

## Client Alert

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## Regulatory developments affecting digital markets in Japan

### Introduction

The Digital Market Competition Convention ("Competition Convention") and its associated working groups were established to facilitate competition and innovation in line with rapid changes in digital markets globally. In order to effectively implement competition policy in this area, the Japanese government has begun discussing digital market regulation. In this alert, we discuss the latest movements surrounding digital platformers, including a direction of a bill that would require greater transparency in transactions involving operators of digital platforms (tentatively named the Digital Platformer Transaction Transparency Bill) disclosed during the Competition Convention meeting held on 17 December 2019.

### Digital Platformer Transaction Transparency Bill

#### Background

The Japan Fair Trade Commission ("JFTC") issued a report on digital platform trade practices (ie, B-to-B transactions on online retail platforms and app stores) that highlighted various issues affecting platform operators and their users, including unilateral changes to contractual terms and conditions, a lack of transparency on reasons for refusing transactions and in the use of transaction data and unfair treatment of customer complaints. To address these issues, the Japanese government has been considering legislation to ensure that digital platforms are operated in a fair and transparent manner. A direction of the Digital Platformer Transaction Transparency Bill was disclosed and submitted to a public consultation process in December 2019 that will continue until 20 January 2020. The results of the public consultations will be taken into account in the final bill to be submitted to the Diet early next year.

#### What will be regulated?

Only a limited number of digital platforms called "Specified DPFs" will be subjected to regulation due to the heightened necessity of ensuring that these platforms are operated with transparency and fairness. More concretely, only large-scale online mall operators and app stores will be defined as Specified DPFs for the time being.

#### Overview of regulations

Specified DPFs will be required to disclose the terms and conditions of their contracts with users and to provide prior notice of revisions to these terms and conditions. They will also be required to take other measures, including the establishment of procedures and administrative organs in accordance with the policies promulgated by the relevant ministry. Specified DPFs will also be required to submit regular reports to the ministry on the status of their



implementation of the above measures which it will then use to review and assess their conduct.

In addition, further consideration is anticipated as to whether specific types of unjustifiable digital platform operator behavior (eg, refusal by an operator to sell products that compete with the operator's products, compelling platform users to use the operator's services, discriminatory and advantageous exhibition of the operator's products in search results, unilateral disadvantageous changes in the terms and conditions of a contract with a user to the significant detriment of the user's business operations) will be set out in the bill based on the results of the public consultations.

## Considerations

As mentioned above, only digital platform operators of a certain scale will be classified as Specified DPFs and subject to the regulations under the bill for the time being. However, platform operators falling within the Specified DPF category are expected to be subject to a significant compliance burden. The government will continue to consider whether and to what extent it is necessary to prohibit specific types of behavior under the bill as mentioned above. These prohibitions, if any, will be carefully written to avoid duplicating similar prohibitions under the Antimonopoly Act (ie, private monopolization and unfair trade practices).

Failure by a Specified DPF to comply with the disclosure and procedural/organizational requirements is expected to result in the imposition of administrative sanctions (eg, recommendations, public announcements, orders to take action). It remains unclear whether criminal sanctions will be introduced.

## **Abuse of superior bargaining position by digital platform operators over consumers**

### Background

Consumers provide personal data to digital platform operators when using the operators' services. Concern has been mounting that both the means by which digital platform operators obtain consumer data and the manner in which they use it constitute abuses of the operators' superior bargaining positions under the Antimonopoly Act. Abuse of superior bargaining position under the Antimonopoly Act has traditionally been found only in B-to-B transactions and it had been unclear whether this type of conduct is prohibited in B-to-C transactions.

The JFTC considered whether problematic conduct by digital platform operators vis-à-vis consumers constituted abuse of a superior bargaining position and, after a public consultation process, announced the Guidelines Concerning Abuse of Superior Bargaining Positions in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc. ("Guidelines") in December 2019.

