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Super Platforms, Big Data, and the Competition Law: The Japanese Approach in Contrast with the US and the EU

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Abstract

This article examines antitrust/competition issues on super-platforms equipped with big-data, focusing on online platforms which work as intermediators between two-sided (or multi-sided) markets. In order to shed a new light on this hot topic, this article highlights recent initiatives by the Japanese competition agency (Fair Trade Commission: JFTC), as compared to those by the US and EU agencies. First examined is whether competition among platforms would result in select few super-platforms with market power. Market power is shown to have been facilitated by two forces: first, network effects, which are augmented through looping between two-tier markets; second, artificial intelligence (AI) in the form of machine-learning, with which only a few super-platforms are capable of efficiently analyzing big-data. On the other hand, big data itself have not deterred new entrants equipped with new value-creating idea. Each online market, therefore, needs to be individually assessed for determining market power. Next, even when market power is identified, competition agencies may not order super-platforms to change their conduct, solely based on their market power, but are required to prove that they have excluded rivals through abusive methods, the determination of which necessitates balancing exclusionary-effects against efficiency-effects. Following these observations, this article, before addressing abuse-of-dominance issues, scrutinizes arguments for utilities-regulation to be imposed on super-platforms, whose big-data are asserted as rendering their market power permanent. Full utilities-regulation, however, fatally undermines innovation-incentives of platforms. Moreover, even if market power may be determined with super-platforms, the power may not be grasped to be permanent, given historical changes in platform champions. Consequently, for utilities-type regulations, only data-portability mandate may be endorsed, leaving the competition-law enforcement as the key tool for addressing big data and super-platforms, against which the core tool is the provision against exclusionary (unitary) conduct, enforcement of which, initially, concerns whether to order super-platforms to render their data accessible to their rivals. On this point, first, passive (pure) refusal-to-share data needs to be scrutinized under the essential-facility-doctrine, which, nevertheless needs to be attached with rigorous conditions, for not undermining platforms' innovation incentives. Next, platforms'

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I have greatly benefited from comments from Professor Daniel Sokol. All errors remain my own.

exclusionary conduct, going beyond pure refusal-to-share data, calls for exclusionary-conduct regulation by competition agencies, which needs to balance exclusionary effects against efficiency effects. In this regard, the JFTC has tackled platforms' exclusionary conduct as unfair-trade-practices, which tends to focus on exclusionary effects, neglecting efficiency effects. Finally, this article addresses another aspect of unitary conduct: exploitative-abuse, explaining its relation to consumer protection, concluding that competition-law enforcement on exploitative-abuse (in contrast with exclusionary-abuse) had better be eschewed against platforms, since it accompanies serious risk of overregulation.

Introduction

As people spend increasingly more time online, the value has been shifting to online-platforms, increasingly concentrated into a couple of super platforms--GAF A (Google, Apple, Facebook, and Amazon), as well as Uber and Airbnb, followed by Alibaba and Tencent in China.

Online-platforms intermediate between two-tier (or multi-tier) markets, comprising typically, first, customers (users); second, suppliers of products/services. In the case of Google search, the first market consists of search users; the second consists of customers for Google's online-advertising. These two-tier markets are closely correlated, reinforcing the network effect. The power of super platforms largely derives from accumulation of user data (Big Data), which enables a platform to better understand and exploit market.¹

Considerable number of treatises has already been published on competition issues on super-platforms with big-data. This article aims to shed an additional light on this hot topic, through highlighting recent initiatives by the Japanese competition agency (Fair Trade Commission: JFTC), comparing the initiatives with those by the US and EU competition agencies—two behemoths in the global competition-law arena.

The competition law targets anti-competitive corporate conduct, comprising horizontal restraints, mergers, and abuse of dominant position (market power). As for vertical restraints, they largely overlap with abuse of dominant position. Among these, regarding horizontal restraints, pricing-algorithms used by platforms have surfaced as a novel competition-issue in facilitating tacit collusion or conscious parallelism. This subject is rapidly evolving, with swift progress in AI and machine-learning; therefore this article leaves this issue to be dealt with in future. Then, next, merger regulation has relevance for tackling mergers between platforms, as well as acquisition of data by a dominant platform. This article considers how competition agencies need to adjust their merger regulation toward data-driven merger and acquisitions. Merger regulation, however, has limitation in that it cannot cope with unitary conduct. Regulation of dominant-position abuse, consequently, stands out as the most important competition issue regarding platforms with big-data: comprising, first, abuse in excluding rivals; second, abuse in exploitation toward trading-counterparts as well as end-consumers.

Dominance-abuse regulation requires competition agencies, first, to inquire whether the targeted super-platforms (equipped with big data) hold market power. Yet this is only the starting point, since the competition law does not condemn enterprises for merely holding market power (except in the case of mergers), but condemns them only when they engage in anticompetitive conduct, ultimately harming consumers. Competition agencies, therefore, need to carefully examine platforms' conduct, weighing its exclusionary effects against efficiency effects.

¹ See, OECD, "Big Data: Bringing Competition Policy to the Digital Era", DAF/COMP (2016)14, para 12.

Part I examines whether competition among platforms would lead to select few super platforms endowed with market power. Part II, before tackling abuse-of-dominance issues, evaluates arguments for utilities-regulation on super platforms endowed with allegedly permanent market-power. Part III comes back to the competition-law issues, focusing on platforms' refusal-to-share data with rivals, followed by Part IV which examines platforms' exclusionary conduct, going beyond pure refusal-to-share data. Finally, Part V addresses exploitative abuse, explaining its relation to consumer protection. Conclusion summarizes implications of this study.

I. Do data-driven network effects lead to super-platforms with market power?

When competition agencies aim to intervene into platforms' conduct, they need to first identify market power held by the platforms. On this issue, notable commentators have pointed to network effects, driven by data accumulated by super platforms, resulting in market power. Yet several commentators have expressed contrary opinions, based on ubiquitous nature of data, among other things.

A. Network effects in two-sided markets and countervailing forces

Big data produce network effects, which are augmented by “feedback loop” between two-sided markets, intermediated by platforms: “On the one hand, a company with a large base of users is able to collect more data to improve the quality of the service (for instance, by creating better algorithms) and, this way, to acquire new users – ‘user feedback loop’. On the other hand, companies are able to explore user data to improve ad targeting and monetize their services, obtaining additional funds to invest in the quality of the service and attracting again more users – ‘monetization feedback loop’. These interminable loops can make it very difficult for any entrant to compete against an incumbent with a large base of customers”.²

Several influential scholars, nonetheless, have expressed contrary opinions, dismissing the idea that platforms have the incentive or ability to use data to entrench their dominant position, on the ground that user-data is non-rivalrous and no one platform controls a significant share of data.³ This dismissal is derived from the unique economic characteristics of data, which does not, by itself, create a barrier to entry, and does not automatically endow an enterprise with either the incentive or the ability to foreclose rivals.⁴ Furthermore, market

² Id. para 22. On monetization-derived entry barrier, *see* Marina Lao, “Erring on the Side of Antitrust Enforcement When in Doubt in Data-Driven Mergers”, in *Douglas H. Ginsburg, An Antitrust Professor on the Bench - Liber Americorum - Vol. I* (Institute of Competition Law, 2018), p. 509 (“the large platforms’ ability to monetize large amounts of data that has given them an almost insurmountable competitive edge over small rivals or new entrants.”).

