

Guidelines Concerning Abuse of a Superior Bargaining Position in
Transactions between Digital Platform Operators and Consumers that
Provide Personal Information, etc.

December 17, 2019

Japan Fair Trade Commission

Introduction

Under the Fourth Industrial Revolution, digital platform operators provide third parties with the platforms for various services, utilizing information and communication technologies and data. They develop innovation, creating new businesses and markets, which benefits enterprises, including small- and medium-sized ones, by dramatically increasing the possibility of accessing markets and consumers by improving convenience. Thus, digital platform operators show their important presence in the Japanese economy and society.

The services provided by digital platform operators constitute multi-sided markets with multiple user segments, and such services readily expand and promote monopolization and oligopolization through their characteristics – network effects, low marginal cost, and economies of scale, etc. Furthermore, the data concentration through network effects and economies of scale increase users' benefits, but also the data-based business model with accumulating and utilizing data by digital platform operators create cycles which maintain and enhance competitive advantages by further accelerating the accumulation and use of data by digital platform operators.

Since, for accumulating data, some digital platform operators adopt a business model where they provide free goods and services in exchange for the acquisition or use of personal information, etc., there are some concerns over the acquisition or use of consumers' personal information, etc. by digital platform operators that provide services to consumers.

If the digital platform operator's acquisition or use of personal information, etc. in unfair manners causes consumers disadvantage and adverse effects on fair and free competition, the issues under the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (Act No. 54 of 1947; hereinafter referred to as "Antimonopoly Act") will arise.

Therefore, the Guidelines describe what kind of conducts related to the acquisition of personal information, etc. or use of acquired personal information, etc. at a digital platform of a digital platform operator will be issues concerning abuse of a superior bargaining position in view of transparency of the Antimonopoly Act enforcement and

improvement of predictability for digital platform operators. (Note 1)

Note that if a conduct described in Part 5 below violates other laws and regulations, interventions under such other laws and regulations will not be prevented.

(Note 1) The “Future Investment Strategy 2018” decided by the Cabinet in June 2018 stipulates that in order to improve the rules in response to the rise of the platform businesses, fundamental principles shall be established during this year, and concrete measures based on these shall be proceeded promptly by the end of 2018. In light of this, the Ministry of Economy, Trade and Industry, the Japan Fair Trade Commission (JFTC), and the Ministry of Internal Affairs and Communications launched the “Study Group on Improvement of Trading Environment surrounding Digital Platform Businesses” comprised of academic experts and others from various disciplines including competition policy, information policy and consumer policy, and since then, the study group advanced research and discussions, and formulated the policy paper “Fundamental Principles for Rule Making to Address the Rise of Platform Businesses” in December 2018.

The Principles stipulated, in “(4) Ensuring Fair and Free Competition in Digital Markets:” “[e]nforcement of competition law as an ex-post regulation will become more and more important as digital platform operators tend to expand and oligopolize or monopolize the market, so measures based on the characteristics of the digital market should be implemented;” and “the operation of the Antimonopoly Act and related institutions to ensure fair and free competition in digital markets will be considered, such as the review of business combination that takes into account of data and innovation, the application of the rules about abuse of superior bargaining position with respect to the relationship with consumers, who provide data related.”

Based on these, the JFTC decided to publish the “Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc.”

*1 In the Guidelines, a “digital platform” 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. (Note 2) A “digital platform operator” refers to an enterprise that provides the digital platforms with above-mentioned characteristics, such as online shopping malls, internet auctions,

online flea markets, apps markets, search services, contents distribution services (image, video, music, e-book, etc.), booking services, sharing economy platforms, social networking services (SNS), video sharing services, electronic payment services, etc.

(Note 2) In the Guidelines, “indirect network effect” refers to the effect that, as the number of users increases in one side of multi-sided market, the utility in another side increases.

*2 In the Guidelines, “personal information” refers to the personal information stipulated in Paragraph 1 of Article 2 of the Act on the Protection of Personal Information (Act No. 57 of 2003; hereinafter referred to as “Personal Information Protection Act”). “Personal information, etc.” refers to the “personal information” and “information relating to an individual except for personal information.” (Note 3)

(Note 3) For example, the information related to browsing websites and location information of mobile devices are generally considered not to be personal information under the Personal Information Protection Act because those alone do not contain personal identification. Such information, however, could be personal information if a digital platform operator may identify a certain person by collating it easily with other information.

*3 In the Guidelines, “personal data” refers to “personal data” provided in Article 2(6) of the Personal Information Protection Act.

