

New Guidelines re: Application of ASBP to Transactions between Digital Platforms and Consumers

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[The Japan Fair Trade Commission \(“JFTC”\) issued “Guidelines Concerning Abuse of Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc.” \(“Guidelines”\) on December 17, 2019.¹](#)

The Guidelines were prepared in accordance with the June 21, 2019 Cabinet decision on the growth strategy, including preparing new JFTC guidelines for application of abuse of superior bargaining position (“ASBP”) to business-to-consumer (“B2C”) transactions with regard to digital platform businesses. The JFTC issued a draft of the Guidelines on August 29, 2019² and sought comments from the public by September 30, 2019. The JFTC received 141 comments, including 21 non-related comments, and finalized the Guidelines after review and consideration of those comments.

ASBP is a type of prohibited single firm conduct (e.g., private monopolization or unfair trade practices). ASBP is somewhat analogous to “abuse of a dominant position,” but, unlike prohibitions on behavior by dominant firms, ASBP does not require market power. ASBP exists when a party in a *relative* superior bargaining position – as opposed to a dominant position – engages in abusive conduct that runs the risk of being an “impediment to competition.”

The Guidelines intend to provide clarity and predictability for the situations where conduct would be problematic in B2C transactions under the ASBP regulation, specifically for transactions where consumers provide information (e.g., personal information) to digital platforms. Up until now, the JFTC has applied ASBP only to business-to-business transactions, but not to B2C transactions, although there is no such limit under the law.

The Guidelines define a Digital Platform as an operator that “*has the characteristics of providing third parties with online platforms for the various services by using information and communication technologies and data in the way to create multi-sided markets with multiple user segments and so-called indirect network effect.*” The Guidelines further explain that “*indirect network effect*” refers to the effect that, as the number of users increases in one side of multi-sided markets, the utility in another side increases.

The principle of the Guidelines basically stayed the same from the draft, and changes are made mainly for clarification. For example, the draft introduced an example that violates the ASBP where a Digital Platform acquired personal information from a consumer, explaining that such information is needed for sales of goods, including information about his/her gender and occupation (i.e., information not necessary for the sales). It will not violate the ASBP if a consumer agreed explicitly, but will be a violation if such agreement was compelled

¹ Tentative English translation of the Guidelines is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2019/December/191217DPconsumerGL.pdf>

² Tentative English translation of the draft of the Guidelines is available at <https://www.jftc.go.jp/en/pressreleases/yearly-2019/August/190829rev.pdf>

to agree. There has been criticism against the draft how and when an agreement is considered to be compelled. The Guidelines added some clarification that the determination of whether consumers are compelled to consent is made, considering the degree of consumers' disadvantages from the viewpoint of not each consumer but general consumers.

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