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Chapter 3 - II

Introduction of "Ex Ante Regulation" via the DMA

: The Behemoths as Gatekeepers

Shuto Naritomi*

1 How to Fight the Behemoth in the Competitive Space

(1) Awakening of the Behemoth in the Competitive Space

The battle between the Leviathan and the Behemoth is, as you know, the confrontation between state power and the threat of destruction of the commonwealth based on social contracts. In this section, it refers specifically to the relationship between the state, which is based on constitutionalism, and the giant digital platform operators (hereinafter "DPF operators"). It is in this competitive space, in the realm of competition law, that this battle seems to be coming to a head. How are DPFs positioned in the world of competition law? First, let us examine the reasons for the Behemoth status of the Behemoths in the competitive space.

As is widely known, in the digital market, broadly defined, each service sector is dominated by one or two of the GAFAM companies (Google, Amazon, Facebook (Meta), Apple, and Microsoft) at the international level. This tendency toward high market concentration in the digital market can be attributed to a number of market characteristics.[1]

First, there is a strong network effect presence. Network effects mean that the more consumers there are, the greater the benefits. In the case of businesses operated by DPF operators, it is said that there is an indirect network effect in which an increase in the number of consumers in one market increases the benefits to consumers in the other market. For example, it is easy to imagine an online intermediary service for searching and booking hotels and restaurants. For users of such a service, the more hotels and restaurants listed on the online intermediary site, the more convenient the site becomes, and thus more users will use the site. And from the perspective of the hotel or restaurant, as more users search for and make reservations on

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1 For example, for an analysis focusing on the mobile ecosystem, see Digital Competition Council, "Competition Assessment of the Mobile Ecosystem: Final Report" (2023) [https://www.kantei.go.jp/jp/singi/digitalmarket/kyosokaigi/dai7/ siryou2s.pdf last accessed January 31, 2024], p. 21.

the online site, the more convenient the service becomes.

Secondly, the accumulation and usage of data is extremely effective. As mentioned above, DPF operators provide digital services that interact with several groups of consumers, such as clients and users. One of the key factors that make it possible to provide such services is the accumulation and use of a vast amount of digital data as an input element.

This can be easily understood by looking at Amazon's services, for example. The company has a wealth of personal data, including purchase histories on the ecommerce site Amazon Marketplace, viewing histories on the video distribution site Amazon Prime Video, as well as a wealth of information on sellers, including sales trends. By leveraging this data, the company is able to offer consulting services targeting sellers, such as marketplace consulting services, and conducts its advertising businesses. One might even say that the company is in a position to easily exploit consumer bias.

The third factor is that economies of scale and economies of scope are likely to come into play. Economies of scale mean that the average cost of production decreases as the production volume increases. In businesses run by DPF operators, the construction costs of the infrastructure that underpins the platform, such as the operating system (OS) in mobile businesses and the data centers required to accumulate and use data, are themselves very high. This means that although fixed costs may be high, the equipment running costs will become relatively small. In this way, it is reasonable to assume that economies of scale are likely to work in businesses run by DPF operators.

Economies of scope also refer to situations in which it is less expensive to produce multiple goods together than separately. For example, data that is the basis of business by a DPF operator can be used by other businesses. In this case, it can be said that economies of scope are likely to work for the various businesses of DPF operators that have accumulated a large amount of such data.

Due to these characteristics, the markets related to DPF operators have high entry barriers, creating monopolistic or oligopolistic conditions once they establish their positions.

In addition, the ability to take advantage of these characteristics makes it possible to connect multiple different markets using the platform as an information infrastructure to provide new services. This is the so-called "market organization" phenomenon[2]. Not only does this give them a competitive advantage, but it can also lead to powerful market dominance across a wide range of complementary markets, known as an "ecosystem".[3]

Furthermore, such a system creates a situation where DPF operators reigns as the de facto ruler. Platform users, whether they are operators or general users, conduct transactions based on the information disclosed on the platform. However, there is a structural asymmetry of information between users and DPF operators[4], and since DPF operators hold complete authority over the operation of the platform, they can restrict user access and unilaterally impose methods and conditions of transactions. For example, Apple's decision to

2 Masako Wakui, "'Market Organization' and Economic Law through Digital Platforms" NBL No. 1248 (2023), p. 8.

3 Noboru Kawahama, "On the Exclusionary Conduct of Dominant Digital Platform Operators" in Akira Negishi et al. (eds.), "Constructing New Competition Policies Regarding Platforms and Innovation" (SHOJIHOMU, 2023), p. 31.