### Superior bargaining position

Where a consumer has no choice but to accept terms and conditions offered by a digital platform operator that are disadvantageous to the consumer, the digital platform operator is considered to occupy a superior bargaining position. More specifically, a digital platform operator will be found to occupy a superior bargaining position where (i) no alternative platform is available that provides a service equivalent to the operator's; (ii) it is difficult for consumers to terminate use of a service provided by the operator; or (iii) the



operator has some discretion to unilaterally determine the terms and conditions of transactions, including the price, quality and quantity of goods or services.

### Abusive conduct

The Guidelines specify the following types of abusive conduct:

- (i) Unjustifiable acquisition of personal information, etc.
  - (a) Acquiring personal information without notifying consumers of the purpose of its use
  - (b) Acquiring personal information against consumers' wishes that exceeds the scope necessary to achieve the purpose of its use
  - (c) Acquiring personal information without taking necessary and appropriate precautions to ensure its safe management
  - (d) Causing consumers who use services continuously to provide other economic interests (eg, personal information) in addition to the consideration provided in exchange for the use of services
- (ii) Unjustifiable use of personal information, etc.
  - (a) Using personal information against consumers' wishes beyond the scope necessary to achieve the purpose of its use
  - (b) Using personal information without taking necessary and appropriate precautions to ensure its safe management

## Competitive assessment of the digital advertising market

### Establishment of the Digital Market Competition Headquarters

Regulations affecting platform operators are expected to extend to advertising displayed on platforms. The government included as part of its 2019 growth strategy the establishment of a specialized organization — the Digital Market Competition Headquarters — to conduct competitive assessments of digital markets as a means of more effectively monitoring the activities of the IT giants.

### Announcement of issues and public consultation process by the Digital Market Competition Headquarters

In accordance with the growth strategies outlined above, the Digital Market Competition Headquarters was established to consider rulemaking in digital markets. The issues listed below were among those the Digital Market Competition Headquarters announced further consideration in connection with the competitive assessment of the digital advertising market. As such, they were subjected to a public consultation process starting on 19 December 2019.

- (i) Structure of the digital advertising market: the dominant power of platform operators in the digital advertising market
- (ii) Transparency in the digital advertising market: potential for an absence of transparency / unjustifiable circumstances/conduct in transactions between platform operators and advertisers/media
- (iii) Concerns regarding potential anti-competitive conduct in the digital advertising market: concerns regarding anti-competitive conduct by



platform operators given the more oligopolistic structure of the digital advertising market

- (iv) Transparency in the acquisition and use of personal data: concerns surrounding targeted advertising, including the acquisition/use of personal data for targeted advertising

Public consultation on the above will continue until 31 January 2020 and will be followed by further surveys. After this process is completed, the government is expected to issue an interim report some time in the spring of 2020, after which it will draft competition policies for the digital advertisement market.

## Zero rating and network neutrality

### Network neutrality (net neutrality)

Net neutrality is a concept developed in the US which argues that internet service providers and the government should treat all data equally irrespective of content and platform. In Japan, the concept has recently been championed in connection with "zero rating," wherein telecommunication operators remove limitations on data traffic for SNS and VOD services. It is arguable that this collaboration between telecommunications system operators and service providers may impede fair competition by enabling the advantageous treatment of specific content providers, thereby undermining neutrality.

### Government action

To address these issues, the "Study Group on Network Neutrality" has been discussing the review of zero rating services by telecommunications system operators since February 2019 and has disclosed draft guidelines for the review.

Under the draft guidelines, telecommunications system operators are obligated to:

- (i) enhance telecommunications infrastructure to handle increased data traffic caused by zero rating services and maintain the quality of users' communications;
- (ii) provide users with information on data usage by services subject and not subject to zero rating in an easily understandable format;
- (iii) apply communication speed limits equally when they are triggered by a data traffic ceiling, regardless of whether a service is subject to zero rating; and
- (iv) impose bandwidth controls on heavy users and as a result of traffic congestion equally, regardless of whether a service is subject to zero rating.

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## Conclusion

The Japanese regulatory environment surrounding digital markets and platform operators has been rapidly evolving recently and regulatory circumstances are expected to change significantly going forward. These movements may require digital platform operators to change their existing business models. Platform operators should closely monitor future Japanese regulatory developments in this area.

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