³ Daniel Sokol and R.E. Comerford, “Antitrust and Regulating Big Data”, 23 *George Mason Law Review* 1129, 1135 (2016). Also see Anja Lambrecht and C. E Tucker, “Can Big Data Protect a Firm from Competition?” (2015) (“big data is not inimitable or rare, that substitutes exist, and that by itself big data is unlikely to be valuable”), available at SSRN: <https://ssrn.com/abstract=2705530> or <http://dx.doi.org/10.2139/ssrn.2705530>.

⁴ Sokol and Comerford, id, p. 1135.

power may be restricted by the ability of consumers to “multi-home”; as an example, in the search engine market, there are few if any restrictions to multi-home.

Another line of contrary opinion highlights lack of evidence for the “winners-take-all” in platform competition; we have witnessed occasional changes in platform champions—Facebook replacing Myspace, and so on.⁵ In Japan, the hitherto champion of SNS (social networking services)—Mixi—has rapidly been replaced by Facebook, which insisted on users’ adopting real names (rejecting pseudonyms), surmounting Japanese people’s pervasive reluctance on using real-names online. This case exemplifies that a new platform with superior value proposition can overtake the current champion. In this case, network effects have worked in reverse to swiftly overtake the incumbent.

These contrasting viewpoints need to be scrutinized. First, it is convincing to negate permanence of market power held by current super-platforms, given non-rivalry of big data, dynamism of digital markets, together with evidence of changes in platform-champions. Counterbalancing this, however, for a middle-term horizon, remarkable development of AI has solidified strongholds of super-platforms.⁶ AI, particularly machine-learning, has accelerated data-driven network effects, through enabling automatic analysis of big data, without human hands.⁷ Limited number of super-platforms with mighty AI capability may withstand disruption by new entrants, at least for a middle-term horizon. Regarding the “multi-home” phenomenon, we have witnessed that most users have stuck to Google, Facebook, or Amazon, although they have allowed multi-homing to users.⁸

Therefore, in the middle-term horizon, market power held by current super-platforms may very plausibly be sustained, although each platform-field necessitates individual scrutiny.⁹ In this scrutiny, the standard method in determining a market—the SSNIP test—may not be automatically utilized for two-sided markets.¹⁰

⁵ D.S. Evans and Richard Schmalensee, “Network Effects: March to The Evidence, Not to The Slogans”, CPI Antitrust Chronicle (September 2017).

⁶ See Marina Lao, *supra* note 2, p. 515 (“a large online platform’s competitive edge arguably comes from its engineers’ sophisticated know-how and analytical tools, and not its possession of big data itself.”).

⁷ See Andrew McAfee and Eric Brynjolfsson, *Machine, Platform, Crowd: Harnessing Our Digital Future* (Kindle ed. 2017).

⁸ German competition agency (Bundeskartellamt) pointed out inertia for users not to switch to alternative platforms: OECD 2016, *supra* note 1, at Box 5 on the German report.

⁹ For example, European Commission denied that Facebook’s acquisition of WhatsApp lead to market power for each relevant market, because of “frequent market entry and short innovation cycles” (for communications-app market), and “a large amount of Internet user data that are valuable for advertising purposes” (for online-advertising market): COMP/M.7217 - Facebook/ WhatsApp (3 October 2014), paras 99, 189. SNS platforms appear to be more susceptible to market disruption, compared to net search (Google) or e-commerce (Amazon), since the SNS history shows that Facebook replaced Myspace, and more recently, Snapchat has overtaken Instagram, among younger generation.

¹⁰ See M.S. Gal and D.L. Rubinfeld, “The Hidden Costs of Free Goods: Implications for Antitrust Enforcement”, 80 Antitrust L.J. 521 (2016) (“the SSNIP test should be adjusted to take into account the fact that profits accrue in a companion market and that firms consider both products simultaneously in maximizing profit”). Also see D.D. Sokol and Jingyuan Ma, “Understanding Online Markets and Antitrust Analysis”, 15 Northwestern Journal of

B. Merger regulation for blocking formation of market power

The most straightforward tool, in the competition law, to tackle market power is merger regulation, which blocks mergers when they create or augment market power. Merger regulation is easier to enforce, compared to abuse-regulation, since creation of market power, by itself, legitimizes intervention by competition agencies; whereas abuse-regulation obligates competition agencies to identify anticompetitive exclusion, in addition to market power.

As an example, the US Department-of-Justice intervened into Google's acquisition of ITA (comparative flight-search company), requiring Google to license ITA's software on non-discriminatory terms, and prohibiting Google from using consumer data for its own benefit.¹¹

For determining market power, competition agencies are required to determine relevant product/service market. For instance, Amazon holds dominant market share in the ecommerce field, but holds only a relatively small share in the general retail field. For determination of market power, competition agencies need to scrutinize each platform-field, as explained above.

Notable commentators have proposed adoption of more stringent (and "incipiency" based) merger regulation, based on, first, empirical analysis of merger regulations;¹² second, prophylactic nature of merger regulation.¹³ Therefore, mergers and acquisitions which agglomerate data may be arrested at the incipiency stage of market-power formation, prioritizing prevention of false-negative errors, over false-positive errors.

C. Japanese approach-- JFTC Data Report

The JFTC, via its think tank, published in June 2017, a study-report on data held by digital platforms-- Report of Study Group on Data and Competition Policy¹⁴ (hereinafter "JFTC Data Report").

JFTC Data Report takes the side supporting that super-platforms hold market power, on the basis of "network loop" effect, in the same way as summarized by the OECD Report.¹⁵ The JFTC Report, consequently, proclaims that merger regulation be implemented against aggregation of data by platforms.¹⁶ Nevertheless, this author would recommend that JFTC

Technology and Intellectual Property 43, 46 (2017) (rejecting SSINIP test for two-sided markets, since the test deals only with single side of two markets).

¹¹ Consent decree, *US. v. Google Inc. and ITA Software, Inc.* (October 5, 2011).

¹² See John Kwoka, *Mergers, Merger Control, and Remedies* (MIT Press, 2015).

¹³ Herbert Hovenkamp, "Prophylactic Merger Policy" U of Penn, Inst for Law & Econ Research Paper No. 18-3 (2018).

¹⁴ English translation available at <http://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170606.html> (accessed 12 December 2017).

¹⁵ JFTC Data Report; Summary Report, p. 1.

¹⁶ *Id.* Summary Report, p. 1.

take into consideration forces countervailing market-power formation by platforms, consequently recommending that the JFTC scrutinize each relevant platform-market.

The JFTC Report, further, stresses that unjust “data hoarding” should be addressed under the Japanese competition law—the Antimonopoly Act (abbreviated as the AMA). This remark signifies that data holding (expressed by the Report as “hoarding”) will be targeted by the JFTC, aside from its merger regulation. However, against unitary conduct, the JFTC is required to identify anticompetitive conduct, in addition to market power¹⁷. The JFTC Report itself certifies this point by stating: “Formation of market power through competition, by itself, does not bleach the AMA.”¹⁸

Consequently, JFTC Report, although condemning “data hoarding”, follows the mainstream competition-law idea, in necessitating identification of abusive conduct before intervening into data-related conduct by super platforms.