4 Emiko Chiba, "Roles and Responsibilities of Platform Operators in Digital Platform Business" NBL No. 1248 (2023), p. 17.

raise the Japanese market price of paid apps in the App Store, a marketplace for mobile app sales, in response to the recent depreciation of the yen, became a social problem among app manufacturers and distributors.[5]

The relationship of such activities by DPF operators with competition law is becoming an issue at the international level. In particular, from relatively early on in the EU, the relationship between Google's activities, particularly with respect to the provision of its services, and the abuse of its dominance under competition law has been challenged in three major cases.

The first was the Google Shopping case in which the company, which holds a dominant position in the search engine market, gave priority to its own shopping services over those of its rivals (this is called "self-preferencing").[6]

The second was the Google Android case in which the company required Android handset manufacturers to install Google Search and Google Chrome as a precondition for providing a Play Store license, which was considered a bundling issue.[7]

The third case was the Google AdSense incident, in which the company banned contracted companies for its content-linked advertising service from posting advertisements from rival businesses on their own websites and required approval before displaying advertisements from rival businesses in search results.[8]

In all these cases, Google filed lawsuits with the General Court seeking to have the European Commission's actions annulled. However, in the Google Shopping and Google Android cases, the Commission's decision was upheld, and the company has appealed to the Court of Justice. As of the time of this section's drafting[9], the Google AdSense case is still ongoing in the General Court. In the course of these disputes, arguments on substantive law issues are accumulating. For example, in the first Google Shopping case, in determining whether the aforementioned self-preferencing constitutes anticompetitive behavior, the Court of Appeals for the First Circuit held that the service provided by Google is an essential facility or similar to an essential facility for the provision of another operator's service, and that the refusal of access to the same facility constitutes anticompetitive behavior.[10]

In Japan, there have been similar cases to the Antimonopoly Act has become an issue. For example: ① Amazon Japan forced businesses listing products on Amazon Marketplace to conclude contracts that included equivalence conditions so that the sales price, product variations, and other conditions for the same product would be the same as those in other distribution channels[11]; and ② Amazon Japan forced suppliers to pay money without disclosing the basis of calculations because they could not achieve their own sales

5 Yomiuri Shimbun, "Demand for Correction from Apple: Ministry of Economy, Trade and Industry's Policy, Amazon, App Prices, etc". November 11, 2022, Morning Edition, p. 1.

6 Google Search (Shopping) (Case AT.39740) (Commission Decision 2018/C 9/08 [2017] OJ C 9/11.

7 Google Search (Android) (Case AT.40099)Commission Decision 2019/C 402/08 [2018] OJ C 402/19.

8 Google Search (AdSense)(Case AT.40411)Commission Decision 2020/C 369/04 [2019] OJ C 369/6.

9 The date this article was drafted was January 31, 2024.

10 Akira Negishi, "Competition Law's Approach to 'GAFA' Regulation: Convergence and Diversity" in Akira Negishi et al. (eds.), "Constructing New Competition Policies Regarding Platforms and Innovation" (SHOJIHOMU, 2023), p. 6.

11 JFTC Press Release, "(June 1, 2009) Handling of the case of alleged violation of the Antimonopoly Law against Amazon Japan, LLC".
[https://www.jftc.go.jp/houdou/pressrelease/h29/jun/170601.html last accessed on January 31, 2024].

profit targets, or returned products deemed to be excess inventory.[12] The court found that these actions were problematic.

Other problematic issues included: ③ the requirement that app providers use Apple's designated billing method when selling digital content within an app, and the prohibition of outlinks (the inclusion of external links in an app that encourage consumers to make purchases using methods other than the designated billing method); and ④ Google's entry into license agreements with Android device manufacturers, requiring those manufacturers to include Google's own apps, such as the search app Google Search and the browser app Google Chrome, when installing the app store Google Play on their devices, as well as specifying the location of app icons and other items on the device screen when the apps are installed.[13]

Thus, at least in the competitive space, it seems that the Behemoth has already begun to move at a level beyond the embryonic.

(2) Addressed Issues: Regulation for DPFs by Competition Law and its Limitations

As discussed earlier, there has been much debate over the substantive law issue of how the actions of DPF operators negatively impact competition.[14] Meanwhile, procedural and enforcement issues regarding how to regulate such actions have also become increasingly important in recent years.

This is due to the recognition that there are limits to the existing regulatory methods under competition law, and a regulatory trend toward a different approach has begun to emerge. In particular, there is a growing awareness of the so-called "ex ante regulation," in which regulated entities are designated in advance under certain criteria, and certain actions are prohibited for such entities. Recently, the EU introduced the Digital Markets Act (DMA)[15], a strict "ex ante regulation" for DPF operators, marking the first of its kind internationally. Japan is also considering the implementation of similar regulations.

Needless to say, it is not entirely clear what the characteristics of such regulatory methods are and what effects they will have. forgiven that the DMA is relatively new, it is too early to evaluate its usefulness.