*4 In the Guidelines, “consumer” refers to an individual but not one who use the service provided as a business or for business purposes.

1 Basic concepts of the regulation on abuse of a superior bargaining position

The trade terms are basically left to the independent judgement of the trading parties. However, in transactions between enterprises and consumers, there is “the disparity in the quality and quantity of information and negotiating power between consumers and enterprises” (Article 1 of the Consumer Contract Act (Act No. 61 of 2000)), and the trade terms are likely to be unilaterally unfair to consumers.

If a digital platform operator in a superior bargaining position over consumers who are the counterparties to transactions unjustifiably causes, in light of normal business practices, disadvantage for such consumers by making use of such position, the digital platform operator will not only impede the free and independent judgements of such consumers but will also likely gain competitive advantage over its competitors. (Note 4) Because such a conduct is likely to impede fair competition, it is restricted under

the Antimonopoly Act as abuse of a superior bargaining position, a type of unfair trade practices.

It is determined on a case-by-case basis whether a certain conduct is likely to impede fair competition, considering the degree of disadvantage in question the spread of such conducts, and so on.

The JFTC, on a priority basis, will investigate the cases which are considered to have wide spread influence on people's livings and fall within 3(2)(i), (ii), and (iii) below, out of the ones which may raise the issue of abuse of a superior bargaining position in transactions between digital platform operators and consumers that provide personal information, etc.

(Note 4) A digital platform operator is likely to gain an advantageous competitive position against its competitors if it achieves to reduce cost or gain profit by making use of its superior bargaining position to impose a disadvantage on a consumer unjustly in light of normal business practices and invests them in relevant or other businesses.

2 Concepts of the “counterparty” to a transaction

The Antimonopoly Act (Item 5 of Paragraph 9 of Article 2) defines abuse of a superior bargaining position as conducts that cause disadvantage for the counterparty in continuous transactions ((a) and (b) of this Item) or for the counterparty ((c) of this Item) by unjustifiably making use of one's superior bargaining position over the counterparty in light of normal business practices. “Counterparty (in continuous transactions)” includes consumers.

The personal information, etc. includes all information related to the individual consumer, such as the consumer's personal attributes and activities. Such information is used in the digital platform operator's businesses and thus has economic value.

Therefore, when it is found that consumers provide personal information, etc. in exchange for the use of the services provided by a digital platform operator, then such consumers obviously fall within the definition of a “counterparty (in continuous transactions)” of the digital platform operator.

3 Concepts of “making use of one's superior bargaining position over the counterparty”

(1) A digital platform operator has a superior bargaining position over consumers who provide personal information, etc. when the consumers, even though suffering detrimental treatment from the digital platform operator, is compelled to accept this

treatment in order to use the services provided by the digital platform operator.

- (2) To determine whether consumers are, even though suffering detrimental treatment from the digital platform operator, compelled to accept this treatment in order to use the services (“said services” in (2)) provided by the digital platform operator or not, the “necessity to trade with” the digital platform operator for the consumers is to be considered.

A digital platform operator providing the said services is normally in the superior bargaining position over the consumers; (i) when there is no other digital platform operator that provides services alternative to the said service for the consumers (Note 5); (ii) when other digital platform operator providing the alternative service exists, it is practically difficult to stop using the said service (Note 6); or (iii) when the digital platform operator providing the said services is in a position to control somewhat freely the trade terms, such as prices, qualities, and quantities.

(Note 5) Whether a certain service is alternative to the said service is determined in consideration of service’s function, contents, quality, etc. This determination is made, considering alternativeness not for each consumer but for general consumers.

(Note 6) Whether it is practically difficult to stop using the said service is determined in consideration of characteristics, such as service’s function or contents and the possibility to transfer network formed with other consumers using the said service and data accumulated through using the said service in other similar services. This determination is made, considering whether it is practically difficult to stop using the said service not for each consumer but for general consumers.

- (3) Also, when the digital platform operator in a superior bargaining position conducts a transaction by unjustifiably imposing a disadvantage on consumers, such a conduct is normally deemed as “making use of” its superior bargaining position.
- (4) In the determination stipulated above, it is necessary to consider that there is the disparity in the quality and quantity of information and negotiating power between a digital platform operator and consumers.

4 Concepts of “unjustly in light of normal business practices”

The requirement of “unjustly in light of normal business practices” shows that abuse of a superior bargaining position is determined on a case-by-case basis from the viewpoint of the maintenance and promotion of fair competitive order. “Normal business practices” here are acceptable in terms of the maintenance and promotion of fair competitive order. Therefore, a conduct will not be necessarily justified simply because the conduct is consistent with existing business practices.

