

Competition law in the EU and Japan– Recent Trends

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Any views expressed are mine, not those of any organisation

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Today's lecture

- Overarching trend
- Changes in leadership
- Digital platforms
 - abuse of dominance
 - mergers
 - the turn towards regulation
- Fines: the only way is up?
- Competition law and labour relations
- Clash between competition policy and industrial policy

Overarching trend: high expectations

- “*plus est en vous*” “*boys be ambitious*” 「少年よ、大志を抱け」
- Competition law is aimed at protecting competition (→ “consumer welfare”)
- But policymakers, the general public and some experts increasingly expect competition law to solve a wide array of issues:
 - power of Big Tech
 - lack of online data protection
 - imbalances in labour markets
- Tension:
 - sticking to traditional competition law concepts → consistency, predictability
 - broadening competition law → increased relevance, power

**TECHNICAL
ANTITRUST**

**ANTITRUST AS A
MOVEMENT**

EU and Japanese competition law – the essence

EU competition law – the essence

- No anti-competitive agreements (horizontal or vertical) (Art. 101 TFEU = Treaty on the Functioning of the European Union)
- No abuse of dominance (Art. 102 TFEU)
- No anti-competitive mergers and acquisitions (EU Merger Regulation)
- No State aid, unless necessary to achieve specified objectives (Art. 107 TFEU)

- Enforcement:
 - European Commission + national competition authorities
 - Civil litigation

独占禁止法 – the essence

- No 不当な取引制限 unreasonable restraints of trade
- No 私的独占 private monopolization
- No 不公正な取引方法 unfair trade practices
 - No 抱き合わせ販売 tying, no 優越的地位の濫用 abuse of a superior bargaining position, etc.
- No 企業結合による競争の実質的制限 anti-competitive mergers and acquisitions
- Enforcement
 - 公正取引委員会
 - 民事訴訟 civil litigation

Leadership changes



2019: a new Commission
(but the same Commissioner for competition)

Commissioner for Competition

- 2nd term for Margrethe Vestager (1st term: 2014-2019)
- Commissioner for Competition + “Europe fit for the Digital Age”
 - Clear separation between two parts of the portfolio (Vestager’s answers to the European Parliament questionnaire, p. 14 https://ec.europa.eu/commission/commissioners/sites/default/files/2019-07/20190716_competition_cwt2019/files/commissioner_ep_hearings/answers-ep-questionnaire-vestager.pdf)
 - Implications

Competition rules and enforcement cannot tackle all the challenges of the digital transformation. Regulation and competition enforcement must work hand-in-hand, complement and reinforce each other. (Vestager’s answers to the European Parliament questionnaire, p. 14)

Japan Fair Trade Commission

- 古谷 一之 FURUYA Kazuyuki appointed as new Chairman
 - Took office on 16 September 2020
 - Former official of the Ministry of Finance, former head of the 国税庁 National Tax Agency
 - Former 官房副長官補 (Assistant Chief Cabinet Secretary) in the cabinet secretariat of Prime Minister Abe
 - Within the cabinet secretariat, he headed a group in charge of the government's policy towards Big Tech

Digital platforms

New insights and learning about platforms

- How two-sided platforms work
- Importance of data
- High fixed costs, low variable costs → importance of scale
- Ecosystems

Digital platforms – abuse of
dominance / superior bargaining
position

The EU Commission's Google Search (Shopping) case

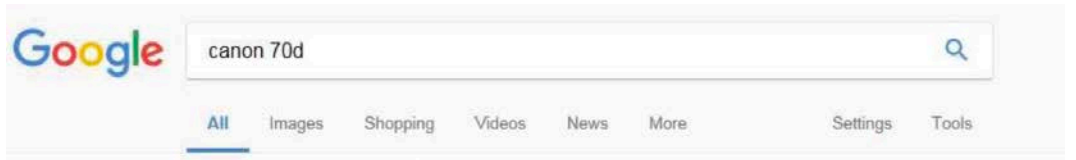
(Case AT.39740, Commission decision of 27 June 2017)