However, assuming that traditional Competition Law is compatible with the Constitution, then shifting to a more powerful means of regulation requires an organized and analytical approach to understand their impact. This analysis is important not only for understanding the regulatory framework but also for its constitutional implications.

Therefore, this section considers how to combat the Behemoths in the competitive space, focusing on

12 JFTC Website, September 10, 2020, JFTC Affirmation Order [https://www.jftc.go.jp/houdou/pressrelease/2020/sep/division3/200910_honbun.pdf last accessed on January 31, 2024].

13 JFTC Press Release, "(October 23, 2023) Commencement of Examination of Suspected Violations of the Antimonopoly Law by Google LLC et al. and Solicitation of Information and Opinions from Third Parties" [https://www.jftc.go.jp/houdou/pressrelease/2023/oct/ 231023ikenboshu.html last accessed on January 31, 2024].

14 As a study on the mechanism of anticompetitive effects and the nature of market definition regarding exclusionary acts by DPFs, see Kawahama, supra note (3), p. 38 et seq. Recent studies that attempt to organize the theory of self-preferential treatment under antitrust law include Sei Shishido, "'Self-Preferential Treatment' in Antitrust Law: Reality and Issues" Seikei Hogaku, No. 98 (2023), p. 171.

15 REGULATION (EU) 2022/1925 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 14 September 2022 on contestable and fair markets in the digital sector and amending Directives (EU) 2019/1937 and (EU) 2020/1828 (Digital Markets Act).

the direction of DPF regulation as a competition policy. In the following, I will first briefly summarize the regulation under Competition Law, taking into account the status of discussions in Japan, and summarize the limitations of using Competition Law to address anticompetitive behavior by DPF operators. Next, as an attempt to overcome these limitations, I will summarize the contents of the DMA under EU law. Finally, the nature of DPF regulation under the DMA will be examined from the institutional arrangement and analysis of the Act, and the current status and future prospects will be clarified.

2 Characteristics and Limitations of Regulation by Competition Law

(1) Characteristics of Regulations under the Competition Law

First, let's summarize some basic knowledge about the field of competition law and the characteristics of its regulations. The term "competition law" as used in this section refers to any law that seeks to maintain market economic order and protect free competition at the international level, regardless of country. Therefore, the scope and meaning of the term differs from that of individual laws such as the Antimonopoly Act in Japan or the Treaty on the Functioning of the European Union (TFEU) in the EU, both of which are essentially competition laws. Such terminology is possible because the types of actions at issue in competition law are common and the field is often discussed in a globally convergent manner.[16]

Of course, there are differences among countries in the scope of competition law objectives, the level of detail in the wording of the provisions, and the content of the procedural law that defines the process of handling specific cases. For example, looking at the number of provisions and regulatory structure, in the EU, many anticompetitive acts are regulated by two major provisions: Article 101 of the Treaty on the Functioning of the European Union prohibits cartels and other concerted activities, while Article 102 of said treaty prohibits the abuse of a dominant market position. By contrast, in Japan cartels and other unfair trade restraints (Article 2, Paragraph 6 of the Antimonopoly Act) are prohibited in the latter part of Article 3 of the Antimonopoly Act, private monopolies (Article 2, Paragraph 5 of said Act) in the first sentence of Article 3 of the same Act, and a wide variety of other acts are prohibited as unfair trade practices (Article 2, Paragraph 9 of said Act) in Article 19 of the same Act. These unfair trade practices include acts that serve as a means of private monopolization, and are regulated in more detailed articles based on differences in the size of the anticompetitive effect and the mechanism by which it manifests itself. However, since the specifics of what is recognized as anticompetitive conduct and the thinking behind determining its appropriateness are similar in each country, let us take a look at the structure of a specific case.

For example, the JFTC examined the Case ③ mentioned in 1(1) (Apple's mandatory billing method and

16 Tadashi Shiraishi, "Lectures on the Antimonopoly Act" (Yuhikaku Publishing, 10th ed., 2023), p. 8. Also developing such an argument is Akira Negishi, "Memorandum on the Global Standard Theory of 'Competition Law'" Konan Hogaku, vol. 51, no. 4 (2011), p. 1.

prohibition of outlinking) on the grounds that it may fall under the category of a private monopoly (Article 2, Paragraph 5). The provision on private monopolization states, "In this Act, 'private monopoly' means ❶ an undertaking, whether alone or in combination or conspiracy with other undertakings or by any other means, ❷ by excluding or controlling the business activities of other undertakings, ❸ substantially restraining competition in a certain field of trade, contrary to the public interest. Broadly speaking, this provision can be divided into the subject requirement (item ❶), the act requirement (item ❷), and the effect requirement (item ❸). Thus, regulations under the competition law typically take the form of determining a violation through the interpretation and application of provisions consisting of these three requirements, and imposing some measure or monetary sanction to eliminate the anticompetitive situation.