D. Summary

The more data is accumulated by platforms, the bigger grows the network-loop effect between two-sided markets, which is further enhanced by AI, equipped with machine-learning. This makes it hard, for new entrants to grow. On the other hand, big-data itself does not prevent new entries, and history of platforms shows that new entrants with new value-propositions have replaced incumbents. Competition agencies, then, need to perform case-by-case analysis for judging market power held by super-platforms. Further, even in cases where intervention by competition agencies are legitimized, radical remedies (particularly divestiture) need to be eschewed, for not undermining innovation incentives by platforms.

The initial tool in the competition law for dealing with market power is merger regulation, through which competition agencies are capable of blocking mergers or acquisitions-of-data by dominant platforms. Merger regulation, however, is devoid of capability to cope with unitarily-acquired market power. Consequently, the most important tool in the competition law (for dealing with super platforms) is enforcement on exclusionary-conduct (or abuse of dominance), which is dealt with in Part III.

II. Utilities regulation on super platforms

Competition agencies, excepting in case of mergers, may not intervene into corporate conduct solely based on market power held by the corporation. By contrast, utilities regulation—which has been applied to natural-monopoly industries—have authorized regulatory agencies to control corporate conduct, including pricing. Then, given super-platforms allegedly represent natural monopoly (due to network effects),¹⁹ several commentators have argued, they are better placed under utilities regulation, rather than competition law enforcement.

¹⁷ The JFTC, when it enforces unfair-trade-practices clause of the AMA, is required to show lesser degree of market power--“significant position in a market”, compared to when enforcing the monopolization clause.

¹⁸ Full Report (in Japanese original), p. 33, note 2.

¹⁹ Luigi Zingales and Guy Rolnik, “A Way to Own Your Social-Media Data”, New York Times (30 June 2017).

Utilities regulation has been exercised on electricity, transport, and even telecommunications (although it has lost natural-monopoly character). Yet much of existing utilities-regulation has become legacy regulation, detrimental to enterprises' innovation incentives. Then, even if utilities-regulation might be implemented on super platforms, the regulation needs to be improved.

A. Mandate on sharing data—rendering big data to common ownership

As the most radical form of utilities regulation on super platforms, some commentators have proposed that platforms' big-data be transferred to public data-base, made open to all competing platforms.²⁰ This idea of treating the Data as public infrastructure is buttressed by resentment against super platforms, which have enclosed personal data for their profit, in spite of many users' assumption of owning their and personal-data. Yet counterbalancing this argument, one may note that users have greatly benefited from having free service, realized by platforms' monetization of users' data.²¹

Regardless of one's standing on data ownership, the idea of appropriating the data to public institution is radically socialistic, robbing platforms of incentives to innovate. Most governments in liberal economies would find it hard to swallow this idea. Indeed, it is only the Chinese government that has put this idea into practice: The Government has ordered Alibaba and Tencent to transfer their web-banking data to "Financial Data Clearing House", through which state-owned banks get access to the data. This order has emanated from the Government's apprehension of data-accumulation by the Chinese super-platform companies, who are far ahead of slow-moving state-owned banks.²² The public clearing-house benefits SOEs, to the detriment of private internet-companies.

B. Mandate on data portability: Allowing access to the data by third parties

Not restricted to the public clearing-house idea, utilities regulation, in its full form, had better be avoided for platforms. Instead, softer measures for facilitating competition are called for. In practice, Japan, as well as the EU, has adopted the "cellphone-number portability", whereby users are authorized to bring with them the same cellphone-number to a rival carrier, ushering in new competition.

As an extension of the cellphone-number portability, data-portability might be imposed on big-data held by super platforms. Accordingly, Zingales and Rolnik (University of Chicago) have proposed that SNS users be admitted transferring their "social graph" (a representation

²⁰ *Eg.*, Martin Sandbu "Three radical ideas to transform the post-crisis economy", *Financial Times* (29 August 2017) ("Internet services with economic functions similar to public utilities should be regulated as such so as to make them behave in the public interest."); also see Robin Harding, "Treat Uber like a stock exchange to ensure fairness", *Financial Times* (1 August 2017).

²¹ D.D. Sokol and Roisin Comerford, "Antitrust and Regulating Big Data", 23 *GEO. MASON L. REV.* 1129, 1134 (2016) ("The monetization of the data in the form of targeted advertising sales for antitrust purposes is not suspect or harmful, but rather 'economically rational, profit-maximizing behavior,' that results in obvious consumer benefit").

²² Gabriel Wildau, "China targets mobile payments oligopoly with clearing mandate" *Financial Times* (10 August 2017).

of the interconnection of relationships in an online social network) to rival platforms.²³ Data-portability represents much milder intervention into corporate behavior than setting up public-clearing-house; thus, it is compatible with liberal market order.²⁴

Nevertheless, whether or not include “social graph” into portability-mandated personal-data needs to be further scrutinized, in view of platforms’ innovation incentive²⁵, as well as users’ privacy concerns²⁶.

Data-portability mandate has already been adopted by one public institution—the European Commission, which will implement, on May 2018, the General Data Protection Regulation (GDPR)²⁷, Article 20 of which proclaims “The data subject shall have the right to receive the personal data concerning him or her, which he or she has provided to a controller, in a structured, commonly used and machine-readable format and have the right to transmit those data to another controller without hindrance”.

Nonetheless, the devil lies in the details: the boundaries of “personal data”, for which platforms are mandated to admit users’ transferring the data to another platform, determine effectiveness of the mandate. But, the GDPR has not yet given clear answer to this point.²⁸ Still, the European Commission has come up with a sector-specific data-access rule in its Directive (EU) 2015/2366 on payment services in the internal market,²⁹ which is to be implemented in 2018. This rule provides access by third parties to a customer’s account and associated data upon the latter’s request.

Contrary to EU, in the US, big data is protected by a computer-related law, under which a rival platform’s access to the dominant platform’s data constitutes crime, even when individual users have given permission to the rival platform for using their personal data.

²³ Luigi Zingales and Guy Rolnik, *New York Times* (30 June 2017). Also see Tim Harford, “A way to poke Facebook off its uncontested perch”, *Financial Times* (2017/11/03).

²⁴ The OECD Data Report endorses data portability from the viewpoint of competition: “rules on data portability play also an important role in restricting companies’ market power, by reducing switching costs and allowing consumers to easily change to new and potentially better services. Taking the example of social networks, enabling consumers to transfer their profile’s data and multimedia files across sites could promote market competition between incumbents and even encourage new entry”. (OECD 2016, para 96).

²⁵ In this regard, see Alex Tabarrok, “The Facebook Trials: It’s Not “Our” Data”, at <https://marginalrevolution.com/marginalrevolution/2018/04/facebook-trials-not-data.html> (accessed 18 April 2018) (“Facebook hasn’t taken our data—they have created it”).

