

Whether and How Competition Law Should Regulate Powerful Digital Platforms ? :Data Collection, Use and Processing

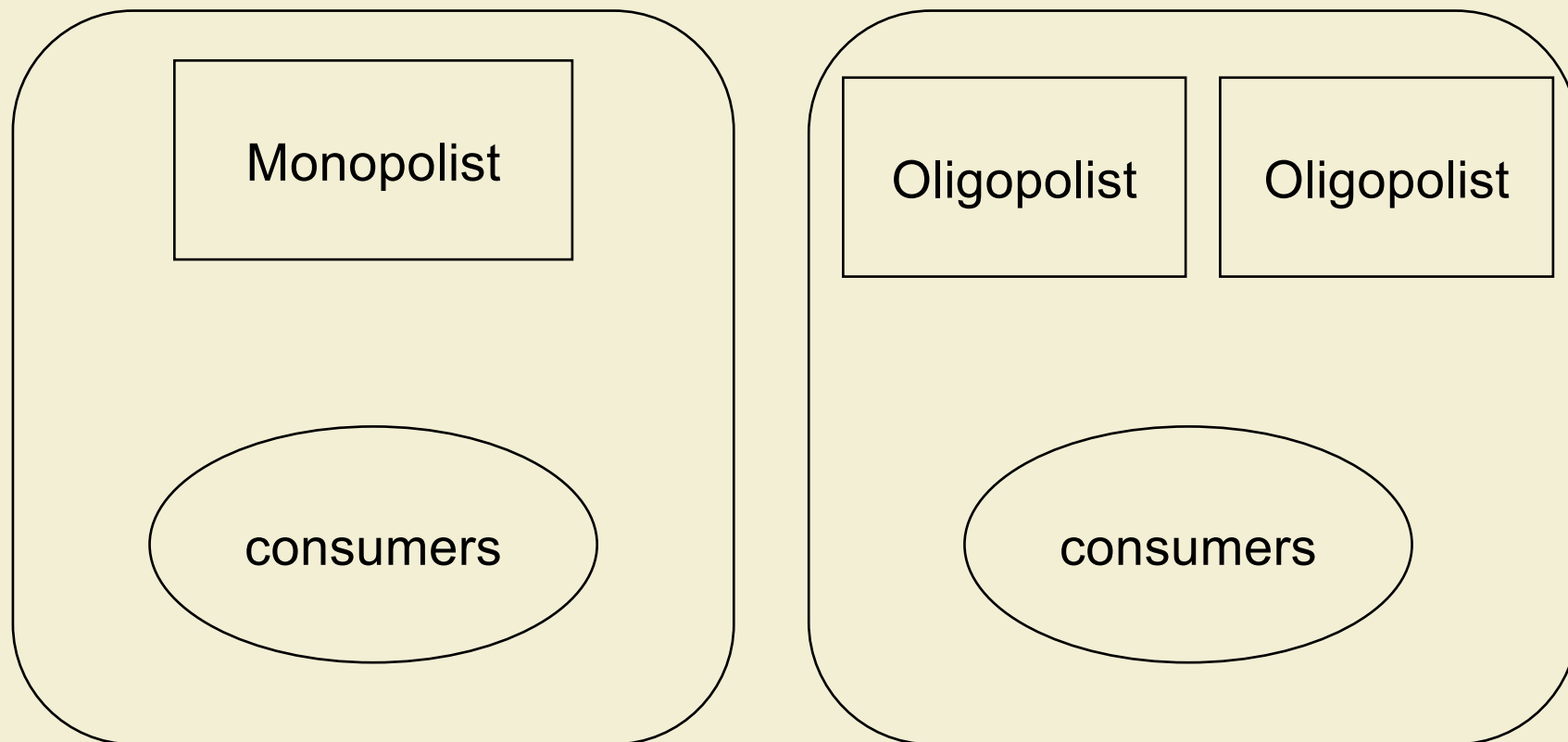
Sayako Takizawa, Tohoku University

Background

How have Online digital platforms raised competition related questions?