A notable feature of regulations under competition law is the determination of the effect requirement. The effect requirement may be subject to other laws as well. For example, in the Penal Code, it would be the result of death in the crime of murder (Article 199), or the burning of an object or the creation of a public danger in the crime of arson (Articles 108-110). However, in competition law, the issue is the adverse effect on competition, which can be difficult to discern at first glance. Therefore, the content and mechanism are explained in various ways.

For example, with regard to private monopolization as highlighted in part ❸ above, "substantially restraining competition in a certain field of trade" is the issue. Generally, it is considered to be harmful to competition to form, maintain, or strengthen market dominance by way of a situation or position that allows one to dominate the market by freely setting conditions for price, quality, quantity, and so on.[17]

To clarify the existence of such anticompetitive effects, the prerequisite is market definition where competition occurs is performed. Then, it is determined in what sense the anticompetitive effects occur (or may occur) in the relevant market. In this process, as with other laws and regulations, evidence is collected to establish such facts, which are then used to argue and prove the case. It is important to note that a specialized method known as economic analysis may sometimes be used as an intermediate step.

In particular, in the EU, there is a tendency to require a precise analysis using economic findings when making judgments regarding abuse of market dominance.[18]

(2) Limitations of Regulations Under the Competition Law

However, there is a growing recognition that there are certain limitations to addressing anticompetitive behavior by DPF operators with the above regulations under the competition law. One of the materials explaining such limitations in Japan is the Digital Market Competition Council's "Competition Assessment of the Mobile Ecosystem: Final Report (hereinafter the "Final Report")" published in 2023. The Final Report outlines a competition assessment of the impact of the layered structure based on mobile OS on the com-

17 On the Supreme Court's understanding of the same requirement in the December 17, 2010 Second Petty Bench Decision of the Second Petty Bench of the Supreme Court, Civil Collection Vol. 64, No. 8, p. 2067, Takaji Kanai et al. eds, Antitrust Law, p. 187 [Toshifumi Yamabe] (Koubundou, 6th ed., 2018).

18 Shuya Hayashi (Wu Kunlin), "On the Regulation of Giant Platform Operators in Europe: Focusing on the Digital Markets Act (DMA)" in Emiko Chiba (ed.), "The Progress of Digital Society and the Design of Law" (SHOJIHOMU, 2023), p. 161.

petitive environment of the digital market, as well as the direction of regulations required to respond to this impact. However, the scope of the regulation is not limited to mobile OS providers, and it also includes content broadly related to DPF regulation.

The Final Report expressed concern that handling each case through competition law regulations would take a considerable amount of time to reach a final conclusion. For example, the mobile OS market in Japan are almost exclusively dominated by Google and Apple, and these platform operators are in a position to exert influence on multiple layers. Actions by these operators that raise competition concerns are expected to be indefinite and simultaneous. This is because they can leverage influence at certain layers, making the competitive harm significant when viewed in aggregate, even if each behavior alone is minor. Moreover, the harm itself may occur across layers, or on a different layer than the one in which the conduct took place.

Furthermore, the markets of DPF-related businesses are often free markets without service charges or are multi-sided markets with multiple groups of consumers, making it difficult to define the market using traditional methods. The difficulty of predicting technological innovation and imagining future competitors is a contributing factor.

Moreover, in order to determine the applicability of each requirement of the competition law, it is necessary to collect information on the market and the relevant business operators, but such information is concentrated among DPF businesses. As a result, it takes too much time to deal with the case by the method conventionally used in competition law, which is to identify the theory of harmful effects on competition, put forward specific assertions and evidence based on that theory, and to impose measures or monetary sanctions to recover from the anticompetitive situation.

In fact, looking at the time from the start of the European Commission's finding of factual conduct and the issuance of the violation decision, it took about seven and a half years (January 2011 to July 2018) in the Google Android case, approximately nine years (circa 2008 to 2017) in the Google Shopping case, and about 13 years (early 2006 to March 2019) in the Google AdSense case.