5 Types of abuses of a superior bargaining position

This section clarifies the concepts of determining what kind of conducts by digital platform operators related to the acquisition or use of personal information, etc. through transactions between digital platform operators and consumers who provide personal information lead to abuse of a superior bargaining position under Item 5 of Paragraph 9 of Article 2 of the Antimonopoly Act.

Note that the conducts that raise issues of abuse of a superior bargaining position are not limited to the following conducts. Also, note that the conducts consistent with other laws and regulations may raise the issue of abuse of a superior bargaining position.

(1) Unjustifiable acquisition of personal information, etc.

If a digital platform operator engages in the following conducts against consumers who use the services provided by it, it will unjustifiably cause disadvantage for the consumers in light of normal business practices, for example, by providing services inequivalent as consideration. (Note 7) Therefore, if a digital platform operator in a superior bargaining position over consumers engages in the following conducts, the issues of abuse of a superior bargaining position will arise.

Note that the issues of abuse of a superior bargaining position will arise not only in the following examples but in any case where a digital platform operator’s conduct concerning the acquisition of personal information, etc. provided by consumers unjustifiably causes a disadvantage for consumers in light of normal business practices. (Note 8)

(Note 7) The service could be considered not to have the minimum required quality which a digital platform operator should have in relation with the acquisition of personal information if there is the conduct mentioned in (1) a., b. and c. Therefore, providing such a service in exchange is

considered to cause a disadvantage for consumers.

(Note 8) The issue of abuse of a superior bargaining position will arise, for example, if a digital platform operator acquires “information relating to an individual except for personal information” from consumers in order to let a third party collate “information relating to an individual except for personal information” acquired from consumers with other information and use for the purpose of causing a disadvantage for consumers.

a. Acquiring personal information without stating the purpose of use to consumers

[Assumed Example (i)] Digital Platform Operator A acquires personal information from consumers without stating the purposes of use on its webpage or in any other ways when acquiring personal information. (Note 9, 10, 11)

(Note 9) Normally, no issue will arise if a digital platform operator has posted the purposes of use in an easily recognizable place on its webpage or if a digital platform operator has notified consumers of the purposes of use by e-mail or in any other ways.

(Note 10) It may be determined that a digital platform operator has acquired personal information without stating the purposes of use to consumers if the digital platform operator acquires personal information from consumers in situations where it is difficult for general consumers to understand the purpose of use: for example, explanations of the purposes of use are unclear, written using technical jargon, posted in a place not easily found or dispersed in many places, or not clearly distinguished from explanations for other services. Normally, no issue will arise if the purposes of use are explained in an easily accessible place, in a clarifying manner, and in a way that is easy to understand for general consumers using clear, plain, and simple terms.

(Note 11) It will raise the issue that a digital platform operator acquires the information which is, for example, related to browsing websites or location of mobile devices and does not generally have personal identification, when identifying it with an individual and not informing consumers of that.

b. Acquiring personal information against consumers' intention beyond the scope necessary to achieve the purpose of use

[Assumed Example (ii)] Digital Platform Operator B stated to consumers that the

purpose of use was the sale of goods when acquiring personal information but acquired from the consumers information on gender and occupation beyond the scope necessary for the sale of goods without obtaining the consent of consumers. (Note 12, 13)

(Note 12) In the event that the purpose of use is the sale of goods, no issue will normally arise if a digital platform operator acquires from consumers the personal information necessary for the achievement of such purpose of use, for example, name, e-mail address tied up with user's name, or payment information of consumers. Also, no issue will normally arise if a digital platform operator receives the personal information upon the express consumers' consent even if such information is beyond the scope necessary for the achievement of the purpose of use, such as gender or occupation tied up with user's name. Note that if consumers are compelled to consent that a digital platform operator acquires their personal information beyond the scope necessary for the achievement of the purpose of use because the consumers have no other alternative but to use the services, the consent may be determined as made involuntarily. The determination of whether consumers are compelled to consent is made, considering the degree of consumer's disadvantage – from the viewpoint of not each consumer but general consumers.

(Note 13) In the event that the said enterprise provides other services in addition to the sale of goods, no issue will normally arise if the digital platform operator acquires the personal information necessary for the provision of the additional services upon the express consent of the consumer who receives the additional services.

- c. Acquiring personal data without taking the precautions necessary and appropriate for safe management of personal information

[Assumed Example (iii)] Digital Platform Operator C caused consumers to use the services and to provide personal data without taking the precautions necessary and appropriate for safe management of personal information of consumers.

