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The Standard and the Burden of Proof in Competition Law Cases – Note by Japan

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1. Introduction

1. The Japan Fair Trade Commission (JFTC) has been addressing anticompetitive conducts of digital platform operators within the framework of the Antimonopoly Act (AMA). However, as described in section 2.2 below, there have been challenges in the enforcement of the AMA, such as taking considerable amount of time for evidence-gathering to issue legal measures, including cease and desist orders against anticompetitive conducts that violate the AMA.
2. Therefore, the JFTC has decided to pursue a legislative solution for the smartphone software market. This approach is necessary to ensure a competitive environment and to actively address anticompetitive conduct in the market.
3. This contribution paper describes the evidence-gathering activities under the AMA against anticompetitive practices of digital platform operators, and then introduces the overview of the Act on Promotion of Competition for Specified Smartphone Software (also known as the Mobile Software Competition Act, or MSCA).

2. Enforcement of the existing AMA and its challenges

2.1. Types of violations of the AMA and applicable legal measures against such violations

4. The AMA is a law aimed at promoting fair and free competition in all market transactions (Article 1). It stipulates prohibitions of certain business conducts by enterprises, such as private monopolization (Paragraph 5 of Article 2 and Article 3), unreasonable restraint of trade (Paragraph 6 of Article 2 and Article 3) and unfair trade practices (Paragraph 9 of Article 2 and Article 19). Furthermore, measures such as cease and desist orders (Articles 7 and 20) and/or surcharge payment orders (Articles 7-2 and 7-9, and Articles 20-2 to 20-6) are taken against violations of the AMA.
5. In cases where an anticompetitive conduct of a digital platform operator falls under the category of private monopolization prescribed in Paragraph 5 of Article 2 and violates Article 3, or it falls under the category of unfair trade practices prescribed in Paragraph 9 of Article 2 and violates Article 19, it is possible for the JFTC to address such conducts by issuing cease and desist orders and surcharge payment orders. In addition, the JFTC has organized and made public its viewpoints regarding behaviors of mobile OS providers under the AMA including what specific conducts might violate the law, such as through conducting market studies and calculating their market shares to the extent possible.

2.2. Challenges in applying the AMA

6. However, in practice, there are challenges when identifying violations of the AMA and taking legal measures such as cease and desist orders, even if that case involves a conduct which could theoretically be classified as a violation. Particularly for establishing

legal requirements regarding effects on market competition (effect requirement¹), as described in the following, it takes a considerable amount of time to gather evidence.

- i. In the investigation of suspected violations of the AMA leading to the issuance of cease and desist orders and/or surcharge payment orders, it is necessary to ensure that the evidence can withstand any possible appeals litigation that may be filed after the order is issued. The JFTC is therefore required to implement detailed and comprehensive investigations, including thoroughly addressing possible counterarguments from the violators.
- ii. In cases where defining the relevant market is a prerequisite for establishing the effect requirement, for example, there can be several market definitions for mobile operating systems, which can require complex analyses where even experts may have differing opinions on the appropriate market definition. Moreover, it is necessary to define markets more rigorously than through market studies and provide enough evidence to leave no room for counterarguments.
- iii. Therefore, even if conducts can be identified as potentially problematic under the AMA based on market studies, conducting an investigation to issue cease and desist orders or surcharge payment orders as administrative measures can be extremely time-consuming. In practice, there has been a case where investigation period was prolonged, but it did not result in finding a violation and issuing a cease and desist order, but instead, measures to resolve the issue were implemented to promptly address competition concerns, closing the investigation.
- iv. The limitations of addressing issues by ex-post investigation under traditional competition law for legal measures including cease and desist orders are becoming a common understanding among competition authorities. Particularly, the ex-ante regulations on certain types of conducts under the EU's Digital Markets Act have been very instructive for the JFTC in drafting the MSCA.

