神戸学院法学第49巻第１号（2020年10月）

〈講　演〉

On Regulating Huge IT

――Towards Ensuring Transparency and Fairness of Trading by IT-Platformers――*

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My name is Hiroaki Tanaka, and I am from the Faculty of Law at Kobe Gakuin University. My main academic subject is antitrust law, and I am conducting research that compares Japanese laws with German and EU laws. Today I will discuss the regulations for huge IT. This is because, in January 2019, an investigation of activities by huge IT was conducted by the Japan Fair Trade commission (hereafter referred to as the "JFTC"), it was recognized that some portions of those activities were not sufficient in terms of transparency and fairness, and there were also matters that possibly conflict with antitrust laws; therefore, the Japanese government began full-scale consideration of regulations. For the time being, a decision was made to formulate regulation requirements and regulation criteria based on the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (the Antimonopoly Law; hereafter referred to as "AML").

In this report I will focus on the initiatives to regulate huge IT by using the AML.

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* 本稿は，2019年11月８日に韓国光州市の朝鮮大学校法科大学で開催された韓中日三カ国国際シンポジウム「最近の法的争点」で行った講演原稿である。本シンポジウムを企画された同大学長金鍾九教授，および運営に当たられた同大学姜嫦臣教授に感謝申し上げたい。また，本講演は本学の岩田将幸教授，春日勉教授のご協力によるところが大きい。併せてお礼申し上げる。

1. Investigation of the actual situation of the transaction practices of digital platformers

Below, I will give an overview of portions of the actual situation of activities by huge IT that are shown by the aforementioned investigation by the JFTC, beginning with an investigation of the actual situation of the transaction practices of digital platformers（refer to https://www.jftc.go.jp/houdou/pressreleasr/2019/apr/190417.html）. The things that are subject to the questionnaire investigation are（i）businesses that operate online malls,（ii）businesses that operate application stores, and（iii）users（consumers）of digital platform services.

A result of the investigation was that many of both（i）and（ii）gave replies that there were “unilateral changes of terms”, and there were also many replies that there were “terms changes that had disadvantageous content”. Concerning screening of store openings and product submission for（i）, there were many replies expressing disapproval that there was “no explanation” and disapproval of an “unsatisfactory” explanation, and concerning application screening for（ii）, there were many replies expressing disapproval of the “unsatisfactory” explanation, such as, “The content of terms is vague”, and “Depending on the person in charge, there is wide variation in interpretation and consideration of the terms”.

For（i）, concerning selling prices of products or product lineup, a reply that “A request or instructions were received” was recognized to a certain degree, and although the grounds for that were that “There was an explanation”, there were many replies that “It was unsatisfactory”. On the other hand, there were many replies that there was nothing that was particularly “disadvantageous” as a result of not following the “request or instructions”.

For（ii）, there were also replies that, in the case of applying for an application that has functions that are similar to those of an application that the operation business itself provides as a condition for approving that application, they received a “request or instructions” to not allow functioning of a portion or all of the similar functions.

For（i）, there were many replies that the use charges paid to the operation

business “were decided unilaterally”. In addition, in cases in which the operation business made a request for unnecessary or irrational payment or a price increase, there were also many replies that even though “There was an explanation” about the grounds for that request, “It was unsatisfactory”. Concerning the reasons why there were other problems for money to be paid, there were many replies that “There was no leeway for negotiations, and it was decided unilaterally”, and that “The level of use charges is expensive compared to other business that operate online malls”. There were also many of the same replies for (ii).

Concerning the settlement method, there were many replies by both (i) and (ii) that “It was only possible to use the payment method or settlement method designated by the operation business or the settlement means provided by the operation business itself”.

For (i), among the replies that said there are problems with the display screens and search results of online malls, many gave the reasons that “The criteria for deciding the display position or the display method or the criteria for determining the ranking of search results are opaque”, or “In order to get an advantageous display position or method or have superior search results displayed, it is necessary to pay expenses to the business that operates the online mall, such as using services by the business that operates the online mall”.