Especially in the digital market, the speed of technological development is so fast that if an ecosystem can be formed and users can be won over, a so-called "winner takes all" is achieved. When this happens, it will no longer be possible to improve the situation through market mechanisms. So for this reason, the aforementioned time issue is particularly important for effective recovery from an anticompetitive situation. In fact, the European Commission also recognized the problem of competition law lagging behind market intervention and failing to adequately address the "winner takes all" situation.[19]

As a result, the required direction is to respond with some form of regulation before a "winner takes all" situation is created. The Final Report therefore takes the position that "ex ante regulation" in the sense of prohibiting or limiting in advance the types of acts that have a high risk of adversely affecting competition, is more appropriate than "ex ante regulation" that responds to certain anticompetitive acts after they have been

19 See, e. g. European Commission, 'COMMISSION STAFF WORKING DOCUMENT IMPACT ASSESSMENT REPORT Accompanying the document Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on contestable and fair markets in the digital sector (Digital Markets Act)' (December 2020). SWD/2020/364 final, at para 119.

committed, as in the case of competition law.[20]

The Final Report references the DMA in EU as such an "ex ante regulation". It is expected that the EU DMA will be significantly used as a model or comparison point for new legislation in Japan in the future. The following is an overview of the EU Digital Markets Act.

3 Overview of the Digital Markets Act in the EU

(1) Background of Implementation

The EU has enacted various laws to address issues in the digital marketplace. Recently, different regulations such as the GDPR and the P2B Regulation have been established to protect users of digital services in light of the uncontrollable collection of data and the imbalance of economic power. However, these are individual legislations, and a political consensus has emerged that the current laws are insufficient to protect society from the diverse impacts brought about by digital businesses.

To address these issues, on December 15, 2020, the European Commission published a bill called the "Digital Services Act Package"[21] which included the Digital Services Act (DSA)[22] to address issues such as illegal content and the prevalence of illegal and harmful information in DPFs, and a draft DMA to address the lack of competition in the core DPFs.

The DMA came into effect in November 2022 and has been enforced since May 2023. Although referred to as an "Act," it is a "Regulation" within the EU, meaning it takes precedence over the domestic laws of the member states.

(2) Overview and Purpose of the Regulation

The DMA consists of 109 recitals and 54 articles. The general framework of the regulation is that the European Commission designates DPF operators that provide services to users located in the EU that meet certain requirements as gatekeepers, and strictly regulates their activities by imposing certain obligations on the designated operators.

The purpose of the Act is to contribute to the proper functioning of the internal market by establishing uniform rules to ensure "contestable and fair digital markets" within the EU (DMA Article 1). "Contestable" markets are those where businesses can overcome entry and expansion barriers based on their products or services' merits and challenge gatekeeper enterprises (DMA Recital 32). "Unfairness" refers to situations where gatekeeper enterprises gain disproportionate benefits, creating imbalances in rights and obligations between business users and themselves (DMA Recital 33).

The issue at stake is that gatekeepers use their position and purchasing power to restrict market partic-

20 Digital Competition Council, supra note (1), p. 29.

21 See, EU Commission, 'The Digital Services Act package' (An official website of the European Union, 17 January 2024)<https://digital-strategy.ec.europa. eu/en/policies/digital-services-act-package> accessed 31 January 2024.

22 For more information on DSA, refer to Chapter 4 II and III of this book.

ipants from obtaining an adequate share of the profits, or to impose uneven conditions on the use of core platforms and related services.

(3) Scope of Regulation

The DMA regulates only gatekeeper businesses that provide core platform services. The Act does not clearly define what core platform services are, but lists online intermediary services, online search services, social media, video sharing platforms, number-independent person-to-person communications, operating systems, web browsers, virtual assistants, cloud computing services, and online advertising services as those that fall under this category (Article 2(2) of the DMA).

The list is exhaustive, meaning the European Commission is not permitted to add new services to the list based on its own judgment. If a new service is introduced that pose serious concerns about the competitive potential and fairness of the market like those already listed, it will be added to the list after a market investigation, publication of the results, and submission to the European Parliament and the Council, followed by a legislative procedure (Article 19 of the DMA).

Whether an entity is a gatekeeper is determined by the European Commission's designation (hereinafter "gatekeeper designation"), based on not only whether it provides core platform services, but also whether ① it has a significant impact on the internal market, ② the core platform services it provides are an important gateway from business users to end users, and ③ it has an established and enduring position in its operations, or has the prospect of achieving such a position in the near future (Article 3(1) of the DMA).

The European Commission examines the fulfillment of these three requirements to designate gatekeepers, and several methods are available for this purpose. First, the Commission may make a determination based on certain thresholds set for each requirement based on sales, number of users, etc. (Article 3(2) of the DMA).

Entities that have reached these criteria must notify the Commission of this fact and provide the relevant information within two months after reaching such criteria. If failing to do so, the Commission may designate a gatekeeper based on the available information (Article 3(3) of the DMA).

Even if these criteria are met, an operator may file an objection to the gatekeeper designation by arguing that the aforementioned designation requirements are not met due to the operational status of the relevant core platform service (Article 3(5) of the DMA). Notably, as the first example, Meta, which operates Facebook and other services, and in the second example, Byte Dance, which operates TikTok, have filed objections with respect to certain services.[23] However, in this rebuttal, the Commission is required to consider only those factors that are directly relevant to the aforementioned thresholds, and rebuttal evidence based on economic findings by clarifying market definition or efficiency is generally not permitted (Recital 23).

