By Toshiaki Takigawa 12 February 2023

A comment on the Australian Government's document–***Digital Platforms: Government consultation on ACCC's regulatory reform recommendations***

Dear Sir,

Below listed are my comment on the ACCC's regulatory reform recommendations:

1) **On subjecting designated digital platforms to mandatory codes**

   Mandatory codes may be limited to transparency issues regarding contracts between platforms and their business users and final consumers.

   On this point, refer to the Japanese Act on Improving Transparency and Fairness of Specified Digital Platforms (the Transparency Act or TFDPA) (Reiwa 2nd Year Law No. 38; 2020; enforcement date 1 February 2021).

   Mandatory codes may avoid intervening in exclusionary practices of digital platforms since exclusionary practices are covered by competition law, and have been tackled by competition laws or antitrust laws, as evidenced by Google cases in the EU and the US.

   The inclusion of exclusionary practices in the proposed mandatory codes would bring wrong answers to long-debated issues in the competition law.

2) **Self-preferencing, interoperability, and data sharing should not be categorically prohibited or mandated**

   These practices or issues have been categorically prohibited (in the case of self-preferencing) or mandated (in cases of interoperability and data sharing) in the EU by the Digital Markets Act (DMA): on self-preferencing, DMA Preface para 52; on interoperability obligation, Article 6 (7) and Article 7 (1); on data sharing obligation, Article 6 (10).

   The ***ACCC's regulatory reform recommendations*** refer to these practices in Recommendation 4: Targeted competition obligations.

   However, in competition law or antitrust laws, self-preferencing has been examined case by case. The European Commission found Goolge's self-preferencing illegal in the

Google Shopping decision and was supported by the General Court. But, this does not lead to a general prohibition of self-preferencing, since there exist substantial differences among different digital platform sectors; Google and Amazon are qualitatively different.

As to interoperability and data sharing, these have been mandated by competition law ruling only in exceptional cases, including the famous AT&T decision in the US. Mandating interoperability and data sharing to designated platforms robs them of the fundamental right of enterprises: freedom to choose their trading counterparts. Robbing platforms of this freedom would cause a high risk of robbing growth incentives to platforms.

Categorically prohibiting self-preferencing, or categorically mandating interoperability and data sharing on designated platforms (as does the DMA) is a grave error.

3) **Data portability is recommended to be mandated**

The mandate of data portability may be included in the proposed mandatory codes. Data portability, in difference from interoperability and data sharing, does not rob platforms of incentives to grow, and at the same time, facilitates new entries. In the EU, data portability has already been mandated by the General Data Protection Regulation (GDPR). Australia may follow suit by including data portability in the proposed mandatory codes.

Best regards,

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