²⁶ Mandating portability of social-graph (which includes friends’ data) greatly expands risk of data leakage, as evidenced by the Cambridge Analytica (and Facebook) incident: see *New York Times* (20 March 2018) “New Investigations into Facebook Add New Pressures” (Reporting on investigation into the use of Facebook data by the political consulting firm, Cambridge Analytica)

²⁷ See < <http://www.eugdpr.org/> >.

²⁸ See Julia Apostle, “Data rules raise tough questions about the meaning of privacy”, *Financial Times* (3 October 2017).

²⁹ Regulation (EU) 2015/2365 of the European Parliament and of the Council on Transparency of Securities Financing Transactions. See Vezzoso, Simonetta, Fintech, Access to Data, and the Role of Competition Policy (22 January 2018), available at SSRN: <https://ssrn.com/abstract=3106594>.

This law is Computer Fraud and Abuse Act (CFAA)³⁰, based on which *Facebook v. Power Ventures* was judged, in which, a newly entered SNS platform (Power Ventures) schemed to scrape Facebook users' social-graph. Power Ventures had obtained permission from Facebook-users for the data use; the judge, however, concluded that the data-use (so called "data scraping") constitutes crime under the CFAA, because users' permission does not override refusal by Facebook to grant permission.³¹

Despite this important precedent, in another data- scraping case, regarding publicly-available SNS user-profiles, a US regional court granted preliminary injunction order, supporting a small data-analytics enterprise (HiQ) against a super platform—LinkedIn, who obstructed (based on the CFAA) the data scraping.³² The difference between this case and *Facebook v. Power Ventures* lies in that this case concerns collection of publicly-available data, whereas the latter concerns data which are password-protected.

C. Japanese approach—JFTC Data Report

As for Japan, the Government has legislated on personal-data protection: "Act on the Protection of Personal Information"³³, which, however, does not contain provision for data-portability. Yet JFTC Data Report endorses data-portability: "citizens have right to transfer their personal-data from one platform to another".³⁴ Backing this position, the Report expresses that "certain policy measure is necessitated to guarantee data-portability; without such measure market power endures in such service markets as SNS, where lock-in effect takes place".³⁵

The JFTC Report's position on data-portability does not reflect a neutral position, but an intentional position in support of data-portability as practiced in EU (its General Data Protection Rule); nevertheless, data-portability remains a globally controversial issue, with the US and the EU taking contrasting positions. Moreover, boundary of portability-mandated "personal data" needs to be carefully set up.

³⁰ Computer Fraud and Abuse Act of 1986, 18 USC 1030. Another case regarding "data scraping" is now pending at the US regional court—*LinkedIn v. HiQ*, in which an entrant platform (HiQ) collected publicly available user-profiles from LinkedIn site. LinkedIn obstructed the "data scraping" based on CFAA, but the regional court granted preliminary injunction order for HiQ, against LinkedIn obstructing the data collection: *HIQ Labs, Inc. v. LinkedIn Corp.*, Case No. 17-cv-03301-EMC, US District Court, N.D. California (14 August 2017).

³¹ *Facebook, Inc. v. Power Ventures*, 844 F. 3d 1058, 1068 (9th Cir. 2016).

³² *HIQ Labs, Inc. v. LinkedIn Corp.*, Case No. 17-cv-03301-EMC, US District Court, N.D. California (14 August 2017) (The Court expresses doubt on applying CFAA to collection of publicly-available data, since the application would "profoundly impact open access to the Internet").

³³ Act No. 57 of May 30, 2003, translation available at <http://www.japaneselawtranslation.go.jp/law/detail/?id=2781&vm=&re=> (accessed 7 October 2017).

³⁴ Full Report, note 27

³⁵ Full Report, p. 23.

D. Summary

Increasing prominence of super platforms, equipped with big data, has prompted proposals for utilities-regulation on the platforms. Full-fledged utilities-regulation, however, would cause serious erosion of innovation-incentives by platforms. Given that super-platforms' market power, even when it exists, is not permanent one (as depicted in the last Part), Governments are advised to eschew utilities-regulation; instead, they might utilize softer competition policies, most representative of which has already been implemented as cellphone-number portability.

As an extension of number portability, personal-data portability might be imposed on super platforms, in order to facilitate competition among platforms. In this imposition, the boundaries on "personal data" need to be delineated with a view to striking a right balance between data-owners' rights and platforms' incentives to innovate, at the same time minimizing privacy leakage.

III. Competition law enforcement on refusal-to-share data

The last Part showed that, among utilities-type-regulations, only the personal-data-portability mandate is worthy of support. This leaves us with competition-law enforcement as the preeminent tool to cope with super platforms, equipped with big data. Collection of big data, itself, is not illegal (excepting merger cases), but excluding competitors through misuse of big data might amount to violation of the competition law. Nevertheless, given that market power held by super platforms derives from their superiority in analyzing data (through AI and machine learning), remedy for illegal conduct should be carefully calibrated for not undermining platforms' competence.

Against misuse of data by single platforms, the competition law is equipped with the provision against exclusionary conduct, which takes the form of Sherman Act Section 2 (monopolization) in the US; Article 102 TFEU (abuse of dominant position) in EU; and the AMA Article 2 (5) (monopolization), as well as Article 2 (9) (unfair trade practices) in Japan.

Exclusionary conduct by platforms, most prominently, takes the form of refusal-to-share data with rival platforms. Such passive-refusal has been given special treatment by competition agencies (and courts), since pure (passive) refusal does not involve active conduct to exclude rivals; therefore, platforms' right on accumulated data needs to be given proper weight.

A. Enforcement on Refusal-to-share data: Pros and Cons of Essential Facility Doctrine

In EU, pure (passive) refusal-to-deal has been evaluated on whether to apply the "essential facility doctrine (EFD)", under which certain facilities are deemed essential for other entities to engage in business, resulting in judging the refusal-to-deal as anticompetitive.³⁶ The

³⁶ See European Commission Article 102 Guidance: Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings (2009/C 45/02), para 81 (The Commission will consider refusals to deal as an enforcement priority if all the following circumstances are present: (1) the refusal relates to a product or service that is objectively necessary to be able to compete effectively on a downstream market; (2) the refusal is likely to lead to the elimination of

European Commission (and courts) has, in limited number of cases, utilized the EFD, for ordering dominant enterprises to allow access to their facilities, although attaching strict conditions: particularly, existence of consumers' demand for new product/service.³⁷ Regarding data, the Commission has ordered TV broadcasters to allow TV magazines' access to the broadcasters' TV-programming data in Magill case, overriding the broadcasters' copyrights.³⁸ Likewise, *IMS Health*³⁹ concerned copy-right protected data-structure.

Relatedly, the European Commission, in its "European Data Economy" vision paper⁴⁰ envisages the FRAND (Fair, Reasonable and Nondiscriminatory) based access to the data held by platforms. However, establishing access-regime, outside the competition law, would undermine balancing consideration, carefully established under the competition law.

By contrast, in the US, Supreme Court has rejected the EFD, for the reason that the doctrine undermines incentives to invest.⁴¹ Furthermore, the Computer Fraud and Abuse Act (CFAA) strengthened this rejection, through criminalizing unauthorized access to computer data. Accordingly, in *Facebook v. Power Ventures*, the court endorsed Facebook for not allowing third-party websites' access to Facebook's website and data, opining that Facebook has the right to manage access and use of the data.