Next, even if the aforementioned criteria are not reached, the European Commission may initiate a market investigation if they suspect that the company is a gatekeeper (Article 17(3) of the DMA). Then, based on

23 Asahi Shimbun Digital, "EU's 'Gatekeeper' Designation: Meta, TikTok Object" November 16, 2023 [https://www.asahi.com/articles/ASRCJ64SRRCJUHBI03D.html last accessed January 31, 2024].

certain factors such as scale, turnover, market size, number of users, and network effects, the Commission may designate the business as a gatekeeper if it is considered to satisfy the above three requirements (Article 3(8) of the DMA). The Commission may also designate a gatekeeper based on the information available to the Commission in cases such as when the entity subject to this market investigation does not comply with the Commission's order to take investigative measures (same Article).

The European Commission may change the assessment of a gatekeeper at any time if a substantial change occurs or if the designation was based on inaccurate information (Article 4(1) of the DMA). In addition, the Commission must reassess the applicability of the requirements for gatekeepers at least every three years (Article 4(2) of the DMA).

(4) Conduct Regulations for Gatekeepers

Gatekeepers designated through the above process must be subject to 22 regulations of conduct. The following is a brief summary of each of the three sections in which the conduct regulations are placed.

For academic purposes there is a regulation known as the "blacklist" (Article 5 of the DMA). Specifically, it stipulates those such as the prohibition of the improper use of personal data, the prohibition of equivalence conditions, the obligation to allow transactions outside the core platform and other services, the prohibition of the forced use of related services, and the obligation to provide information to advertisers.

Likewise, there is a regulation known as the "gray list" (Article 6 of the DMA). Specifically, it stipulates the prohibition of self-preferential treatment, the prohibition of actions that restrict end-users from using other companies' services together or switching to other companies' services, and the obligation to ensure transparency of advertised services.

In order to clarify the content of the above "gray list" acts, the European Commission has the authority to issue implementing acts (Article 8(2) of the DMA). These implementing acts are meant to specify the measures to be taken by gatekeepers in order to comply with the "gray list" of conduct regulations. The gatekeeper may also request the Commission to hold a "regulatory dialogue" to determine whether the measures it intends to take are effective for compliance with the regulation (Article 8(3) of the DMA). The Commission has discretion to decide whether to hold this dialogue in accordance with the general rule of law, including the principles of equal treatment and proportionality (ibid.).

Other obligations (Article 7 of the DMA), in addition to each of the above lists, the DMA stipulates interconnection obligations for gatekeepers providing number-independent person-to-person communication services with operators who provide other communication services. Due to the complexity of these services, different compliance timelines are set. The European Commission has the authority to issue directives and the right to request opportunities for dialogue regarding regulation from gatekeepers, similar to the regulation of conduct regarding the "gray list" (Article 8(2) and (3) of the DMA).

The compliance of these conduct regulations may also be deferred by the Commission if it can be shown that compliance with such obligations by the gatekeeper would jeopardize the economic viability of its operation in the EU (Article 9 of the DMA). In addition, the Commission may also exempt certain conduct regulations on grounds of public health and public security (Article 10 of the DMA).

The above obligations may be updated by the European Commission. The Commission may, after a market study that identifies the need to update the obligations, make exceptions to current conduct regulations or, conversely, expand their scope. However, updates require legislative proposals to the European Parliament and the Council, and new obligations cannot be introduced simply based on the Commission's consent (Article 19(3) of the DMA).

(5) Ensuring Compliance with Conduct Restrictions

In conjunction with the abovementioned conduct restrictions, gatekeepers also have multiple reporting obligations. Gatekeepers must report on the measures taken to ensure compliance with conduct regulations within six months of designation (Article 11(1) of the DMA). The European Commission is required to publish a summary of the report on its website (Article 11(3)), and gatekeepers must update their report at least once a year (Article 11(2)).

In addition, gatekeepers must independently submit to the European Commission an audited description of the consumer profiling techniques applied to their core platform services (Article 15(1) of the DMA), which must be updated at least once a year (Article 15(3) of the DMA). The agreement also stipulates the establishment of a compliance system (Article 28 of the DMA).

Furthermore, the European Commission monitors the compliance of gatekeepers with the conduct regulation (Article 26 of the DMA) and must submit an annual implementation report to the European Parliament and the Council (Article 35 of the DMA). Every three years, an assessment of the operation of the Digital Markets Act is to be conducted to determine whether it is achieving its objectives and impact on users (Article 53 of the DMA).