- Google dominant in the market for general search
- The abuse: Google used (**leveraged**) dominant position in one market to exclude competitors in another market
 - Market for general search: covers the entire internet
 - Specialized search markets: focus on specific content e.g. flights, hotels, news, shopping
 - In this case: Google leveraged its dominant position in general search to exclude competitors in the market for comparison shopping services
 - Comparison shopping services = shows product offers from merchant websites, enabling users to compare them

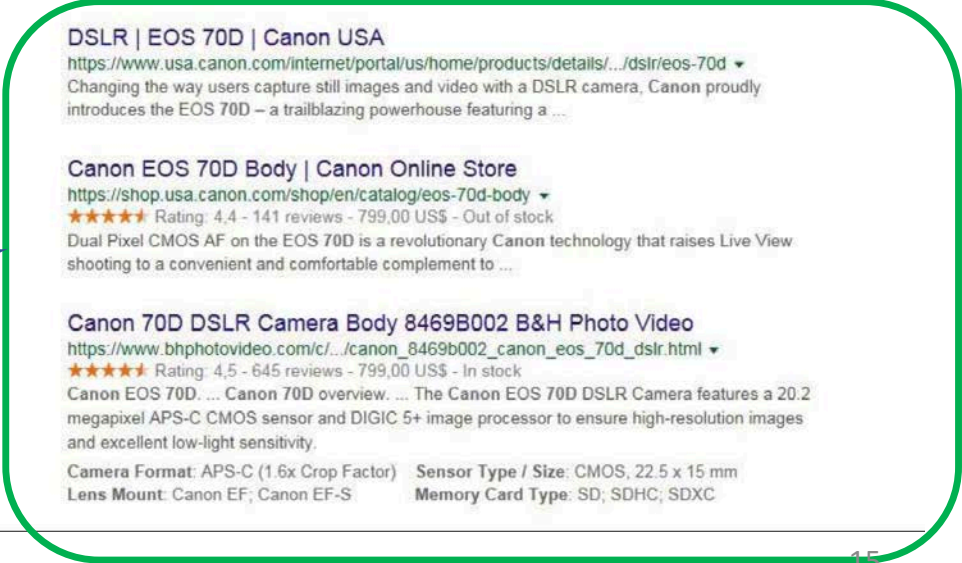
Google shopping
(only Google is
allowed in the box,
even when other links
are more relevant)



Generic search results
(where competitors are
demoted)



Canon® EOS 70D - La boutique officielle - canon.be
store.canon.be/70D
Qualité d'image et vidéos Full HD. Livraison et retour gratuits.
Suivre Votre Commande - Livraison/Retour Gratuits - Aide Produits En Ligne
Gagnez 365 jours d'été Nouveautés Canon
Soyez Inspiré avec Canon Appareils Photo Hybrides



EU – Google Search (Shopping) case – Commission decision

- Google must end the infringement → Google must treat its own comparison shopping services the same way as those of its competitors
- Fine of 2.42 billion euro
- **Appeal pending** (T-612/17 Google and Alphabet v. Commission)
 - Hearing took place from February 12 to February 14

The *Bundeskartellamt's* Facebook case

- Case based on German competition law, which has a provision on abuse of dominance that is very similar to the one in the EU (§ 19 (1) GWB).
- At issue: Facebook collects data *outside* of Facebook (WhatsApp, Instagram, third party websites), in violation of GDPR, and links this to Facebook profile → exploitative abuse + exclusionary abuse
- Bundeskartellamt: orders Facebook to end abusive data processing
 - Facebook is still allowed to collect data via WhatsApp, Instagram, and third party websites, but it must obtain true consent
 - No fine



The *Bundeskartellamt*'s Facebook case

- On appeal: Higher Regional Court of Duesseldorf suspends the decision.
- Further appeal: Federal Supreme Court annuls Duesseldorf judgment; *Bundeskartellamt* decision becomes effective again
 - Key point is not that GDPR is violated
 - But consumers are deprived of choice → exploitative abuse
 - And additional data gathering by Facebook makes it harder for competitors to enter → exclusionary abuse