Nonetheless, in a currently ongoing case (*Authenticom v. CDK*), a regional court issued a preliminary injunction, ordering a consulting company to concede access to the company's data (through machine reading) by another company engaged in value-adding service to the consulting business.⁴² The appellate court, however, reversed the decision.⁴³ Despite the reversal, this case implies that, denial of EFD (together with the CFAA) does not eliminate possibility that courts, under special circumstances, order platforms to concede other companies' access to their data. Still, for protecting users' privacy rights, mandated data-sharing needs to be restricted to occasions in which users consent to the sharing, which is the case in *Authenticom v. CDK*.

effective competition on the downstream market; (3) the refusal is likely to lead to consumer harm).

³⁷ *IMS Health GmbH & Co. OHG v. NDC Health GmbH & Co.* [2004], para 38 (for refusal-to-deal to be found illegal "three cumulative conditions be satisfied, namely, that that refusal is preventing the emergence of a new product for which there is a potential consumer demand, that it is unjustified and such as to exclude any competition on a secondary market.")

³⁸ *RTE and Independent Television Publications Ltd. v. Commission* [Magill], [1995] ECR I-743.

³⁹ *Supra*, note 37.

⁴⁰ European Commission, Communication from the Commission to the European Parliament, "Building A European Data Economy", COM(2017) 9 final (10 January 2017), p. 13.

⁴¹ *Verizon Communications v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 408 (2004) (forced sharing "may lessen the incentive for the monopolist, the rival, or both to invest in those economically beneficial facilities").

⁴² *Authenticom, Inc. v. CDK Global, LLC et al*, U.S. District Court for the Western District of Wisconsin, No. 17-cv-318-jdp (July 14, 2017).

⁴³ *Authenticom, Inc. v. CDK Global, LLC et al*, Seventh Circuit, Nos. 17-2540, 17-2541, (6 November 2017).

B. Japanese approach-- JFTC Data Report

Regarding pure refusal-to-share data, JFTC Data Report, although expressing basically the same EFD as adopted by the European Commission, stresses that Report's position is not that of the EFD,⁴⁴ thus effectively broadening boundaries of illegal refusal-to-share data, beyond areas mandated under the EFD.

For backing this position, the Data Report expresses apprehension that platforms' denial of access to their data by rival platforms "risks inhibiting users from switching to rivals".⁴⁵ This remark by the Report, in effect, urges the JFTC to order platforms to grant rivals the access to the platforms' data.

To be precise, the Report cautions the JFTC on need for preserving innovation-incentives by platforms.⁴⁶ This caution, however, does not signify endorsement of the EFD, since the EFD absolutely prohibits competition agencies from ordering data-access, when the data lacks essentiality.

As a more detailed point in going beyond the EFD, the Report points out that when the Japanese personal-data protection law (Act on the Protection of Personal Information⁴⁷) mandates access to the data by rivals or customers, the refusal by a platform constitutes competition-law violation.⁴⁸ As a background, the Japanese personal-data protection law, in contrast with the European Commission's GDPR, does not mandate general data-portability; still the Japanese law delineates circumstances in which data may be accessed by customers (as personal-data owners). As an example, the JFTC Report refers to a case in which a condominium-management-services company is mandated to transfer its management-data to a rival company, to which the condominium-owners have shifted the management-services contract.

Nevertheless, the fact that personal-data protection law mandates data-access does not necessarily transform the data into essential facility under the competition law. The Data Report's standing, then, represents more aggressive competition-law enforcement than that allowed under the EFD. In this case, aggressive competition-law enforcement may not be endorsed for the need to protect consumers, since condominium-owners are entitled to directly resort to the personal-data protection law.

IV. Competition law enforcement on exclusionary conduct by platforms with big data

A. General observation

In case super-platforms utilize the data for excluding rivals, in ways surpassing pure (passive) refusal-to-share, competition agencies should consider enforcing competition-law provisions against exclusionary conduct. As an example, the French and German competition agencies

⁴⁴ JFTC Data Report: Full Report (Japanese original), p. 45, note 2.

⁴⁵ Id. p. 20.

⁴⁶ Id. p. 21.

⁴⁷ Supra note 33.

⁴⁸ JFTC Data Report: Full Report, p. 45.

(according to their joint report)⁴⁹ have utilized following provisions: those against discriminatory access (including refusal to access)⁵⁰, exclusive dealing⁵¹, and tying⁵².

On this issue, the US and EU competition agencies have exhibited contrasting postures: the US is cautious while the EU is aggressive, as exemplified in the contrasting enforcements on Google's search representation.⁵³

B. Japanese approach

In Japan, for addressing exclusionary conduct, the JFTC has utilized, in addition to monopolization clause (AMA Article 2 (5)), unfair-trade-practices clause (AMA Article 2 (9)). Utilization of the latter (abbreviated as "UTP") enables the JFTC to expand boundaries of illegal conduct, compared to utilization of the former (monopolization clause). The JFTC, therefore, has predominantly utilized the UTP clause against exclusionary conduct.

1. JFTC Data Report

Corresponding to the JFTC practice of prioritizing the UTP clause over the monopolization clause, JFTC Data Report describes how the JFTC would enforce the UTP clause on data-related conduct by platforms. Among sections of the UTP clause, the Report highlights the section on "trading on restrictive terms".⁵⁴ Based on this section, the Report expresses that a platform's pressure on its counterparties to concede their valuable data to the platform constitutes illegal UTP, since the conduct strengthens the platform's significant position in the market, through undermining the counterparty's innovation-incentives, resulting in weaker competition in the market.⁵⁵

However, the problem exists with the "trading on restrictive terms" section, in its expansiveness. First, the meaning of "restrictive" is subjective, resulting in condemning as restrictive those contract-terms with which both parties have agreed. Second, only "risk of lessening competition" (short of substantial lessening of competition) by an entity with "significant position in the market" is required as the degree of competition-restraint sufficient to be deemed illegal. Third, although the restrictive-terms section has come to be interpreted as allowing efficiency-defense on the part of the targeted enterprise, the JFTC, in practice, has routinely focused only on restrictiveness of the trading-terms, ignoring their efficiency effects.

⁴⁹ Autorité de la Concurrence and Bundeskartellamt, "Competition Law and Data" (2016).

⁵⁰ Id. p. 19.

⁵¹ Id. para 67.

⁵² Id. p. 20.

⁵³ The US: FTC Press Release, File Number 111-0163 (3 January 2013) ; The EU: European Commission Decision, Case AT.39740, C(2017) 4444 final (27 June 2017).

⁵⁴ Designation of Unfair Trade Practices (1982, revised 2010), Section 12: "Trading on Restrictive Terms" (prohibiting trading terms "which unjustly restrict any trade between the said party and its other transacting party or other business activities of the said party."), English translation available at

http://www.jftc.go.jp/en/legislation_gls/unfairtradepractices.html (accessed 17 October 2017).

⁵⁵ JFTC Data Report: Full Report (Japanese original), p. 36.

