Japan's Regulatory Response to Digital Platforms

Comparisons with European and Asian Approaches

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I. Introduction: Background of the Regulatory Inquiries

1. Japan's Focus on Digital Platforms

From a comparative law perspective, it is useful to observe how the law responds to the development of new technology that is likely to have significant economic and social impact. This author has previously examined Japan's special liability rules for facilitating commercial space activities,[1] as well as its attempts to set up a governance framework for artificial intelligence.[2] The former is a legal scheme modelled after US and French coun-

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1 S. Kozuka, Strict Liability and State Indemnification under Japanese Law: The New Space Activities Act Compared with the Scheme on Compensation for Nuclear Damages, ZJapanR/J.Japan.L. 43 (2017) 3–20.

2 S. Kozuka, Japan's Response to New Technologies: Draft Artificial Intelligence Research and Development Guidelines for International Discussions, ZJapanR/J.Japan.L. 46 (2018) 3–18; S. Kozuka, A governance framework for the develop-

terparts, apparently introduced due to a kind of regulatory competition, while for the latter subject Japan is more proactive and trying to lead the world in reaching a consensus, sharing the goal with, among others, the European Union. In this article, the author analyses how Japan is responding to the recently emerged platform business in order to identify the features of the Japanese approach.

The reference to digital platforms appeared in the "Interim Report on the Vision for the New Industrial Structure" by the Industrial Structure Council of the Ministry of Economy, Trade and Industry (METI) in 2016 (hereinafter "the Vision Report"). The Report mentioned, as one of the various issues that Japan faces in shifting to the new economic and social system, the "competition rules in response to the fourth industrial revolution", and it expressed concerns about the concern about "the possibility that platformers like GAFA (Google, Apple, Facebook, Amazon) have used network effects, low marginal costs and an ease of replication so as to rapidly expand their market shares, thus allowing them to secure competitive advantages and acquire dominant positions because of, among other reasons, the high switching costs [faced by consumers]".[3]

The concern has been responded to by the government's Growth Strategy 2018, which identified the promulgation of "fundamental principles" regarding the platform business as the imminent policy goal. The relevant part of the Growth Strategy 2018 provides:

> "As digital platforms continue to dominate the market, the rise in businesses with platform business models has brought a need to sustain a competitive business environment.
>
> Fundamental principles regarding this new business model shall be finalized and rolled out during this year to ensure fairness to users and clarify corporate social responsibility of platform businesses. Deregulation aimed to stimulate innovation (relaxation of entry requirements, etc.) will be also considered."[4]

With the aim of considering the fundamental principles regarding platforms, two bodies for discussions were created. One is the Study Group on

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ment and use of artificial intelligence: lessons from the comparison of Japanese and European initiatives, Uniform Law Review 24, 2 (2019) 315–329.

3 SANGYŌ KŌZŌ SHINGI-KAI, *Shin-sangyō kōzō bijon: dai-4-ji sangyō kakumei o līdosuru nihon no senryaku chūkan seiri* [The Vision for the New Industrial Structure: Japan's Strategy to Lead the Fourth Industrial Revolution, Interim Report] (27 April 2016), *https://www.meti.go.jp/shingikai/sankoshin/shinsangyo_kozo/pdf/ch_01.pdf*, 40 (in Japanese).

4 Growth Strategy 2018 (15 June 2018), *https://www.kantei.go.jp/jp/singi/keizaisaisei/pdf/miraitousi2018_en.pdf*, 18–19 (translation by the Cabinet Office). The omitted part of the passage mentions the issues of data portability and open API. Both are important issues, but this article cannot cover them due to the different nature of the subject.

the Business Environment Concerning Digital Platformers, under the joint auspices of the METI, the Japan Fair Trade Commission (JFTC) and the Ministry of Internal Affairs and Communications (MIC) (hereinafter the "Joint Study Group"). The other is the Committee on the Common Rules for Commerce of the Connected Industries, known as the Smart Commerce Committee, under the Industrial Structure Council. Both started deliberations in July 2018 and published Interim Reports in December of the same year. While the Smart Commerce Committee suspended its activities after that, the Joint Study Group established two Working Groups (one on the relationship between platform operators and retailers and one on the portability and openness of data) and continued examination of the subject. The two Working Groups published their policy options in May 2019.