BUNDESGERICHTSHOF BESCHLUSS

KVR 69/19

vom
23. Juni 2020
in der Kartellverwaltungssache

Nachschlagewerk: ja
BGHZ: ja
BGHR: _____ ja

GWB § 19 Abs. 1

Facebook

Japan

- December 2019: New guidelines on abuse of superior bargaining position

「デジタル・プラットフォーム事業者と個人情報等を提供する消費者との取引における優越的地位の濫用に関する独占禁止法上の考え方」

- Makes clear that 優越的地位の濫用 can also occur between companies and consumers
- Strongly inspired by data protection law
- Would make a German Facebook-type of case possible

Japan – JFTC’s action against Rakuten



- Rakuten’s “free shipping plan” (送料無料, later 送料込み)
 - would be effective 18 March 2020
 - Purchases of more than 3,980 yen → free shipping
 - Merchants obliged to offer free shipping (or include shipping costs in total price)
 - Rakuten Union (association of merchants) very critical; urges JFTC to take action (January 2020)
- JFTC files petition for emergency interim order (緊急停止命令の申立て) before Tokyo District Court (28 February 2020)
 - Alleges abuse of superior bargaining position (Art. 2(9)(v)(iii) = 独占禁止法第2条第9項第5号ハ = changing terms unilaterally)
- Rakuten announces plan will be postponed because of coronavirus (6 March 2020)
- JFTC withdraws petition (取下げ) (10 March 2020) (but investigation continues)

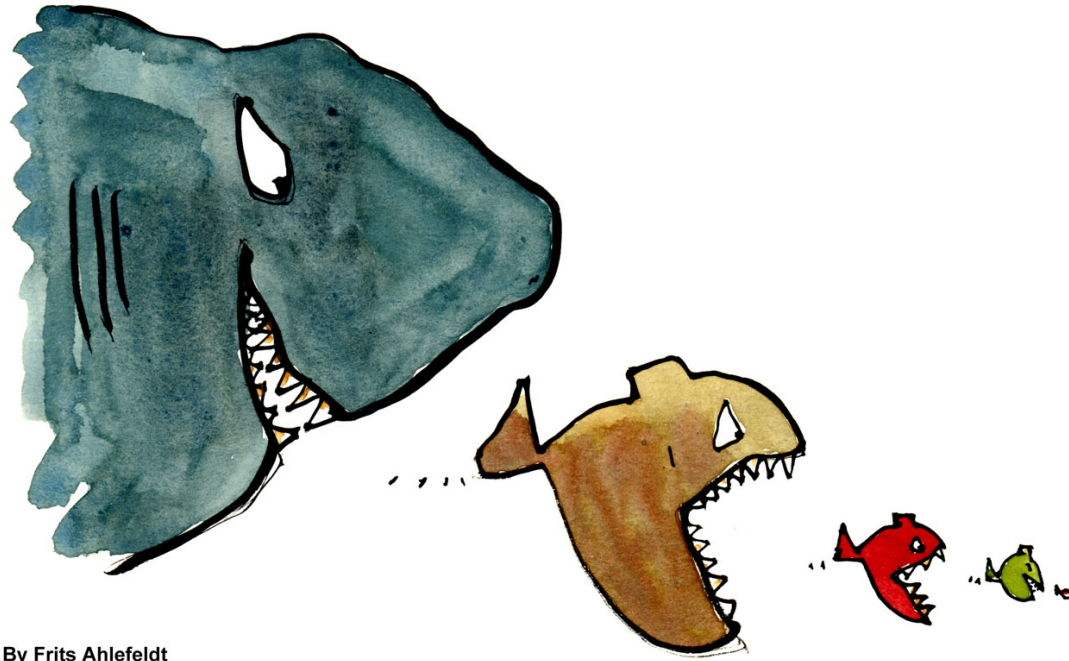
Japan – JFTC’s action against Amazon

- Suspected abuse of a superior bargaining position (since May 2016):
 - Alleged victims: suppliers of Amazon (different from merchants)
 - Amazon forced its suppliers to compensate Amazon when Amazon didn’t reach profit targets
 - Amazon forced suppliers to make various payments, e.g. discounts on products with excessive inventory, excessive contributions for marketing
 - Amazon forced suppliers to take back products in case of excessive stock
- Commitments (確約計画)
 - terminate conduct
 - 2 billion yen will be returned to around 1400 suppliers
 - Put in place compliance system
 - Report to JFTC regularly
 - Valid for three years