Competition related problems

Digital Platforms tend to be a monopoly or an oligopoly



Reasons

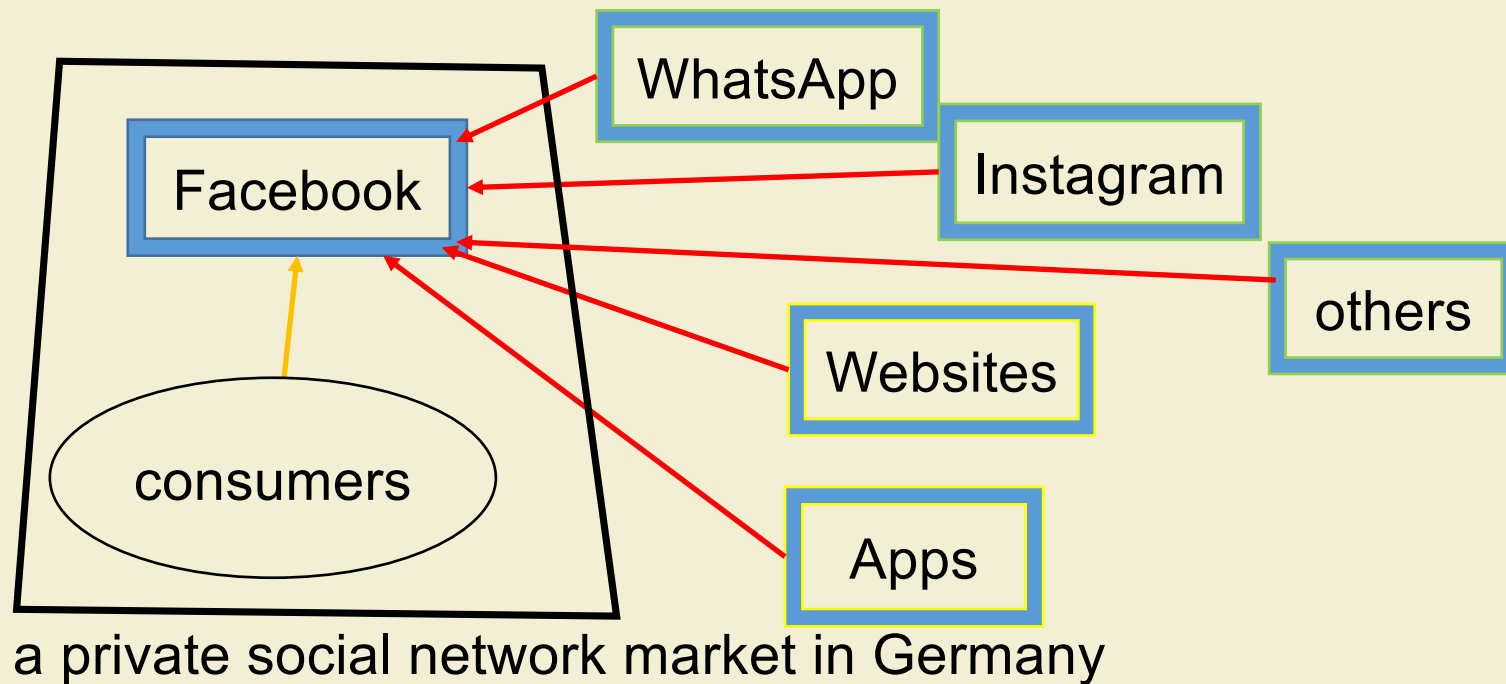
- Stronger direct and indirect network effects
- Greater economies of scale
- Enhance their algorithms by analyzing big data ahead of anyone
- Consumer's behavioral biases

Legal Issue

An Exploitative Abuse Problem:
collection, use and processing of consumer's
data by powerful digital platforms

Facebook Case

- Bundeskartellamt prohibited Facebook's data and cookie policy.



Facebook Case

- Bundeskartellamt decision, Case B6-22/16

(6 February, 2019)

Facebook's data and cookie policy is abusive pursuant to GWB Section 19(1).



suspended

- Judgement by the Higher Regional Court in Düsseldorf, Case VI-Kart 1/19 (V) (26 August, 2019)

The decision did not have enough proof of competition harm.