Last for (iii), 47.7% replied that they “want digital platformers to stop using users’ personal information and data about use as they please”. In addition, concerning the question of what kind of personal information and data about use is being collected, 43.1% replied that they did not know. In addition, concerning the question of how such information is used, 51.3% replied, “I don’t really know” or “I don’t know”, and finally, concerning the question of who digital platformers are sharing such information with, 59.6% replied “I don’t really know” or “I don’t know”.

It can be said that this investigation clarified the fact that while users recognize digital platform services’ convenience and utility value, they also have concerns about them.

2. The Japanese government's movements toward regulating huge IT

Based on the investigation by the JFTC that was mentioned in section1, on April 24, 2019, the Japanese government publicly announced a government plan aimed at bringing about that regulation. I will indicate an overview of this below（refer to the April 25, 2019 issue of the Nikkei）.

First, something that is pointed out as "problem awareness" is digital platformers（huge IT）magnifying benefits to consumers and transaction partners that provide products through collection of large amounts of information, structuring of that information, and improving matching of transactions. There are also aspects in which they are promoting competition among small and medium-sized businesses and accelerating technological innovation. However, the larger the scale is, the more user's benefits increase; therefore, huge IT is in a structure in which it is easy for oligopolies and monopolies to be created by major companies and in which superiority of information strengthens negotiating power. It is also pointed out that there is a large amount of opacity in the platform design and operation. The level of controlling power will not immediately lead to a problem, but if fair and free competition will be hindered because of opacity, correction is necessary. The true situation is that some transaction partners have actually expressed dissatisfaction concerning transaction practices such as unilateral changes of agreement conditions and excessive cost burdens.

Next, concerning the direction of regulation, efforts are being made to promote rule preparation that has a good balance between actualization of fair transactions and promotion of technological innovation for the purpose of healthy development of platforms. However, there are also many major IT companies that have bases overseas, and ensuring effectiveness is an important task.

As the direction of regulation, it was said that the policy would mainly addresses active operation of antitrust laws that regulate, after the fact, only actions that have a possibility of restricting competition for the management of rule preparation. The necessity of rules to supplement antitrust laws was also considered along with that（consideration of the new law discussed above）. Further-

more, regarding specific measures, it has been pointed out that there is leeway for applying "abuse of a superior position"(1) or "prohibition of private monopolies"(2) concerning the transaction practices of major IT companies. However, it is thought that it will take a considerable amount of time to conduct a detailed determination of facts through an investigation. Because of that, if handling is delayed, there is a possibility that significant damage will arise, such as transaction partners falling into a state in which they are forced to accept the situation. Accordingly, choices such as those below are conceivable for the purpose of quick relief.

(1) Establishment of guidelines

This is something that, for the purpose of prevention, specifies actions that have a strong possibility of being deemed illegal. However, this does not determine illegality; therefore, it will be necessary to make judgment for each individual case.

(2) Notification of specific designation

This is something that uses notifications to point out specific actions as unfair transaction methods. If a violation is committed, it will be subject to a cease and desist order. Although quick execution is possible, actualization of appropriate

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(1) Abuse of a superior position refers to using the fact that one's own transaction-related position is superior over that of the other party to conduct abusive actions. Superiority here occurs due to the fact that the other party for a transaction cannot easily change the transaction partner, and there is superiority related to systems, superiority related to agreements, and superiority related to facts, but the majority of cases are related to agreements. Examples include subcontract transaction relationships in continuous agreement relationships, transactions with banks and other financial institutions, and distribution transaction relationships between manufacturers and distributors.

(2) Private monopoly refers to a business excluding or controlling the business activities of other business, irrespective of whether it does so independently, by conducting combination or collusion with another business, or by any other method, and thereby going against the public interest and substantively restricting competition in a certain transaction field (Article 2.5 of the AML).

regulations in the platform fields that have intense environmental changes will become the task.

(3) Utilization of procedures for definite promises

This is a mechanism by which suspicion of an antitrust law violation is resolved by agreement between the JFTC and the company (a system that was introduced by conclusion of the TPP Agreement). This leads to quick resolution because corrections can be facilitated without recognizing violations. However, because such cases will not be violations, there is a possibility that rule formation by using an accumulation of precedents will be insufficient.