Need for speed

- Investigations based on abuse take time
- Use of algorithms, functionalities, inter-operability restrictions, etc. by dominant platforms is complex; information asymmetry
 - Difficult to take timely action, i.e. before market has tipped
- Interim measures as possible solution:
 - EU: Broadcom (AT.40608, October 2019)
 - Commission orders Broadcom, the world's leading supplier of chipsets used for TV set-top boxes and modems, to stop applying certain clauses in agreements with six of its main customers
 - Preliminary finding of abuse of dominance: exclusivity-inducing clauses
 - Serious and irreparable damage without interim measures
 - Had not been used since 18 years
 - October 2019
 - Japan: Rakuten (February-March 2020)



By Frits Ahlefeldt

Digital platforms - mergers

Mergers

- Google acquired over 260 companies
- in the last 20 years
 - More than 1 acquisition per month
- Most mergers not reviewed by competition authorities
- No prohibitions
- No remedies so far in EU or Japan

Source:

List of mergers and acquisitions by Alphabet
https://en.wikipedia.org/wiki/List_of_mergers_and_acquisitions_by_Alphabet

177	Skillman & Hackett	United States	April 16, 2015	—	Tilt Brush	[236]
178	Timeful	United States	May 4, 2015	—	Google Inbox, Google Calendar	[237]
179	Pulse.io	United States	May 28, 2015	—	Android	[238]
180	Pixate	United States	July 21, 2015	—	Android	[239]
181	Oyster	United States	September 21, 2015	—	Google Play Books	[240]
182	Jibe Mobile	United States	September 30, 2015	—	Android	[241]
183	Agawi	United States	June 18, 2015	—	Android, Google Play	[242]
184	Digisfera	Portugal	October 17, 2015	—	Street View	[243]
185	Fly Labs	United States	November 11, 2015	—	Google Photos	[244]
186	bebop	United States	November 11, 2015	\$380,000,000	Google Cloud Platform	[245]
187	BandPage	United States	February 12, 2016	—	YouTube	[246]
188	Pie	Singapore	February 18, 2016	—	Spaces (app)	[247]
189	Synergise	Canada	May 2, 2016	—	Google Docs	[248]
190	Webpass	United States	June 22, 2016	—	Google Fiber	[249]
191	Moodstocks	France	July 6, 2016	—	Google Photos	[250]
?	Amvato	United States	July 8, 2016	—	Google Cloud Platform	[251]
	Kifi	United States	July 12, 2016	—	Spaces (app)	[252]
	LaunchKit	United States	July 27, 2016	—	Firebase	[253]
	Orbitera	United States	August 8, 2016	\$100,000,000	Google Cloud Platform	[254]
	Apigee	United States	September 8, 2016	\$625,000,000	Google Cloud Platform	[255]
	Urban Engines	United States	September 15, 2016	—	Google Maps	[256][257]
	APLAI	United States	September 19, 2016	—	Google Assistant	[258][259]
	FameBit	—	October 11, 2016	—	YouTube	[260]
	influence	—	October 24, 2016	—	Google VR	[261][262]
	Android	United States	November 5, 2016	—	Android	[263]
	bs	—	November 21, 2016	—	Google Cloud Platform	[264]
	ics	United States	December 13, 2016	—	Android Wear	[265]
	y	Sweden	January 5, 2017	—	Google Duo, Google Hangouts	[266]
		United States	January 19, 2017	—	Firebase	[267]
		United States	March 8, 2017	—	Google Cloud Platform	[268]
		United States	March 9, 2017	—	Google Docs	[269]
		United States	May 10, 2017	—	Google VR	[270]
		India	July 12, 2017	—		[271]
		Belarus	August 16, 2017	—	YouTube	[272][273][274]
		Taiwan	September 21, 2017	\$1.1 x 10 ⁹	Google Pixel	[275][276][277]
		United States	September 26, 2017	—	Google Cloud Platform	[278]
		United States	October 9, 2017	—	Accelerated Mobile Pages	[279]
		United States	October 11, 2017	—	Google Play Music, Google Podcasts	[280]
		United States	January 11, 2018	—		[281][282]
			March 27, 2018	—	Google Images	[283]
			2018	—	Google Cloud Platform	[284]
				—	Google Cloud Platform	[285]
				—	Android	[286][287]