(6) Enforcement Non-Compliance

In the event of violation of the above regulations, the European Commission must investigate (Articles 21-23 and 26 of the DMA) and issue a non-compliance decision against the gatekeeper (Article 29(1) of the DMA). In this case, a fine of up to 10% of global turnover in the fiscal year preceding the first violation may be imposed (Article 30(1) of the DMA), and the fine may be increased to 20% if the gatekeeper has violated the same type of obligations identified in the non-compliance decision in the previous eight years (Article 30(2) of the DMA). The European Commission may also impose finite periodic penalties (Article 31(1) of the DMA) to ensure that gatekeepers comply with certain obligations (Article 31(1) of the DMA).

Interim measures may be taken against the gatekeeper if business or end users face imminent and irreparable damage due to violation of Articles 5-7 of the DMA (Article 24 of the DMA).

And in the case of systematic breaches of duty, behavioral or structural measures may be imposed to ensure compliance with the conduct regulation, effective after a market investigation (Article 18(1) of the DMA).

Actions by the European Commission that have been organized above, such as the gatekeeper designation, non-compliance decisions, and the imposition of fines, are subject to judicial review by the Court of Justice of the European Union (Article 263(4) of the TFEU). The Court of Justice of the European Union may order an increase or decrease in the amount of the sanction or revoke the imposition of the sanction, as it has unlimited jurisdiction over monetary sanctions such as the imposition of fines, as is the case in ordinary proceedings.

These characteristics can be found in the regulations of the DMA. The following will consider the legal nature of the DMA, taking such features into account.

4 Issue to consider as introducing of "ex ante regulation"

(1) Characteristics and Legal Nature of Regulations under the Digital Markets Act

The Digital Markets Act seeks to ensure a "contestable and fair digital market" by designating certain DPF operators as gatekeepers based on specific criteria and restricting certain conduct. From this structure and stance of the Act, it seems possible to recognize that certain DPFs are also positioned as "rule makers" and are given a special responsibility to ensure that they do not impose active competition in setting rules in the market.[24]

There is no doubt that the Act has the nature of a competition law in that it is oriented toward ensuring the possibility of competition in the digital market. Among the acts that are considered to regulate conduct, at least those pertaining to the "black list," are considered to correspond to precedents set by the European Commission in its investigations and sanctions concerning violations of competition law.[25]

However, the legal character of the Digital Markets Act should not be viewed as being limited to competition law, but rather as a "competition law + α" regulation. This is consistent with the fact that the Digital Markets Act emerged in the midst of various DPF regulations under the policy objective of "creating a single digital market".[26]

The mechanism for gatekeeper designation also differs from that of regulations under the existing competition law. The DMA does not set absolute criteria for determining the applicability of gatekeeper designation, and gatekeeper designation may be granted even if the criteria are not met. Although DPF operators are given the opportunity to rebut their gatekeeper designation, the burden of proof lies with them. And arguments of DPF operators based on economic grounds such as market definition and efficiency which have traditionally been considered characteristics of regulations under competition law, are excluded. Such a system can be said to answer the limitations of regulation under the competition law as summarized in 2(2) above.

However, this shift can be viewed as a relative decline in the role of economic analysis in competition policy. This may lead to question whether the best results can be derived from a competition policy perspec-

24 Hayashi/Wu, supra note (18), p. 163.

25 Kentaro Hirayama, "EU Digital Markets Act: Overview of the Regulation and Implications for Japan" Gendai Shohisha Hou 58 (2023), p. 112. The author, who is also an attorney, maintains his own firm's website (https://hirayamalawoffices.com/2023/02/23/%e6%ac%a7%e5%b7%9e%e3%83%87%e3%82%b8%e3%82%bf%e3%83%ab%e5%b8%82%e5%a0%b4%e6%b3%95%ef%bc%88the-eudigital-markets-act%ef%bc%89/ last accessed on January 31, 2024) which also provides a detailed explanation of the DMA.

26 For a detailed examination of this point, see Hayashi/Wu, "Issues and Implications of EU Digital Markets Act" Information Law and Regulation Study No. 13 (2023), p. 138. See also Hayashi/Wu, supra note (18), p. 164.

tive for those regulations imposed on gatekeepers that have already been evaluated in competition law cases (or are being contested concurrently), notwithstanding the types of competition impact that have already been accumulated in competition law cases.[27] Looking at the conduct restrictions in relation to this point, the opportunity for dialog between the DPF operators and the European Commission regarding matters other than those related to the "black list" suggests a modest approach to regulation.

In addition, the Digital Markets Act imposes strict conduct restrictions on gatekeepers, as well as reporting and other obligations not only on operators but also on the European Commission, the regulator. It is important to note that these rules ensure a certain degree of procedural transparency.