3. Legislative directions and considerations regarding the Act on Promotion of Competition for Specified Smartphone Software

3.1. Legislative direction

7. Through a market study that assessed the competitive landscape of the mobile ecosystem, it was confirmed that in the digital field, particularly within the smartphone software market where a robust ecosystem structure has been established, certain enterprises possess particularly strong influence due to market structure.

8. Based on these findings, the government decided to take the following legislative measures in order to improve the competitive environment in smartphone software markets, thereby realizing free competition among enterprises providing goods or services using smartphones;

- i. Prohibit specific enterprises from engaging in certain types of conducts that exclude other enterprises or suppress business activities of other enterprises (prohibited actions), and

¹ Effect requirements are categorized as "substantially restricting competition in a relevant market" for private monopolization, and "tending to impede fair competition" for unfair trade practices.

- ii. Oblige these specific enterprises to take certain types of measures which will have positive effects on competition (compliance measures).

3.2. 3.2. Legislative considerations

9. For enterprises which are subject to the regulations of the MSCA, certain legal requirements are established to evaluate their influence, such as the potential to adversely affect the market by excluding other enterprises. This framework aims to ensure regulatory predictability and legal stability by pre-designating those enterprises who meet the requirements as those subject to the MSCA.

10. The framework of the new regulations was designed in light of the following considerations.

- i. Since ex-post measures have challenges such as taking considerable amounts of time and human resources for investigations, based on market studies and enforcement cases by the JFTC, it is necessary to preemptively prohibit highly malicious acts that have the potential to restrict competition as defined under the AMA. This allows for these acts to be swiftly and comprehensively eradicated.
- ii. There is a necessity to actively seek to restore competition through obligations for certain enterprises to implement certain measures necessary to ensure fair and free competition among enterprises.
- iii. In principle, violations of prohibited actions will lead to legal measures such as cease and desist orders and/or surcharge payment orders in line with measures against violations of the AMA. For violations of compliance measures, given that it is difficult to definitively establish specific measures to be taken, the JFTC shall first issue a recommendation to the enterprise in question. In the case that the enterprise fails to comply with the recommendation, the JFTC will issue an order.
- iv. Given the characteristics of digital markets in which business environments change rapidly, it has been decided not only to establish certain prohibited actions and compliance measures, but also to impose regular reporting obligations on compliance status for the JFTC to identify problems in a timely manner.

4. Summary of the Mobile Software Competition Act

4.1. Overview

4.1.1. Purpose and definitions

11. The MSCA aims to promote fair and free competition in relation to specific software, thereby contributing to the improvement of people's lives and the wholesome development of the national economy (Article 1).

12. It also defines “mobile operating systems (OS),” “application stores,” “browsers,” and “search engines,” which are collectively defined as “Specified Software,” along with other necessary term definitions (Article 2).

4.1.2. Designation of providers subject to regulations

13. The JFTC will designate enterprises subject to the regulations of the MSCA (called Designated Providers), which conduct businesses that provide specific software at a certain scale having the capability of excluding or controlling the activities of other enterprises.

Providers of Specified Software which fall under a certain scale determined by a Cabinet Order² shall notify the JFTC (Article 3).

4.1.3. Obligations of Designated providers

14. The MSCA stipulates that Designated Providers are prohibited from engaging in certain types of activities which are typical violations of the AMA (Articles 5 to 9) and are also required to take certain types of measures necessary to ensure fair and free competition (Articles 10 to 13).

4.2. Prohibited actions (Articles 5 to 9)

4.2.1. Prohibition of unauthorized use of acquired data (Article 5)

15. Designated Providers of OS, application stores or browsers shall not use acquired data such as the usage information or specifications of other companies' applications, in order to provide their own applications competing with the other companies' applications.

4.2.2. Prohibition of unfair treatment against application providers (Article 6)

16. Designated Providers of OS or application stores shall not unjustly discriminate against, or unfairly treat application developers in transactions and usage conditions.