Killer acquisitions

= large firms acquire innovative companies to terminate their projects, before they grow and become a significant competitor

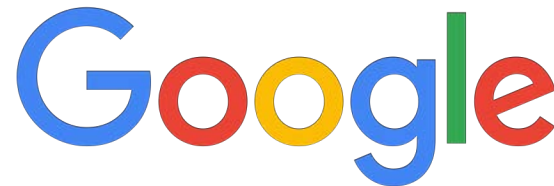
- Originally "discovered" in the pharmaceutical world (Colleen Cunningham, Florian Ederer, Song Ma, *Killer Acquisitions*, 2019)
- Also in digital sector
- Acquisition is done when target's turnover is still low → not reviewed by competition authorities

Increased scrutiny of mergers involving digital platforms

- Yahoo – Line
 - Z Holdings (owner of Yahoo Japan) + Line
 - Cleared with “remedial measures”
 - No exclusivity clauses
 - Annual reports to the JFTC
 - Duration: three years



- Google / Fitbit (M.9660)
 - European Commission opened Phase II in August 2020
 - First Phase II for Google since its acquisition of online advertising technology company DoubleClick (M.4731 - Google / DoubleClick (2008))
 - Pending in phase II
- Facebook / Giphy (UK, CMA), Sabre / Farelogix (UK, CMA)
- M3/Nihon Ultmarc (JFTC)



Japan: changes to merger guidelines

- Notification thresholds traditionally based on turnover of companies
- New: 2019年12月17日: 「企業結合審査の手続に関する対応方針」
 - transaction value of more than 40 billion yen (400億円) → consult JFTC
- Changes to substantive merger guidelines:
 - Acquisitions of start-ups with data or IP.
 - How to deal with multi-sided markets, competition on quality, network effects, etc..