Even more problematic than the restrictive-terms section is another UTP section on “Interference with a Competitor's Transactions”.⁵⁶ Problem with this section lies in its abstractness; “unjust-interference with competitor’s transaction” virtually comprises whole range of exclusionary conduct. JFTC Data Report, consequently, explains that data holders’ conduct, which obstruct transaction by the holders’ rivals, risks violating the “interference” section of the UTP.⁵⁷

Coupled with abstractness of its wording, the “interference” section’s risk in overutilization is enhanced by JFTC’s interpretation (supported by courts) that “interference” is predominantly exclusionary, allowing the JFTC to condemn exclusionary conduct, through categorizing the conduct as “interference”, ignoring the conduct’s possible efficiency-effects.⁵⁸

2. JFTC’s DeNa and Airbnb cases: Exclusive dealing in two-sided markets

Using the “interference” section of the UTP, the JFTC, for the first time, intervened into a platform’s exclusionary conduct in its DeNa case.⁵⁹ DeNa is the largest platform for “social games” (online-games that require interaction between gamers), which consist of two-sided markets: gamers’ market and game-developers’ market.

DeNa discriminated against those game-developers who transacted not only with DeNa but also with its main rival—Gree. The discrimination took the form of deleting links to those games at DeNa website.

The JFTC identified exclusionary effects in the DeNa’s conduct: “Gree has encountered difficulty in convincing game-developers, for at least a half of them, to offer their games through Gree’s website”.⁶⁰ The JFTC, thus, condemned DeNa as engaging in illegal “interference”, without examining the conduct’s efficiency rationale.

This case, concerning two-sided markets, deserves detailed analysis of its exclusionary effects as compared with its efficiency effects. Nevertheless, the JFTC, through categorizing DeNa’s conduct as “interference”, focused only on its exclusionary effect, neglecting its efficiency effects.

Still, JFTC’s conclusion of finding DeNa illegal, itself, is convincing, since DeNa’s conduct is equivalent with exclusive dealing, which prevents new platforms from obtaining game-

⁵⁶ Designation of Unfair Trade Practices (1982, revised 2010), Section 14, which prohibits “unjustly interfering with a transaction between another entrepreneur who is in a domestic competitive relationship with oneself or with the corporation of which one is a stockholder or an officer, and its transacting party, by preventing the effecting of a contract, or by inducing the breach of a contract, or by any other means whatsoever.”

⁵⁷ Full report p. 44.

⁵⁸ See *infra* note 59.

⁵⁹ JFTC Remedy Order, DeNA (9 June 2011), 58 (1) Shinketsushu 189, Summarized English translation available at <http://www.jftc.go.jp/en/pressreleases/yearly-2011/jun/individual-000427.html> (accessed, 19 October 2017). Also see Van Uytsel, Steven and Uemura, Yoshiteru, “Competition Law Interference Prior to the Formation of a Digital Market -The JFTC's Enforcement Action Against DeNA” (12 December 2017), available at SSRN: <https://ssrn.com/abstract=3086449> or <http://dx.doi.org/10.2139/ssrn.3086449> (accessed 16 March 2018).

⁶⁰ DeNA, 58 (1) Shinketsushu 189, 191.

developers, to the degree numerous enough for attaining critical mass.⁶¹ Moreover, in these two-sided markets, network-loop augments network effects, so that exclusive-dealing imposed by the largest platform (DeNa) exerts disproportionately-exclusionary effect, compared to the dealing's efficiency effects. Still, problem remains in that the JFTC, through use of the "interference" section, neglected to examine details of the two-sided-markets.

Subsequently, the JFTC, on November 2017, made an on-the-spot inspection on the offices of Airbnb (its Japanese subsidiary), on suspicion that Airbnb has engaged in exclusive-dealing with contractors for local homes, to the detriment of rival platforms.⁶² This initiative by JFTC is in line with its action against DeNa; Airbnb, if indeed engaged in the exclusive dealing, deserves condemnation.

3. JFTC's Amazon MFN case

On the heels of the DeNa case, the JFTC tackled the more consequential super-platform, in its Amazon MFN (Most Favored Nations) case. This case, regrettably, did not result in a formal decision; JFTC suspended its proceeding, following Amazon's voluntary termination of MFN. Even so, JFTC's public statement⁶³ reveals significance of this case.

MFN clause is alternatively called "price-parity clause (PPC)", whereby Amazon (its Japanese subsidiary) prohibited those merchants, selling at Amazon's platform (Amazon Marketplace), from setting lower prices at rival platforms: Rakuten and Yahoo Shopping, among others. JFTC condemned the Amazon's MFN clause as having exclusionary effect against rival platforms.

MFN, internationally, has already gone through considerable number of cases as well as commentaries in both the US and EU. These commentators have pointed out both shortcomings and benefits of MFN: shortcomings lie in MFN's exclusionary effect, as well as its effect of facilitating parallel pricing; benefits lie in preventing free-riders, as well as eliminating transaction costs.⁶⁴

As to actual enforcement by competition agencies, those in EU member countries have condemned the MFN (exercised by Booking.com, as well as Amazon), resolving the cases through commitment decisions.⁶⁵ By contrast, the US antitrust agencies, although having expressed concerns, have never condemned the MFN. To be sure, the DOJ condemned

⁶¹ As to importance of "critical mass" of users for platforms, see D. S. Evans, "Economics of Vertical Restraints for Multi-Sided Platforms" (Coase-Sandor Institute for Law & Economics Working Paper No. 626, 2013), p. 20.

⁶² Nikkei (Japanese edition) "JFTC dawn-raided Airbnb for suspected Antimonopoly Act violation" (17 November 2017). The JFTC has not made any press-release on this case.

⁶³ JFTC Press release (1 June 2017), Summary English translation available at <http://www.jftc.go.jp/en/pressreleases/yearly-2017/June/170601.files/170601.pdf> (accessed 19 October 2017).

⁶⁴ See J.B. Baker and J.A. Chevalier, "The Competitive Consequences of Most-Favored-Nation Provisions", 27 (2) Antitrust 20 (2013).

⁶⁵ These member countries are France, Sweden, Italy, Germany, and UK: See Margherita Colangelo, "Parity Clauses and Competition Law in Digital Marketplaces: The Case of Online Hotel Booking", 8 (1) Journal of European Competition Law & Practice 3-14 (2017).

Apple's trading terms with e-books publishers, including the MFN clause, which, however, was tackled as a facilitating device to bring about hub-and-scope cartel.⁶⁶

Against this backdrop, the JFTC, although having missed a perfect chance to stand-out in the global stage by issuing a formal decision against Amazon, has condemned MFN, in support of the position taken by the EU members' competition agencies.

C. Summary

Against pure (passive) refusal-to-share data, the essential-facility-doctrine (EFD) is recommended to be applied, but with rigorous conditions, as implemented by the European Commission. Even in the US, whose courts have rejected the EFD, the Authenticom case (2017) signifies that specific circumstances might legitimize forcing data-holders to share the data with rivals.