(2) Considerations for Introduction of DPF Regulations in Japan

Finally, I would like to consider what perspectives are needed when considering the introduction of "ex ante regulation" for DPF operators in Japan, based on the above review and evaluation.

As mentioned above, the legal character of the DMA can be viewed as "competition law + α". However, when considering the introduction of a similar system in Japan, this legal character would likely have a great impact on which government agency would be in charge. The "competition law + α" character can also be found in Japan's current laws, such as the Telecommunications Business Act. The Japan Fair Trade Commission and the Ministry of Internal Affairs and Communications, which have jurisdiction over the Antimonopoly Law, cooperate to clarify how certain regulations under that law should be applied.[28] A similar coalition may be needed when introducing regulations similar to the Digital Markets Act in Japan.

It is also not necessarily clear whether Japan has the necessary foundation to introduce such "ex ante regulation" as the DMA. In Japan, discussions are underway on the need for new regulations due to the characteristics of the business conducted by DPF operators and the limitations of regulations under competition law. The new regulations are referred to as "ex ante regulations", which prohibit or require certain types of conduct in advance on the premise that the DPF operators' conduct with a high risk of adversely affecting competition has been identified.[29]

Although it is essential to consider whether the current laws are inadequate, the direction of the above discussion in Japan should not be dismissed. The question is whether the preconditions for the introduction of new regulations have been fulfilled.

The EU has accumulated considerable knowledge on the effects of the DPF's conduct on competition, based on the application of the law by the European Commission and disputes in judicial review. It is widely recognized that this is the basis for the regulation of conduct under the DMA, and there is an understanding that this may provide a reasonable level of comfort with the use of "ex ante regulation".[30] In addition, in the

27 Hayashi/Wu, supra note (18), p. 62.

28 A manifestation of such an attitude is the Fair Trade Commission, Ministry of Internal Affairs and Communications, "Guidelines for the Promotion of Competition in the Telecommunications Business Sector" (2023) [https://www.soumu.go.jp/main_content/000695595.pdf last accessed on January 31, 2024].

29 Digital Competition Council, supra note (1), p. 29.

30 Hirayama, supra note (25), p. 115.

EU, the decision text is relatively detailed in regulation under competition law (including in the case of commitment decisions), and there is an obligation to publish various types of reports in the DMA. The DMA also requires the publication of various reports, and there is a consistent attitude toward ensuring the transparency of procedures.

By contrast, in Japan, although cases are being filed, they are all either terminated midway through the examination process or dealt with through confirmation, and there is only limited public information available. At this point in time, it is not necessarily clear how the actions of each DPF will be evaluated as pertaining to the Antimonopoly Act. As such, it seems that Japan cannot be said to have the same level of predisposition as the EU in relation to the introduction of "ex ante regulation" for DPF operators.

The Telecommunications Business Act (e.g., Article 30) include asymmetric regulations that seem to fall under the category of "ex ante regulation" in the aforementioned sense in the current law. These are based on the oligopoly of terminal-based transmission facilities and the characteristics of the telecommunications business, but Japan's telecommunications business has transitioned to its current competitive state through a process of government-run and natural monopolies. In contrast, the DPF at least started out as a private entity, and it is possible that some may feel uncomfortable with the idea of regulating it in a manner that is completely consistent with the Telecommunications Business Act.

In any case, it is necessary to be careful that the introduction of "ex ante regulation" in such a situation does not lead to the introduction of "regulations that omit" due process, which should be taken as a matter of principle, namely, assertion and proof. "Ex ante regulation" are, after all, public restraints imposed by the state.

On the other hand, as mentioned above, if we assume that the field of competition law itself allows for common understanding across national boundaries, it may be possible to understand that it is rather natural to cite and adapt mechanisms of anticompetitive effects that have been clarified in other countries. This may lead to the general issue of how much competition law should be treated as a matter of international standards, and how much should be regarded as a matter of national law.

Thus, when examining the battle between Leviathan and Behemoth, there is the question of "how to fight" the battle from the perspective of the state or the people to whom power is attached, even if we only look at the competitive space.

All that can be said at this point is that we need to continually watch the Leviathan so that the chains that bind it are not torn off as we focus on the characteristics of the Behemoth in that battle. The appearance of a common enemy does not mean that the Leviathan is unconditionally side with the people...

Additional Note

After publishing this original paper, the Act on Promotion of Competition for Specified Smartphone Software is legislated in Japan. Although the Act similar to DMA in EU, the target is only mobile businesses. The provisions about designation operators in the Act has implemented since 19 December 2024, three operators (Apple inc., iTunes Co., Ltd, Google LLC) is designated by the Japan Fair Trade Commission. And the provision about conduct regulation in the Act will be implemented by 18 December 2025.