Digital platforms - The turn towards new regulations

The turn towards regulation – existing regulation

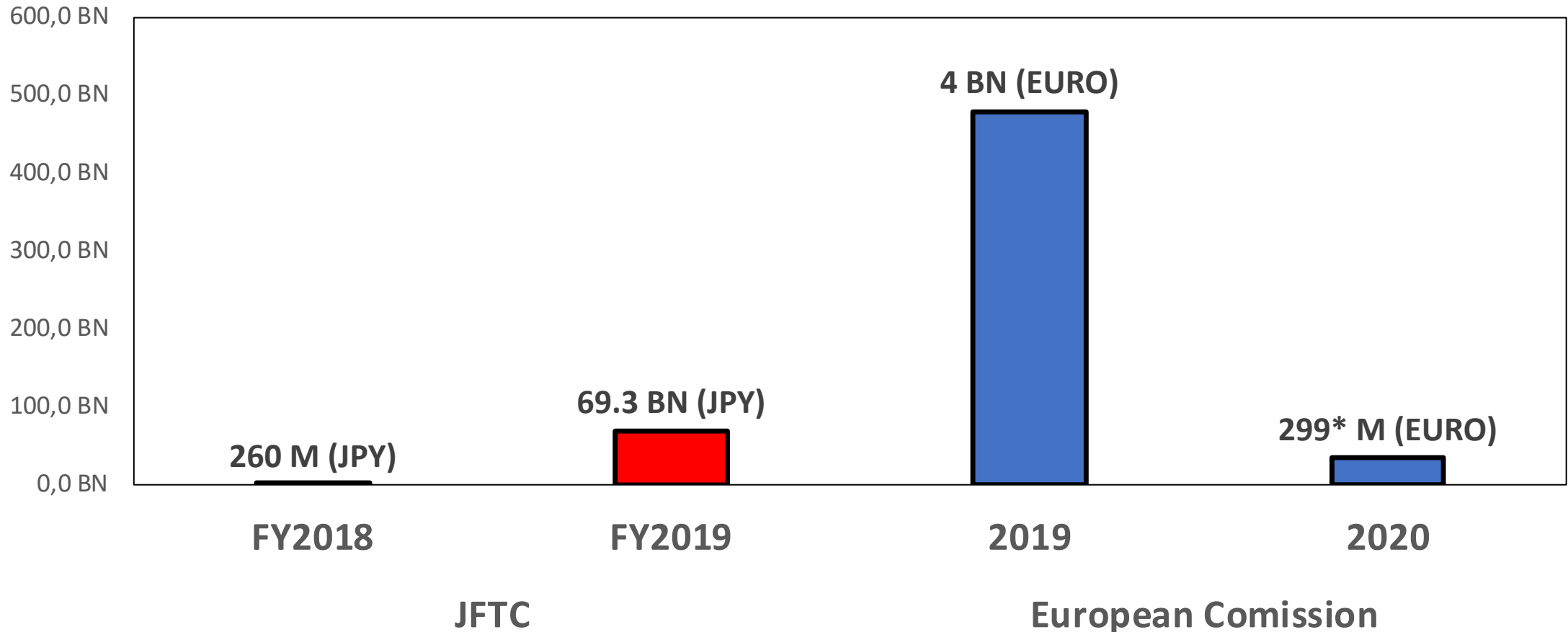
- **EU: platform-to-business Regulation** (Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services)
 - Applies from July 2020
 - Applies to platforms and search engines
 - Aims at “transparency and fairness”
 - For instance:
 - If platform suspends business:
 - Must provide reasons
 - Must wait 30 days
 - Platforms must explain ranking
 - Enforcement: up to Member States; mostly private enforcement
- **Japan: 特定デジタルプラットフォームの透明性及び公正性の向上に関する法律**
 - Applies to “designated platforms”
 - Reporting to METI
 - METI can issue corrective orders

The turn towards regulation – EU new proposal

- Proposed New Competition Tool:
 - Markets with structural competition problems
 - Markets at risk of “tipping”
 - Markets with a structural lack of competition (e.g. oligopoly with tacit collusion)
 - Behavioural or structural remedies can be imposed even without infringement
 - E.g. forcing data to be made available, no exclusivity clauses
 - E.g. forced divestiture
- Proposed *ex ante* regulation of platforms (“gatekeeper proposal”)
 - Blacklist with dos and don’ts for specific platforms: e.g. no self-preferencing, MFN clauses
 - Enforcement to be determined
- Commission hopes to table a legislative proposal in Q4 2020

Fines – the only way is up?

Levels of fines: Japan and EU



Scale is accurate after converting euro to yen at
1 euro = 123 yen

*Corrected (video erroneously shows 281 M
(EURO))

Level of fines: Japan and EU

- European Commission

- Total fines 2019: 4 billion euro
 - Cartels 1.48 billion euro
 - Antitrust (=dominance + non-cartel 101) 2.52 billion euro
- Total fines 2020 (until 1/10/2020): 299* million euro (corrected)
 - Cartels 278* million euro
 - Antitrust 21 million euro

- JFTC

- Total fines fiscal year 2018: 260 million yen
- Total fines fiscal year 2019: 69.27 billion yen

*Corrected (video erroneously shows 281 M (EURO))

*Corrected (video erroneously shows 260 M

Japan – changes to the fine (課徴金) system

- June 2019 amendment
- will enter into force on or before 25 December 2020
- Calculation of fines: basis for calculating fine is increased
 - Up to three years → up to ten years
 - Turnover of closely-related business (密接関連業務) included
 - No lower percentage for wholesalers and retailers
- Changes to leniency system
- "In return": attorney-client privilege: JFTC case team will not access communication between company and attorney in administrative investigations for 不当な取引制限 unreasonable restraints of trade.

Competition law and labour relations

Increase in “independent” workers

- Increasing number of businesses rely not on employees but on freelance workers, self-employed people
 - Architects, insurance brokers, freelance journalists, etc.
 - Uber Eats delivery riders
- Not protected under labour law
- Role of competition law?