2. The Role of Platforms in the Digital Economy as Background

The 2016 document on the "New Industrial Structure" explicitly referred to the acronym "GAFA." Apparently, the Japanese government initially held concerns about the dominant powers that American tech giants exerted over Japanese retailers. In fact, the METI and JFTC conducted surveys about the practices of online commerce in 2016 and found several instances that seemed abusive. They included the forced use of payment methods provided by the platform (offered for high fees), restrictions on pricing by retailers, exclusion of apps competing with the platform provider's own app, and preventing an app's download from a source other than the official app store.[5] Thus, one of the policy focuses in regard to the platforms was the regulation of their powers.

It should also be noted that, in Asia, there are Chinese counterparts of these American platforms, known by the acronym "BAT." They are Baidu (search engine and movie sharing), Alibaba (marketplace and shopping mall services) and Tencent (messaging, online games and music supply to mobile devices).[6] These Chinese giants have grown up in the populated Chinese market, from which the US giants (GAFA) are kept out, and they are now expanding into the Asian markets. As the market shares of BAT are still small in the Japanese market, Japan is not so much concerned about protecting Japanese retailers in the domestic market. However, Japan is keen on backing

5 *Dai-4-ji sangyō kakumei ni muketa ōdanteki seido kenkyū-kai hōkoku-sho* [The Report of the Study Group on the Cross-sectional Rules towards the Fourth Industrial Revolution] (15 September 2016), *https://www.meti.go.jp/press/2016/09/20160915001/20160915001-3.pdf*, 7–11 (in Japanese).

6 C. CAKEBREAD, One chart shows how different the internet landscape looks in China, Business Insider (16 August 2017), *https://www.businessinsider.com/one-chart-shows-the-companies-dominating-the-chinese-internet-2017-8.*

Japanese platforms, such as Yahoo! and Rakuten (both now providing marketplace services), in their competition with BAT in Asian markets.

Furthermore, platforms are crucial in the emerging "sharing economy" type businesses. One of the best-known sharing services is the sharing of accommodation, for which a regulatory framework (the Law on the Accommodation Business by Residential Houses) was introduced in 2017.[7] There are many other sharing services that are not subject to any regulations. In 2019, the membership of the Sharing Economy Association of Japan totalled just less than 300.[8] Given that most of these sharing services are small startups, it was feared that introducing strict regulations over "platforms", without any conditions or qualifications, could stifle these burgeoning businesses due to compliance costs that they might find too expensive.

As a result, the policy focus has somewhat blurred. The Japanese government is now faced with the uneasy task of harnessing the foreign (American) giant platforms in the domestic market, without affecting the domestic platforms in the Japanese and neighbouring (Asian) markets. The sections that follow will examine how such conflicting demands have been addressed by Japanese policymakers; they examine in turn: what policy measure has been chosen with respect to the relationship between platforms and retailers (business users) (II.), the responsibility of platforms in relation to consumers (III.) and the possibility of regulating platforms as such (IV.). A brief conclusion and the future outlook follow thereafter (V.).

II. Fairness in the Rules between Platforms and Retailers (Business Users)

1. The Expected Use of the Antimonopoly Act

As anticipated by the conflicting policy perspectives, the examinations by the deliberative bodies were not straightforward. The complications were apparent in the Interim Report of the Joint Study Group.[9] It first acknowledges the positive role of platforms in facilitating innovations that result in new businesses and markets, in providing opportunities to small and medium enterprises and startups, and also in bringing benefits to the consumers. Then the Interim Report reiterates the concerns in the Vision Report that these plat-

7 A. Hosokawa, The "Sharing Economy" in Japan, ZJapanR/J.Japan.L. 46 (2018) 131.

8 See the graph embedded in the website of the Sharing Economy Association, *https://sharing-economy.jp/ja/about/join/* (in Japanese).