(4) Formation of trade associations

This is something that forms an organization consisting of businesses that use a platform. It increases the negotiating power of businesses that cannot make complaints because they are afraid of retaliation, and it promotes actualization of a fair transaction environment.

(5) Continuous investigation of the actual situation

This is something by which the JFTC will continuously investigate the actual situation and thereby ascertain problematic actions. The aim is to also consider "Article 40 investigation"[(3)] based on Article 40 of the AML, which stipulates compulsory authority for the purpose of investigation, and to lead restraint and voluntary resolution of violations.

(6) Other things -Regulations to supplement antitrust laws

This involves supplementing antitrust laws and considering the necessity and system design for rules to promote transparency and fairness of digital markets.

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(3) The JFTC can, when necessary for the purpose of conducting its duties, order a public office (=government agency), special corporation, business, trade association, or a staff member of one of these things to make an appearance or ask it to submit the necessary report, information, or materials.

This also includes consideration of whether or not to set prohibited matters for unilateral changes of terms and arbitrary account suspension as rules for which the effects of preventing violations can be expected. In addition, it will also be necessary to consider whether to set obligations for disclosure and specifications for elements that determine the display order for search results or the rankings of the results, or the screening criteria. However, this also has a possibility of falling under business secrets, and careful consideration must be conducted based on international trends.

In addition, it will also be necessary to organize a framework, such as whether to use laws and regulations or to use self-imposed regulation. Self-imposed regulation that is not stipulated by law has little possibility of hindering technological innovation, but it cannot secure effectiveness. It is necessary to take into account a situation in which competition between platforms does not work and industry groups are not functioning sufficiently.

On the other hand, under laws and regulations there are also choices that impose prohibited actions and obligations for disclosure and specification. However, in such a case, there is a possibility that specific regulation will hinder technological innovation. Accordingly, utilization of the voluntary nature of self-imposed regulation, while also using joint regulation in which the government supplements those limits, is also conceivable. For example, it is conceivable to impose a certain obligation of disclosure in order to ensure transparency and then stipulate an abstract code of conduct and use a design to receive active explanations of whether or not requests will be satisfied. In addition, measures to evaluate voluntary initiatives will also become important.

3. Examples of Japan, the EU, and Germany

Below, we will take a look at the example in Japan（example of an on-site inspection）that served as the opportunity for the aforementioned investigation of section 1 and the government's creation of the plan of section 2, and examples in the EU and Germany that became precedents for full-scale regulation of huge IT.

(1) On-site investigation of Amazon Japan (the February 26, 2019 electronic version of Mainichi Shimbun)

On February 26, 2019, the JFTC began an investigation of the actual situation concerning a reward points system for all products, which Amazon Japan intended to begin in May. That system was something for which reward points of 1% or more would be given for all of the products sold within the Amazon site, including not only products that Amazon procured itself but also products put up for sale by external companies and individuals. The system was to expand the reward points that previously were only for some things, such as products procured by Amazon, but the financial source for those rewards would be borne by the sellers. Many sellers are small and medium-sized businesses and individuals, and it is conceivable that there would also be cases in which the financial source burden would be heavier than the sales promotion effects caused by the reward points and that the advantages would be meager. Amazon claimed that "The question of how to consider future transactions would be left to the sellers' judgment," but there would be an automatic switch to the relevant system, and the rewards would apply uniformly to sellers that continued transactions.

The JFTC is strengthening its viewpoint that there are no advantages and that even if a seller wants to refuse that system, in reality, the seller has no choices. If it is judged, through investigation of sellers and Amazon, that disadvantages are being forced on transaction partners against the background of Amazon's dominant position, that indicates an intention to urge Amazon to make improvements based on the AML. In other words, a system that uniformly places the burden of the financial sources for rewards on the sellers will be deemed to have a possibility of being the abuse of a superior position that is prohibited under the AML.

If that were the case, it would be deemed a unilateral agreement change that abused Amazon's superior position and that would be a major problem that distorts fair competition conditions for small and medium-sized businesses. Amazon Japan underwent this on-site inspection and postponed implementation of that reward points system.