Japan

- February 2018: report by JFTC's Study Group on Human Resources and Competition Policy 「人材と競争政策に関する検討会報告書」
- Informal meetings between JFTC and various sectors
- JFTC obtained changes to rules of several associations, allowing independent workers (e.g. athletes, entertainers) greater mobility (e.g. Japan Rugby Football Union, Japan Boxing Commission)

Japan: SMAP case (JFTC, 注意, July 2019)

- 2016: three SMAP members leave ジャニーズ事務所
- Number of TV appearances goes down dramatically
- 18 July 2019: JFTC issues warning to ジャニーズ事務所
- Basis: 不公正な取引方法 unfair trade practices – 取引妨害
interference with a competitor's transactions – 取引拒絶 refusal to deal

EU:

- Consultation on collective bargaining for the self-employed



The clash between industrial policy and competition policy

Competition policy vs. industrial policy

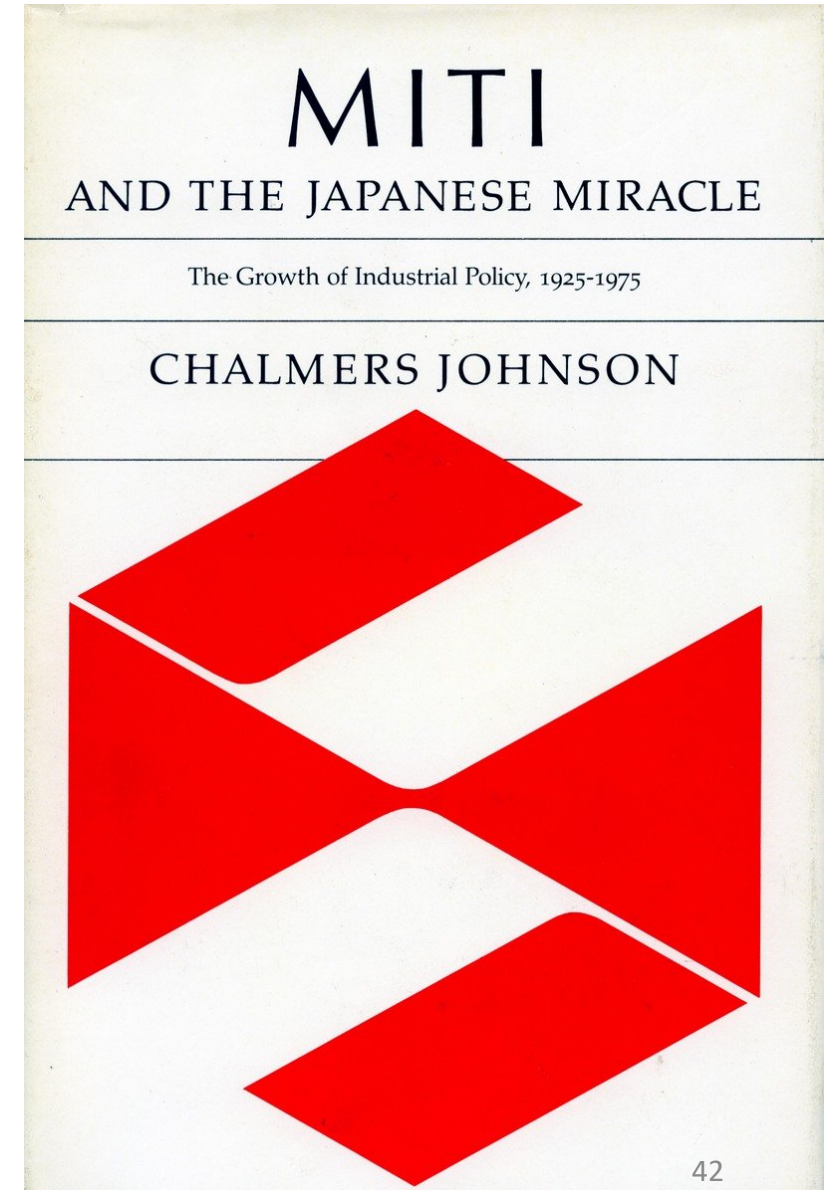
- Competition policy: competition
 - Promote competition among businesses
 - No distinction domestic – foreign companies: competition can come from anyone
- Industrial policy: competitiveness of domestic industry
 - Improve infrastructure, subsidies to strengthen industry, etc.
 - Sometimes: shield specific companies from competition
 - Create national champions
- Japan
 - strong industrial policy in 1960s-80s
 - does this show the benefits or failure of industrial policy?