Against exclusionary conduct, surpassing pure refusal-to-share data, usual competition-law enforcement on exclusionary conduct needs to be implemented, with balancing consideration between exclusionary effects and efficiency (pro-competitive) effects. In this regard, JFTC's utilization of the unfair-trade-practices clause tends to result in overregulating super-platforms.

V. Exploitative-abuse regulation for consumer protection

Regulation of unitary-conduct is aimed at exclusionary conduct. Still, several countries/regions have also targeted exploitative abuse: acts of inflicting harm on trading-counterparts, as well as on end-consumers. Exploitative-abuse regulation, when it protects end-consumers, overlaps with consumer protection policy. This overlapping, however, has negative side effects.

A. Exploitative-abuse regulation

Exploitative-abuse has been cracked down by competition agencies in EU, Japan, and China, while the US antitrust agencies have denounced the concept. As for Japan, the JFTC has condemned exploitative-abuse, through the AMA's "abuse of superior bargaining position" clause.⁶⁷

Exploitative-abuse regulation enables competition agencies to order super-platforms to amend their conduct which harms consumers (customers), regardless of the conduct's exclusionary effects on rivals. The abuse regulation, thus, radically expands boundaries in condemning super-platforms' conduct. This enlarges risk of overregulation, which is why the US antitrust agencies have denounced the concept. For the same reason, the European Commission has, in recent years, refrained from enforcing the regulation.

⁶⁶ U.S. v. Apple, Inc., 952 F. Supp. 2d 638 (S.D.N.Y. 2013), aff'd, 791 F.3d 290 (2d Cir. 2015).

⁶⁷ The AMA Article 2 (9) (v), translation available at http://www.jftc.go.jp/en/legislation_gls/amended_ama09/index.files/The_Antimonopoly_Act.pdf (accessed 5 May 2018)

Even so, EU member countries are now witnessing emergence of exploitative-abuse regulation against super-platforms, exercised by several competition agencies, backed by competition-law scholars. Most prominently, German competition agency (Bundeskartellamt) has been investigating Facebook, for “amass[ing] every kind of data generated by using third-party websites and merge it with the user's Facebook account”.⁶⁸ Although Bundeskartellamt accuses Facebook for both exclusionary abuse⁶⁹ and exploitative abuse, the focus is on the latter: “If a dominant company makes the use of its service conditional upon the user granting the company extensive permission to use his or her personal data, this can be taken up by the competition authority as a case of ‘exploitative business terms’.”⁷⁰

This move by Bundeskartellamt is in line with opinions from influential competition scholars. Most prominently, Ariel Ezrachi and Maurice Stucke have urged competition agencies to inquire on super-platforms’ ability to increase market power and profits, at the expense of degraded quality to users.⁷¹

Exploitative-abuse regulation against super-platforms, however, accompanies serious risk of overregulation. First, proof of exploitation (typically, degrading qualities to users) is hard to be substantiated; how can you conclude that Google has degraded its searches? Second, straightforward remedy to the abuse is breaking-up the super-platforms, which, however, undermines platforms’ incentives to innovate and grow. That is why competition agencies have come to refrain from breaking-up companies as a remedy for law violation.

B. Consumer Protection and the Competition Law

Exploitative-abuse regulation, when it aims at protecting end-consumers, overlaps with consumer protection policy, since the abuse-regulation targets platforms’ conduct of increasing their profits at the sacrifice of consumer benefits, including protection of personal data. Indeed, Bundeskartellamt has expressed: “data protection law has the same objective as competition law, which is to protect individuals from having their personal data exploited by the opposite market side.”⁷²

Nevertheless, consumer-protection policy and the competition-law enforcement need to be separated, since the competition policy should not aim at directly protecting consumers, but should aim at suppressing competition restraints, thus indirectly enhancing consumer welfare. This point has been most strictly adhered to in the US, where the FTC, although endowed with tasks of both the competition-law enforcement and consumer protection (centering on

⁶⁸ Bundeskartellamt, Preliminary assessment in Facebook proceeding: Facebook's collection and use of data from third-party sources is abusive (19 December 2017), http://www.bundeskartellamt.de/SharedDocs/Meldung/EN/Pressemitteilungen/2017/19_12_2017_Facebook.html (accessed 10 March 2018).

⁶⁹ Id. (“There is also potential for competitive harm on the side of the advertising customers who are faced with a dominant supplier of advertising space.”)

⁷⁰ Id.

⁷¹ M.E. Stucke and Ariel Ezrachi, “When Competition Fails to Optimize Quality: A Look at Search Engines”, 18 YALE J.L. & TECH. 70, 108-109 (2016) (“if a company systematically degrades the quality of its search results to attain or maintain a monopoly, it seems likely that authorities would intervene.”).

⁷² Supra note 68.

prohibition of false advertising), has institutionally separated these two tasks: Bureau of Competition, and Bureau of Consumer Protection, in order not to mingle them.⁷³

Likewise, in Japan, the JFTC has also adhered to the same separation of roles: the JFTC, although also endowed with role of prohibiting false advertisement (through the Premiums and Representations Act), has cut the prohibition's link with the Japanese competition law, in order to directly protect consumers from false advertising. Consequently, newly inaugurated "Japanese Consumer Protection Agency" has taken over the false-advertisement surveillance role (under the Premiums and Representations Act) from the JFTC.

In a similar vein, the European Commission, in contrast to German Bundeskartellamt, has rejected to consider on privacy in the case of Facebook/WhatsApp merger: "Any privacy-related concerns flowing from the increased concentration of data within the control of Facebook as a result of the Transaction do not fall within the scope of the EU competition law rules but within the scope of the EU data protection rules".⁷⁴

Against this backdrop, competition agencies' adoption of exploitative-abuse regulation (aimed at protecting end-consumers) needs to be viewed negatively, since the adoption results in mingling competition-law enforcement with consumer-protection policy.⁷⁵

Same negative stance applies to the proposal for linking privacy protection with competition-law-enforcement. To be sure, protection of privacy (personal data) is a vital concern to users of platforms, which has led to appeal to government agencies. Nevertheless, privacy protection does not necessitate intervention by competition agencies, as evidenced by the European Commission, which has protected privacy through direct consumer-protection measures or communications policy. Indeed, the Commission has ordered Google to erase personal data from Google's search results, when those persons proclaim the "right to be forgotten". The Commission is scheduled to further enhance privacy protection, through the General Data Protection Rule (to be enforced on May 2018).

Still, several commentators have advocated utilizing competition law for privacy protection. As an example, in the US merger case of Google/DoubleClick (regarding online advertising market), several commentators urged FTC to block this merger for protection of personal data. The FTC, however, rejected this solicitation, on the ground that FTC's antitrust

⁷³ According to Commissioner Ohlhausen, "This evolution in the Congress and the Courts of two distinct but complementary bodies of law—competition and consumer protection—reflects a consensus in the United States about the outer limits of our competition laws.": M.K. Ohlhausen and A.P. Okuliar, "Competition, Consumer Protection, and the Right [Approach] to Privacy", 80 *Antitrust Law Journal* 121 (2015). Also see Marina Lao, "Erring on the Side of Antitrust Enforcement When in Doubt in Data-Driven Mergers", in *Douglas H. Ginsburg, An Antitrust Professor on the Bench - Liber Americorum - Vol. I* (Institute of Competition Law, 2018), p. 507 ("consumer protection regulation rather than antitrust law would seem to be the better solution for a number of reasons").

