free and independent decision of the transacting restaurants regarding the acceptance or rejection of transactions and trade terms”. This plaintiff’s allegation is considered to be related to whether the setting or operation of the Algorithm has the character of suppressing the independence of the plaintiff against its will, and whether it would be disadvantage that cannot be calculated in advance to the plaintiff. As for the risk of impeding fair competition, as mentioned above, the degree of disadvantage that the act causes to the counterparties and the extensiveness of the act, among others, will be taken into consideration.

33. Therefore, in determining whether the setting or operation of the Algorithm has a “risk of impeding fair competition,” it is considered that, in addition to overall contents of algorithms used to calculate ratings and the status of their changes (including what factors are considered, how often the factors are reviewed or changed), it should be considered when and how the Algorithm is set up or operated for what range of restaurants (including whether or not discussed with restaurants in advance), whether it has a character of suppressing the independence of restaurants, and to what extent it disadvantages restaurants.

34. The Report points out that, if a restaurant portal in a superior bargaining position to a restaurant, without justifiable grounds, sets or operates a rule (algorithm) that goes beyond the normal rules (algorithm) and applies only to a specific restaurant, lowering the rating (score) of the restaurant, thereby disadvantaging the restaurant unjustly in light of normal business practices, e.g. by causing the restaurant to change its contract plan to one that is favorable for the restaurant portal, it could constitute a violation of the Antimonopoly Act as an abuse of superior bargaining position. In seeking the opinion on the Case, the Court asked the JFTC whether the phrase “e.g. by causing the restaurant to change its contract plan to one that is favorable for the restaurant portal” above even includes the meaning that the restaurant portal must directly benefit from the disadvantages of the restaurant. With regard to this point, the JFTC responded that the phrase did not include such meaning.

4.4.3. “establishing or changing trade terms or executing transactions in a way disadvantageous to the counterparty”

35. The defendant alleges that the ratings of the restaurant listed in the Website do not fall under the “trade terms” with restaurant members¹⁴, nor do it fall under the “executing transactions”, which are various types of treatment that are carried out in connection with transactions under the contract of restaurant members. As the basis for the allegation, the defendant points out that the ratings are also given to non-members that have no transactional relationship with the defendant, and that the defendant has made it clear that the ratings of restaurant do not rise or fall due to being restaurant members (paid members or free members) that have transactional relationship with the defendant.

36. Regarding this allegation, first, even if non-members were also given the ratings in the Website, this does not mean that, in relation to the plaintiff, the setting or operation of

¹⁴ As stated in 2 above, all of plaintiff’s restaurants are paid restaurant members of defendant.

the Algorithm by the defendant does not constitute a “trade terms or executing transactions.”

37. Second, according to the contract between the defendant and the restaurant members, free members can do “Profile Registration” to update their restaurant information in the Website, and paid members can additionally receive services such as “Access Up,” which places their restaurant higher in the standard search results.

38. Although the ratings of the restaurant in the Website are not covered by the contracts between the defendant and paid members or free members, restaurants are trying to attract more customers by becoming restaurant members and using services such as “Profile Registration” and “Access Up,” to raise their ratings, and to attract even more customers, in connection with transactions. For this reason, displaying the ratings falls under the “executing transactions”.

5. Conclusion

39. The Case is notable for its focus on whether the setting or operation of an algorithm by a digital platform operator violates the Antimonopoly Act. In conclusion, the court held that the defendant's actions violated the Antimonopoly Act.

40. The Case is also a good example of advocacy activities by the JFTC. First, according to the news report, the plaintiff stated that it would not have filed the Case if the JFTC had not published the Report. This can be evaluated that presenting problems in the Report have led to private enforcement of the Antimonopoly Act. Second, the JFTC, upon the request of the court, submitted its opinion on the application of the Antimonopoly Act in the Case. This is an example of litigation advocacy by the competition authority.