(2) Google lawsuit

(i) The Google shopping case (June 27, 2017 decision by the European Commission)

According to a decision by the European Commission, Google abused its dominant position in the market as an Internet search engine and unjustly conducted advantageous handling of its comparison shopping service, which is a separate Google product. As a result of that unjust handling, user traffic to Google's comparison shopping site, namely the amount of data that uses communication lines, dramatically increased while traffic to competing comparison shopping sites dramatically decreased. This resulted from Google placing the results of its own comparison shopping in a place that stands out on the screen that displays ordinary search results and using a noticeable format to make displays in higher positions. At the same time, Google was using an ordinary format to display the results of competing comparison shopping in lower positions for which considerable scrolling and searching is necessary.

In this case, the fact that Google's dominant power in comprehensive net searches was used in other categories and consumer welfare (consumer benefit) was harmed as a result became a problem, and it was decided that it was a violation of Article 102 of the Treaty on the Functioning of the European Union. Article 102 of the Treaty on the Functioning of the European Union prohibits actions in which businesses that have a dominant position in a market in the EU region or in its main portion abuse that position and thereby affect transactions between member countries. This regulation does not prohibit the actual fact of a business being in a dominant position in a specific market, but rather it sees abuse[(4)] of that

(4) The abuse mentioned Article 102 of the Treaty on the Functioning of the European Union indicates the things below.

(a) Directly or indirectly imposing unfair purchase prices, selling prices, or other unfair conditions

(b) Disadvantageously restricting production, sales channels, or technology development for consumers

(c) Making a transaction entity competitively disadvantageous by applying different conditions to other transaction entities for equivalent transactions

position as a problem. In this case, it was decided that handling on Google's comparison shopping site is abuse.

(ii) Google/Android case (July 18, 2018 decision by the European Commission)

A decision by the European Commission found problems with the fact that Google caused the pre-installation of its own search application and its Chrome browser on mobile devices that adopted its fundamental software Android and thereby stabilized its dominant position as a comprehensive search service. That is to say, it found that Google improperly used Android to strengthen the superiority of Google's own search engine. It was also judged that, as a result of such practices by Google, not only would other competing companies lose technological innovation and opportunities for competition, but there would also be loss of the consumer benefits for EU member countries that should have been obtained through healthy competition.

In this case as well, it was decided that the relevant measures by Google violate Article 102 of the Treaty on the Functioning of the European Union. Incidentally, Google's market share that was confirmed in this case exceeded 90% in the countries of the European Economic Area (EEA) as a comprehensive search market, Android was 95% or more in the entire world (excluding China) in the open-patent operating system market, and in the application store market for Android, the share of Google Play, which is Google's application store application, was 90% or more. Based on this date, it is conceivable that Google has a dominant position in the comprehensive search market, the open-patent operating system market, and the application store market as well in Europe.

(iii) Google/AdSense case (March 20, 2019 decision by the European Commission)

The European Commission's decision found a problem with the actions of, with advertisers that use Google's AdSense, which is a service for advertisements linked to online searches, prohibiting posting advertisements delivered by other

(d) Making the other party's acceptance of an additional provision that is unrelated to the agreement in terms of the content of the relevant provision or commercial practices a condition for the agreement

competing companies and using restraints such as requiring approval in order to display other companies' advertisements in search results, in order to maintain Google's dominant position in search advertising brokerage.

Looking at the circumstances of this case, in many cases, websites such as newspaper websites, blogs, and sites that collect travel information include search functions, and when a user uses one of those search functions to make a search, the website provides advertisements linked to searches along with search results. Those advertisements linked to searches are displayed next to search results. Through AdSense for searches, Google provides those advertisements linked to searches to the owners of websites called publishers. Similar to an advertising agency, Google is carrying out a role as a broker between website owners and advertisers that want to obtain profit from the spaces around search result pages. For that reason, AdSense for searches is functioning as a platform that conducts brokerage for advertisements linked to online searches.

In the brokerage for advertisements linked to online searches in the EEA, Google is the most powerful business, its market share in the period from 2006 until 2016 exceeded 70%, and it had a market share that exceeded 75% in the market for advertisements linked to online searches in almost all of the EU member countries.