4.2.3. Prohibition of interference with providing application stores. (Item 1 of Article 7)

17. Designated Providers of OS shall not limit application stores to those provided by themselves. Additionally, they shall not prevent other enterprises from providing application stores or prevent smartphone users from using third party application stores. However, measures necessary to achieve the objectives of security, privacy, youth protection, etc., can be taken as long as it is difficult to achieve the objectives through other less competition-restricting measures. (So-called “justifiable measures.” The same applies to (iv) to (vii) below.

4.2.4. Prohibition of interference with features related to smartphone operation (Item 2 of Article 7)

18. Designated Providers of OS shall not prevent other application developers from using features controlled by the OS with the same level of performance as the one used by Designated Providers.

4.2.5. Prohibition of interference with using other billing systems (Item 1 of Article 8)

19. Designated Providers of application stores shall not prevent other application developers from using third party billing systems, for example, via imposing conditions prohibiting third party billing systems.

² e.g., According to the draft of the Cabinet Order published in October 2024, the scale is expected to be 40 million users in Japan (monthly average number of users of Specified Software on smartphones)

4.2.6. Prohibition of interference with transactions through web pages, etc. (Item 2 of Article 8)

20. Designated Providers of application stores shall not prevent other application developers from providing items, etc. through external web pages.

4.2.7. Prohibition of interference with the use of other browser engines (Item 3 of Article 8)

21. Designated Providers of browser engines shall not prevent other application developers from using other browser engines, for example, via conditions that only allow the usage of the Designated Provider's own browser engine.

4.2.8. Prohibition of mandatory labeling of methods of user confirmation (Item 4 of Article 8)

22. Designated Providers of application stores shall not impose the conditions of using the application store on displaying the user verification methods provided by the Designated Provider within the app.

4.2.9. Prohibited conducts by Designated Providers for search engines (Article 9)

23. Designated Providers of search engines shall not engage in any form of preferential treatment of their services over those of competitors in the display of search results without justifiable reason.

4.3. 4.3. Compliance measures (Articles 10 to 13)

4.3.1. Measures on disclosure of conditions for acquisition of data, etc. (data governance) (Article 10)

24. Designated Providers of OS, application stores or browsers shall take measures to disclose the conditions regarding their acquisition of data, including the usage status and specifications of applications of third parties.

4.3.2. Measures on transfer of acquired data (data portability) (Article 11)

25. Designated Provider of OS, application stores or browsers shall take necessary measures to smoothly transfer acquired data upon user request.

4.3.3. Measures on changes to default settings and display of the choice screens (Items 1 and 2 of Article 12)

26. Designated Providers of OS or browsers shall take necessary measures to make smartphone default settings simple to change and measures to contribute to users' choices such as displaying choice screens for default settings.

4.3.4. Measures on consent for additional installation and uninstallation (Item 1 of Article 12)

27. Designated Providers of OS shall take necessary measures to obtain consents from users when installing additional applications provided by the Designated Providers, and to make deletion of the application simple.

4.3.5. Measures on specification changes of Specified Software, etc. (disclosure obligations) (Article 13)

28. Designated Providers for OS, application stores or browsers shall take necessary measures such as ensuring a sufficient period, disclosing information, and setting up necessary internal structures to enable other enterprises to smoothly adapt to changes in the specifications of Specified Software.

4.4. Submission of compliance report (Article 14)

29. Designated providers shall prepare and submit annual reports to the JFTC, which will include information on the measures taken to comply with the provisions of 4.2 and 4.3 above. The JFTC shall disclose those reports after excluding any business secrets.

5. Conclusion

30. As outlined above, by establishing categorical prohibited actions and compliance measures, proving violations of each provision of the MSCA requires only that the conduct falls under such prohibited actions and compliance measures, rather than having to establish whether the conduct resulted in anti-competitive effects.

31. However, there is substantial judgment involved in determining whether suspected conducts fall under prohibited actions and compliance measures, and determining what justifiable measures are remain as operational issues. Efforts are currently underway to clarify these issues through subordinate regulations, such as the Cabinet Order described above, and guidelines.