The Japanese situation

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

(JFTC, December 17, 2019)



The “Fundamental Principles for Rule Making to Address the Rise of Platform Businesses Formulated”

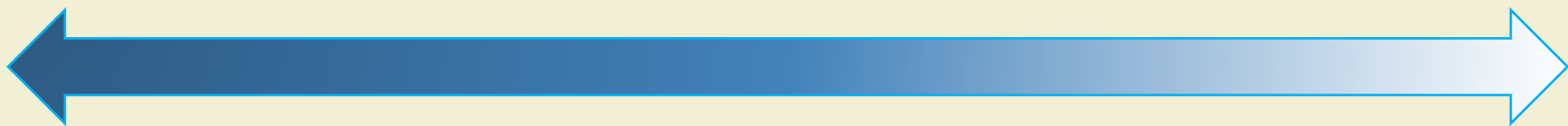
(published on December 18, 2018)

Supported by the “Future Investment Strategy 2018” decided by the Cabinet (June, 2018)

Exploitative abuse regulations

Intervention

Non-Intervention



EU (UK)

an abuse of a dominant position (TFEU §102)

Japan (South Korea)

an abuse of a superior bargaining position

US

Pro-regulation arguments

Comparative Study

Facebook decision and the JFTC guidelines

Market Position

Bundeskartellamt Decision

- Market Dominance ← the user-based market share > 40%
assumption based on **GWB Section 18(4)**

- Facebook's strong identity-based network effects



a lock-in effect

: **preventing users from switching to another social network**

JFTC guidelines

- a superior bargaining position: **Practical interchangeability of its trading counterpart**

Based on General Consumer's Practical difficulty

(JFTC always refers to market share and other factors as well.)

Abuse

Bundeskartellamt Decision

- Facebook's data policy allows comprehensive collection and processing of personal data without users' sufficient consent.
→ users' loss of control over their data
= excessive data collection and processing
infringement of GDPR ⇒ Exploitative Abuse
including the examination of unforeseeability?

JFTC guidelines

- Substantially refer to requirements of Personal Information Protection Act to determine an abuse

Japan: generally uses 2 factors: Unforeseeability and Excessiveness

EU: tend to focus on Excessiveness (especially excessive pricing)

Counterarguments

Reasonings of Düsseldorf Court Judgement

Düsseldorf Court Judgement

- Need to prove competition harm: require “as-if” competition analysis
 - Violation of GDPR doesn’t automatically become a violation of competition law
 - NO exploitation as a matter of excessiveness because
 - not weakening the consumers economically
 - not delineating excessive data
 - Users’ damage as a "loss of control" is not persuasive
- Because conducts were within a scope of terms and conditions
- With a sufficient users’ consent without any evidence of misleading representations or unfair means (coercion, pressure, etc)
 - under users’ control
 - Actual difficulty to overview and control their data is irrelevant

Questions

1. Relationship between competition law and other fields of law, especially GDPR and consumer protection law

- enforcement coordination, policy integration and coherent interpretation under a single legal system
- which legal enforcement is the most suitable tool

2. Competitive harm in terms of an exploitative abuse

Characterization, “as-if” competition examination, burden of proof

3. Difficulty in determining excessiveness

Use another law as a benchmark and more

Responsive comments

In terms of the Japanese situation

The first question

- The doctrine of *Lex specialis* ?

AMA = a general law, PIPA = a specific law ?

original legislature's design or intent

a better tool to regulate the specific field

However,

the situation has greatly changed since the legislation or new situation has emerged beyond the scope of a specific law

→ a general law is applicable

- A cooperation of multiple enforcements is desirable.
- Interpreting AMA respecting PIPA policy is needed to prevent inconsistency under the same jurisprudence.

The second question

The most controversial question in Facebook case, whereas not that big issue in Japan.

- A causation is assumed when an undertaking with a superior bargaining position commits an abusive conduct.
- An undertaking has a burden of proof to break the causation.

Characterization of competition harm

- A party with a superior bargaining position will likely gain a competitive advantage?
 - ← Already become a competition related problem when you find a superior bargaining position.
 - :The market is narrowly defined with the locked in customers

The third question

- Competition is not only about price but quality.
- JFTC guidelines use PIPA as a minimum quality measurement.

practically useful

achieve a coherent interpretation and enforcement

Beyond the scope of PIPA → make an analogy from PIPA

No clue from PIPA → General examination of 2 factors

- Excessiveness: hard to assess by itself?
- Foreseeability: reasonable from general consumers' viewpoint

A sufficient consent is needed by examining an actual difficulty to understand the terms and conditions.

Thank you!

I look forward to your comments.