- d. Causing consumers in continuous use of services to provide other economic interests like personal information, etc. in addition to the consideration provided

in exchange for the use of services.

[Assumed Example (iv)] Digital Platform Operator D caused consumers in continuous use of services to provide personal information, etc. in addition to the personal information, etc. provided in exchange for the use of services. (Note 14, 15)

(Note 14) Such additional acquisition of personal information, etc. will become an issue even if the additional personal information, etc. is acquired without the conduct in question as explained in a, b, or c above.

(Note 15) No issue will normally arise if, for example in voluntary questionnaires, consumers voluntarily provide personal information, etc. in addition to the personal information, etc. provided in exchange for the use of services.

Also, in the event the said enterprise provides other services in addition to the existing services, no issue will normally arise if the digital platform operator causes consumers to provide the additional personal information, etc. in exchange for receiving the additional services.

Additionally, no issue will normally arise if, considering the advantage (such as improved quality of the service) which the consumers receive by providing personal information, etc. in addition to the personal information, etc. provided in exchange for the use of services, personal information, etc. additionally provided is within the reasonable scope.

(2) Unjustifiable use of personal information, etc.

If a digital platform operator engages in the following conducts in relation to the personal information acquired from consumers who use the services provided by it, it will unjustifiably cause a disadvantage for consumers in light of normal business practices, for example, by providing services inequivalent as consideration. (Note 16) Therefore, if a digital platform operator in a superior bargaining position over consumers conducts the following conducts by making use of its position, the issues of abuse of a superior bargaining position will arise.

Note that the issues of abuse of a superior bargaining position will arise not only in the following examples but in any case where a conduct by a digital platform operator in a superior bargaining position over consumers using the service concerning the use of personal information, etc. acquired from consumers

unjustifiably causes a disadvantage for consumers in light of normal business practices. (Note 17)

(Note 16) The service could be considered not to have the minimum required quality which a digital platform operator should have in relation with the use of personal information if there is the conduct mentioned in (2) a. and b. Therefore, providing such a service in exchange is considered to cause a disadvantage for consumers.

(Note 17) The issue of abuse of a superior bargaining position will arise, for example, if a digital platform operator provides “information relating to an individual except for personal information” from consumers in order to make a third party collate “information relating to an individual except for personal information” acquired from consumers with other information and use for the purpose of causing a disadvantage for consumers.

- a. Using personal information against the intention of consumers beyond the scope necessary to achieve the purpose of use

[Assumed Example (v)] Digital Platform Operator E stated that the purpose of use was the sale of goods and used the personal information acquired from the consumers by indicating the purpose of use as targeted advertising without obtaining the consumers’ consent. (Note 18)

(Note 18) Normally, no issue will arise when a digital platform operator uses personal information that has been obtained from consumers after it communicates to each consumer that the personal information will be used for targeted advertising, in addition to the existing purpose of use for the sale of goods, for example, by e-mail and obtains the consumers’ consent to the use of the personal information for such additional purpose by asking to check a checkbox on its webpage. Note that if consumers are compelled to consent to the use of personal information beyond the scope necessary to achieve the purpose of use because such consumers had no other alternative but to use the service for the sale of goods, the consent may be determined as made involuntarily. The determination of whether consumers are compelled to consent is made by considering the degree of consumer’s disadvantage – from the viewpoint of not each consumer but general consumers.

[Assumed Example (vi)] Digital Platform Operator F provided the personal information acquired from consumers who use the services to third parties without obtaining the consent of consumers. (Note 19)

(Note 19) Regarding the provision of personal information to third parties, no issue will normally arise, for example, if a digital platform operator provides personal information that has been obtained from consumers after it e-mails to each consumer that the personal information will be provided to third parties and obtains the consumers' consent to the provision of the personal information to third parties by asking to check a checkbox on its webpage. Note that if consumers are compelled to consent to the provision of personal information to third parties because such consumers have no other alternative but to use the services, the consent may be determined as made involuntarily. The determination of whether consumers are compelled to consent is made by considering the degree of consumer's disadvantage – from the viewpoint of not each consumer but general consumers.

Also, note that no issue will arise if a certain department of a digital platform operator provides the personal information provided by consumers to another department of the same company even without obtaining the consent of consumers.

b. Using personal data without taking the precautions necessary and appropriate for the safe management of personal information

[Assumed Example (vii)] Digital Platform Operator G caused consumers to use the services and used personal data without taking the precautions necessary and appropriate for the safe management of the personal information.