Japan: role of industrial policy

- Porter & Sakakibara (2004): "Japan indeed pursued an array of policies that limited competition, but these policies were not applied throughout the economy. In fact, those industries in which competition was restricted prove to be those where Japan was not successful internationally. In the internationally successful industries, internal competition in Japan was invariably fierce in spite of Japan's peculiar institutional setting.



Michael E. Porter and Mariko Sakakibara. 2004. "Competition in Japan ." Journal of Economic Perspectives, 18 (1): 27-50.



Conflict between competition policy and industrial policy

- Not necessarily in conflict
 - competition law → healthy competition in country
 - companies operating in that country are forced to be competitive
 - optimal prices and quality → companies can purchase inputs at competitive prices
- But conflict may arise:
 - Industrial policy: create national champions, for instance through mergers → creates companies with market power
 - bad for consumers in the domestic market
 - but may make the company larger and more profitable → better able to compete abroad?

EU – merger prohibitions in 2019

- Case M.8677 – Siemens / Alstom (decision of 6 February 2019)
- Case M.8900 – Wieland / Aurubis rolled products / Schwermetall (decision of 6 February 2019)
- Case M.8713 – Tata Steel / ThyssenKrupp / JV (decision of 11 June 2019)



Siemens' acquisition of Alstom's train business

- Alstom: French train maker
- Siemens: German train maker
- Deal supported by French and German governments to create “European champion”

Prohibition because

- Harm to competition in
 - the market for very high speed trains
 - the market for mainline signaling
- Very high combined market shares
- Siemens and Alstom are already leading players globally
- Largest players outside of China
- Relevant geographic market:
 - For very high speed trains: world (minus China, Korea and Japan) or EU+CH
 - For signaling: relevant geographic market: EU or national
- The Commission's view was supported by customers, competitors, national competition authorities and the Parties' internal documents.

Competition from China?

- Threat of Chinese entry?
 - CRRC is not a credible bidder as illustrated by disqualification from tender in UK
 - No sale of Chinese high-speed trains in Europe
 - Customers' view: CRRC not an option in the foreseeable future

Political reactions



The EU's ban on the Siemens / Alstom merger demonstrates the urgent need for a European industrial strategy. It's about orders of many \$ 100 billion worldwide. That's why we need a strong European Champion. France & Germany agree.

15.29 · 06/02/2019 · [Twitter for iPhone](#)



Suivre

Alstom-Siemens : Il faut désormais se tourner vers l'avenir et refonder les règles de la concurrence européenne. Avec mon homologue allemand @peteraltmaier, nous allons faire des propositions pour refonder ces règles et avoir une politique industrielle européenne plus ambitieuse



Impact

- **Review of the Market Definition Notice** (announced in Speech Commissioner Vestager, *Defining markets in a new age*, 9 December 2019)
 - Globalization and digitization have changed the way many markets work
 - Commission has developed and refined techniques
 - Time to review the Market Definition Notice, which dates back to 1997
- Initiative on foreign subsidies → White Paper on levelling the playing field as regards foreign subsidies, June 2020
- What about Siemens and Alstom? Merger blocked but Alstom subsequently acquired Bombardier → acquisition approved with remedies (31 July 2020, M.9779 – Alstom / Bombardier Transportation)

Japan: acquisition of 十八銀行 by ふくおかフィナンシャルグループ

- Cleared with remedies by the JFTC after lengthy review (notification: June 2016; decision on 24 August 2018)
- 2020: Law to exempt certain mergers from competition law review
 - Regional banks and local bus lines
 - Effective for 10 years
 - Invokes Japan's shrinking population and its effects on rural areas
 - Local bus lines also exempt from cartel rules

Concluding thoughts: high expectations or false hopes?



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