9 Torihiki Kankyō Seibi ni Kansuru Kentō-kai, *Dejitaru purattofōmā o meguru torihiki kankyō seibi ni kansuru chūkan ronten seiri* [The Interim Report on the Business Environment concerning Digital Platformers] (12 December 2018), *https://www.meti.go.jp/press/2018/12/20181212002/20181212002-1.pdf* (in Japanese).

forms tend to hold monopolistic or oligopolistic positions because of the network effect that such platforms have on account of their nature and due to the economies of scale specifically enjoyed by businesses using the digital technology. Based on such findings, the Interim Report on the one hand suggests that the relevant regulations be revised where the existing regulations tailored to specific modes of business hinder market entry by the new types of businesses using platforms. On the other hand, the same Interim Report demands the "rules" be transparent and fair vis-à-vis both retailers and consumers. The Interim Report explicitly notes that the "rules" here include technological setups known as "codes" or "architecture."[10]

In response to these findings of the Study Group, the three government agencies (METI, JFTC and MIC) published seven Fundamental Principles for the rules concerning platformers.[11] Two of them, namely the third and fourth Principle, address the concerns expressed by the Study Group. The third Principle emphasises the need for transparency to ensure fairness in transactions with big platform operators. Subsequently, the fourth Principle requires that fair and free competition be realised in regard to digital platform operators and that the application of the Antimonopoly Act be reexamined in this context. Thus, it seemingly appears that the third Principle addresses the problem of contract terms, while the fourth Principle deals with the competition law issue.

Interestingly, one of the Working Groups, which worked on the third Principle, has not suggested the formulation of any special contract law rules. In the policy options published in May 2019, this Working Group concludes the use of the Antimonopoly Act the most preferable approach.[12] Before reaching that conclusion, the Working Group considered the asymmetric regulations governing a so-called essential facility (such as the regulations on certain telecommunication service providers) and the regulation

10 As may be well known, the ever larger influence of digital "code" was emphasised by Lawrence Lessig, (for example in L. LESSIG, Code version 2.0 (New York 2006)), while the relevance of architecture is argued by Cass Sunstein (for example, in C. SUNSTEIN, Choosing not to Choose: Understanding the Value of Choice (Oxford 2015)).

11 KEIZAI SANGYŌ-SHŌ, *Purattofōmā-gata bijinesu no taitō ni taiōshita rūlu seibi no kihon gensoku* [The Fundamental Principles of the Rules in Response to the Emerging Platform-type Businesses] (18 December 2018), *https://www.meti.go.jp/press/2018/12/20181218003/20181218003-1.pdf* (in Japanese).

12 DEJITARU PURATTOFŌMĀ O MEGURU TORIHIKI KANKYŌ SEIBI NI KANSURU KENTŌ-KAI, *Torihiki kankyō no tōmei-sei, kōsei-sei kakuho ni muketa rūlu seibi no arikata ni kansuru opushon* [Policy Options for the Rules towards a Transparent and Fair Business Environment] (21 May 2019), *https://www.meti.go.jp/press/2019/05/20190521004/20190521004-1.pdf* (in Japanese).

of platform businesses as such, but it found that these were not appropriate for an innovative business institution like platforms.

2. Comparison with the European Approach

This conclusion is in contrast with the European approach. The European Union is currently working on a proposed regulation promoting fairness and transparency for business users of online intermediation services.[13] Recognizing the need for transparency and fairness, which is consistent with the recognition of Japanese policymakers, the European Commission proposes to regulate the terms and conditions between online intermediation services providers (platform operators) and business users (retailers). Starting from the demand that the terms and conditions be drafted in clear and unambiguous language and made easily available,[14] the proposed regulation requires: that the suspension and termination of an online intermediation service provided to a certain business user be based on objective grounds, which must be provided to the business user in a statement of reasons;[15] that the main parameters determining ranking and the reasons for the relative importance of these main parameters be set out in the terms and conditions;[16] that any differentiated treatment among consumers and business users be described in the terms and conditions;[17] that the technical and contractual access of business users to any personal or other data be described in the terms and conditions;[18] that any restrictions on the business user's offer of the same goods and services to consumers under different conditions be based on the grounds included in the terms and conditions;[19] and that the online intermediation services be equipped with an internal system for handling the complaints of business users.[20]

Japan's preference for the Antimonopoly Act, as opposed to the European orientation in the regulation regarding terms and conditions, has both technical and policy reasons. The technical reason is that the Japanese Antimonopoly Act includes prohibitions of unfair trade practices, which does not