In the European Commission's decision, it said that Google's actions fall under abuse of a dominant position in the market for mediating advertisements linked to online searches by hindering efficient competition. As stated above, under the Treaty on the Functioning of the European Union, the fact that a business has a dominant position in the market will not itself be deemed illegal. However, a business in a dominant position abusing strong power to control the market by restring competition, either in the market in which it is in the dominant position or in another market, is not allowed.

(3) Facebook decision (February 7, 2019 decision by Germany's Federal Cartel Office)

Germany's Federal Cartel Office ordered the United States' Facebook Inc. to

broadly restrict collection of users' data. Precisely, Facebook is prohibited to comb users' data that is in services affiliated with Facebook or any external services without users' agreement. Germany's Federal Cartel Office considered Facebook's state of compliance with competition laws, including the viewpoint of the principle of protecting personal data, and judged that Facebook has a dominant position under Germany's competition law（the Act Against Restraints of Competition）and that it was abusing that dominant position by imposing exploitative and unfair terms of use on users.

Looking in detail at that consideration by Germany's Federal Cartel Office, through acknowledging Facebook's dominant position in the market, it was defined that social network services（SNS）are a market related to products. It was also acknowledged that, in that related market, Facebook has a dominant position in the market and is associated with a market share of 95％ or more of SNS users in Germany. Under those circumstances, Facebook was collecting user data from its affiliated photograph-sharing application Instagram and conversation application WhatsApp, as well as from external services that carry Facebook's Like button. In that way, Facebook was integrating an enormous amount of personal information and creating a highly accurate database of users. Germany's Federal Cartel Office judged that using such data in Facebook's advertising business was hindering fair competition.

Andreas Mundt, who is head of Germany's Federal Cartel Office said the following: "As a controlling business in the market, Facebook bears a special obligation under competition laws. It cannot be said that a user agreed under his or her own initiative simply by entering a check in the check box for use conditions", "From now on, it will no longer be permitted for Facebook to in effect collect data without restriction outside its networks and then force users to agree to having that data linked to their Facebook user accounts", and "Data source cooperation is making a major contribution to the fact that Facebook built a database that other companies cannot imitate for individual users and obtained power in the market".

As a result, it was indicated that Facebook collected user data without restric-

tion over many years and thereby augmented its superiority in terms of competition and established a dominant position in the market that cannot be overturned by other companies.

4. Prevention of data oligopolies, and optimization of transactions with small and medium-sized businesses

In 2017, the aggregate market value of Google, Apple, Facebook, and Amazon (so-called GAFA) rose to a total of approximately USD 2,400 billion. The thing that caused such a result is utilization of personal data, which is called "the new petroleum of the digital world". In other words, by ascertaining the state of use of Google's search service and Facebook's posting service, it is now possible to siphon off an enormous amount of personal data and utilize it for business. Moreover, a new trend that should be noted is being created for data. That is the fact that there is an increase in cases in which data is entrusted to a service called a cloud that is provided by huge IT without having to be saved on one's smartphone or computer or a company computer. This is because it is convenient and cheap for both individuals and companies to rely on clouds. However, the rise of cloud reliance is further accelerating the flow in which data concentrates in huge IT, and it is spurring market oligopolies and control.(5)

Professor Victor Mayer-Schonberger of the University of Oxford, who is one of the co-authors of *Capitalism in the Age of Big Data,* said the following: "The aspect in which huge IT is different from other companies is the fact that huge IT itself is the market", and "(From now on), currency will also continue to be used, but in the data-based market it will be driven into a supporting role. The emphasis of the economy will shift from financial capitalism to data capitalism".(6)

Amazon is a giant market in which all kinds of products are sold and purchased. Apple operates a market for music, videos, and applications. Google and Facebook have become worldwide advertisement markets. The commonalities among these companies are the ravenous collection of customer data and the ability to

(5) August 15, 2019 The Yomiuri Shimbun.
(6) *Ibid.*

analyze and utilize that data. Professor Mayer-Schonberger's concern is that if oligopolies in the data market are left as they are, not only will competition be hindered, but there is also a possibility that there will be an occurrence of various harmful effects（the examples of the aforementioned section 3 and cases in which, in reality, new entry will be hindered by cartels taking up a portion of enormous amounts of data and not allowing it to be used by other companies[7]）.