⁷⁴ European Commission, COMP/M.7217 - Facebook/ WhatsApp (3 October 2014), para 164.

⁷⁵ Sokol & Comerford comment "while antitrust and consumer protection laws are complementary, they still comprise distinct areas of law, and consumer protection remains the correct institutional choice to address potential Big Data harms.": D.D. Sokol and Roisin Comerford, "Antitrust and Regulating Big Data", 23 *GEO. MASON L. REV.* 1129, 1130 (2016).

enforcement aims at protecting competition, while privacy issues have been tackled by FTC's Bureau of Consumer Protection⁷⁶

C. Japanese approach

1. JFTC Data Report on exploitative abuse

JFTC Data Report stresses applicability of the AMA's exploitative-abuse provision—superior bargaining-position (SBP) clause—to the platforms equipped with big data. Yet the Report nuances this position, by pointing out that the JFTC has utilized the SBP clause exclusively for protecting small-and-medium enterprises (as suppliers to large enterprises); end-consumers have been left out of the protection.⁷⁷ Nevertheless, on legal-provision basis, the JFTC is entitled to utilize the SBP clause for protecting end-consumers, since the clause does not exclude end-consumers from the clause's protection. Still, JFTC's reticence in actual enforcement is praiseworthy, since protection of end-consumers may better be left to consumer-protection measures.

Still, the SBP clause of the AMA, as currently utilized exclusively for protecting SMEs (predominantly, suppliers to big retailers), has presented risks of overregulation. These risks emanate, first, from SBP's lack of limitation on targeted enterprises; the existing legal requirement of targeted enterprises' having "superior bargaining position" (against their trading counterparts) has lost its delimiting role, since the JFTC has held this requirement as fulfilled whenever "abuse" is found to be committed by big enterprises (mostly big retailers), on the pretext that any trading-counterpart acceding to abusive trading-terms does so only facing pressure from enterprises with superior-bargaining-position.

Second, the JFTC has exercised wide latitude in identifying "abuse", leading to overregulation. This has been caused by JFTC's disregard of the statutory definition of "abuse"— "unjust [conduct] in light of normal business practices"⁷⁸; the JFTC has examined abusiveness of trading-terms anew, from the viewpoint of "fair-competition order", even when such trading-term has been routinely practiced in the industry.⁷⁹

Thus, the SBP clause of the AMA tends to be overused; the clause, therefore, is recommended to be utilized carefully against online-platforms, which have gone through innovative transformations. The JFTC might apply the SBP clause on digital platforms, only when the platforms adopt clearly abusive trading terms, namely, same traditional abusive-

⁷⁶ "[T]he sole purpose of federal antitrust review of mergers and acquisitions is to identify and remedy transactions that harm competition. Not only does the Commission lack legal authority to require conditions to this merger that do not relate to antitrust, regulating the privacy requirements of just one company could itself pose a serious detriment to competition in this vast and rapidly evolving industry.": Statement of FTC Concerning Google/DoubleClick, FTC File No. 071-0170 (2007).

⁷⁷ JFTC Data Report (Japanese original), p. 37.

⁷⁸ The AMA Article 2 (9) v.

⁷⁹ JFTC Hearing Decision (4 June 2015), Toys"R"Us-Japan, 62 Shinketsushu 119, 158 ("Trading-terms which bleaches 'fair-competition order' may not be regarded as 'normal business practice'; therefore, even if the abusive conduct conforms to existing trading customs, the conduct may not be legitimized.")

terms adopted by big-box retailers. In other words, JFTC is advised to refrain from judging platforms' novel trading-terms from the viewpoint of "fair-competition order".

2. JFTC investigation on Amazon—Superior Bargaining Position case

On March 2018, the JFTC made an on-the-spot inspection on Amazon (its Japanese Subsidiary), on suspicion of the SBP abuse by Amazon toward merchants from which Amazon has wholesaled for e-retailing on Amazon's site.⁸⁰ This case is distinguished from the previous Amazon case on MFN.⁸¹ Amazon allegedly has pressured merchants to offer to Amazon a refund amounting up to 10% of discounts that Amazon has offered to e-customers.

The JFTC would pursue this case under the SBP clause (within the unfair-trade-practices), following the framework established in previous SBP cases, particularly the Toys"R"Us case⁸²: First the JFTC would identify superior-bargaining-position held by Amazon toward the merchants, to which Amazon would dispute on the ground that many merchants operate on big scale, with enough alternative-outlets ; second the JFTC would find Amazon's refund-demand as abusive, in causing undue damage to the merchants, to which Amazon would dispute on the ground that refund-request to merchants on occasion of bargaining-events as prevalent business practices.

D. Summary

Exploitative-abuse condemnation under the competition law accompanies risks of overregulation, since the condemnation lacks objective standards for identifying undue exploitation. Consequently, direct consumer-harm caused by platforms may better be tackled by consumer protection agencies (including one aimed at privacy protection), not by competition agencies.

Conclusion

The core tool in the competition law against super-platforms is the provision against exclusionary (unitary) conduct, comprising monopolization clause or abuse-of-dominance clause. This clause is enforced on dominant enterprises, when they exclude their rivals through anticompetitive methods. Dominance (market power), then, needs to be proven by competition agencies. Market power needs to be evaluated for each online market; still, market power may be shown to be held by several platforms equipped with superb AI capabilities.

Yet competition agencies may not order super-platforms to perform remedies, solely based on their market power, but are required to prove that the platforms have excluded rivals through anticompetitive methods, the determination of which necessitates balancing exclusionary effects against efficiency effects.

Big data accumulated by super platforms have come to be asserted as rendering their market-power permanent, leading to proposals for putting super-platforms under utilities-regulation.

⁸⁰ Nikkei (Japanese edition) (2018/03/16) "How the JFTC would scrutinize on Amazon's Superior Position?". The JFTC has not made any press-release on this case.

⁸¹ Supra note 63.

⁸² Supra note 79.

Full utilities-regulation, however, fatally undermines innovation-incentives of platforms. Moreover, even if market power held by super-platforms may be determined, the power may not be grasped to be permanent, given historical changes in platform-champions. Consequently, for utilities-type regulations, only the data-portability mandate may be endorsed. This leads to reconfirmation that competition law enforcement remains as the key tool for addressing big data held by platforms.

The competition-law enforcement regarding big-data, initially, concerns whether to order super-platforms to render their data accessible to their rivals. On this point, first, passive (pure) refusal-to-share data may be evaluated under the essential-facility-doctrine, which, needs to be attached with rigorous conditions, for not undermining platforms' innovation incentives. Second, positively-exclusionary conduct by platforms calls for application of exclusionary-conduct clauses of the competition law. Third, regulation of exploitative-abuse (in contrast with exclusionary-abuse) had better be eschewed against platforms, since it brings serious risk of overregulation. Although exploitative-abuse regulation works as a direct consumer-protection measure, direct competition protection has already been implemented, separate from the competition law, in the form of direct consumer-protection measures, particularly privacy-protection measures.