Although there is a strong necessity to prevent data oligopolies, the current situation is also one in which possession of an enormous amount of data will serve as the source of company growth as a substitute for M&As. The JFTC is also maintaining the opinion that data cooperation itself is necessary in order to accelerate technological innovation. The act of companies cooperating and sharing data will not itself be a violation of the AML. It is thought that drawing a line for which cases will be problematic under the AML is a task for consideration.

Meanwhile, as seen in the government plan for the aforementioned section 2, initiatives aimed at improvement of the transaction practices of platform companies（huge IT）are seen as effective for now. In addition, even under that government plan, it is thought that it will be possible to considerably improve the transaction environment of platform companies by utilizing the framework of the current AML and thoroughly executing laws. In order to correct information disparity（asymmetry of information）as a measure intended to achieve balance between companies in a dominant position for information control and companies in an inferior position and consumers, it is thought that an approach framed as

（７） Concerning concentration of data, the Israeli historian Yuval Noah Harari additionally said the things in his book *Homo Deus*: "Capitalism and democracy favor decentralized processing, whereas communism and dictatorships rely on centralized processing," and "The democratic camp won the cold war because decentralized processing functioned better than centralized processing in the situation in the latter period of the 20th century." Based on such an awareness, he is concerned about the rise of digital dictators, and he is pointing out the possibility that AI will change the situation. He has expressed pessimistic views, such as "AI makes it possible to centrally process huge amounts of information. A system that centralizes power may be made much more efficient than a decentralization system. This is because the greater the amount of information, the better AI functions"（*ibid.*）.

abuse (at least abuse of a relatively superior position) of the relative companies' dominant position is effective for measures based on disparity.

It is also conceivable that it is essential to abolish unilateral changes of transaction conditions and other forms of opacity of transactions, which are caused by the relevant companies being in superior positions. I think that it may be necessary to take measures to impose on huge IT an obligation of disclosure of transaction condition, including disclosure of hidden information.

For huge IT, it is necessary to always pay attention so that optimization of transactions can be obtained for small and medium-sized businesses in exchange for allowing huge IT to have freedom in its activities. I hope that the government plan seen in the aforementioned section 2 will also proceed in that direction.

5. Closing remarks

Joseph Alois Schumpeter expressed capitalism's development process by using the phrase "creative destruction". It may be the huge IT called GAFA that bear the creative destruction of modern times. They have repeatedly purchased start-up companies, continued to ravenously grow by investing huge research expenses, and came to control the market in a few decades after their establishment. As Schumpeter asserted, innovation itself is the essence of a capitalistic economy, and it was thought that entrepreneurs' free activities would create a more convenient society. However, as data oligopolies became widespread, existing businesses were destroyed and major economic changes arose. Those changes also have positive aspects, but as seen in the aforementioned examples, there are also aspects that are difficult to accept based on competition laws (antitrust laws).

I think that in our daily lives, we are in a situation in which we can no longer deny the benefits caused by GAFA. Accepting those benefits while building a framework to hinder GAFA from acting recklessly is probably the very thing that is an urgent task for consideration. I think that one of the materials for that consideration may lie in operation of competition laws.

Compared with Japan and Europe, the United States, which possesses GAFA was thus far passive about regulating huge IT. However, on July 23, 2019, the

United States Department of Justice announced that it would investigate huge IT concerning whether or not there are actions that violate antitrust laws（United States' antitrust laws）. The Ministry of Justice decided to investigate the ways in which huge IT that operates platforms acquires power to control the market, and whether or not there are actions that hinder competition and technological innovation and cause disadvantages for users.

Following Europe and Japan, antitrust authorities in the United States will also make serious efforts for investigation, and it can be said that an encircling network for huge IT is closing in throughout the world. In addition, we intend to verify the propriety of regulation.

This concludes my report. Thank you for your attention.

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