13 The European Commission, Proposal for a Regulation of the European Parliament and of the Council on promoting fairness and transparency for business users of online intermediation services, COM(2018) 238 final (hereinafter "proposed regulation").
14 Art. 3 (1) of the proposed regulation.
15 Art. 4 of the proposed regulation.
16 Art. 5 (1) of the proposed regulation.
17 Art. 6 (1) of the proposed regulation.
18 Art. 7 (1) of the proposed regulation.
19 Art. 8 (1) of the proposed regulation.
20 Art. 9 of the proposed regulation.

require market analysis.[21] Furthermore, the abuse of a dominant position,[22] one of the prohibited unfair trade practices, does not presuppose absolute dominance in the market, applying instead when a relative dominance over the abused party is found.[23] In these respects, the Japanese Antimonopoly Act differs from European competition law, namely Articles 101 and 102 of the Treaty on the Functioning of the European Union, and can be invoked in situations where European competition law is not useful.[24]

The policy reason derives from the positive aspects of platforms that the Interim Report of the Joint Study Group finds. The Interim Report argues that facilitating further development of the platform business in Japan is quite important.[25] A newly developed platform may use an innovative algorithm for matching and employ new types of parameters for the determination of the ranking. A platform operator, as a new entrant in the market, may wish to not disclose such algorithms and parameters. The Interim Report's idea seems to be that, unless the platform becomes dominant in the market and retailers have no alternatives to choose from, the reputation of their system will resolve complaints from retailers.[26]

Such observations being made, the contract law rules have remained unaffected by the policy considerations concerning platforms. There seems to be a persistent reluctance in Japan to introduce economic or social policy aims into contract law rules.[27] The policy issues are usually dealt with by special rules, such as those governing consumer law, labour law and competition law, including the Subcontracting Act. After its most recent reform, the Civil Code has introduced rules on the standard conditions of a contract, applicable not only to consumer contracts but to business-to-business contracts as well.[28] Still, the introduced rules are modest and much different from the regulation

21 J. TAMURA/A.CHEN, Competition and Fair Trade, in: McAlinn (ed.), Japanese Business Law (Alphen an den Rijn 2007) 453, especially at 465.

22 Art. 2 (9) 5 of the Antimonopoly Act.

23 A. NEGISHI/U. EISELE, § 17 – Recht der Wettbewerbsbeschränkungen, in: Baum/Bälz (eds), Handbuch Japanisches Hendels- und Wirtschaftsrecht (Cologne 2011) 744, para. 101.

24 On the difficulty of applying European competition law, see T. MADIEGA, Fairness and transparency for business users of online services, EU Legislation in Progress (2019), *http://www.europarl.europa.eu/RegData/etudes/BRIE/2018/625134/EPRS_BRI(2018)625134_EN.pdf*, 3.

25 The Interim Report of the Joint Study Group, *supra* note 9, 2.

26 See Policy Options, *supra* note 12, 21–22.

27 See S. KOZUKA/L. NOTTAGE, Policy and Politics in Contract Law Reform in Japan, in: Adams/Heirbaut (eds.), The Method and Culture of Comparative Law (Oxford 2014) 235.

of unfair contract terms in Europe.[29] Such independence of contract law rules from the underlying policy considerations has been maintained in the context of platform regulation, whether intended or not.

3. The Issue of Investigation and Enforcement

By contrast, the Interim Report of the Joint Study Group makes a bold proposal that the regulator is to collect data on what exactly the practice is in transactions involving the platform. Having noted that some platform operators prevent retailers from making complaints to the regulator by way of a non-disclosure agreement, the Interim Report proposes that the JFTC exercise their investigatory power under Art.40 of the Antimonopoly Act against uncooperative platform operators.[30] The Working Group's Policy Options reiterates the usefulness of this investigatory power and further notes that the "commitment" procedure under the Antimonopoly Act, just introduced in accordance with the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP),[31] may also be available.[32] It may also be worth mentioning that even in the absence of an official cease and desist order by the JFTC, a party may bring a tort liability case to recover damages allegedly incurred as a result of unfair trade practices under the Antimonopoly Act. Therefore, the preference for the Antimonopoly Act over the regulation of contractual terms and conditions does not mean that private initiatives for remedies are excluded in the phase of enforcement.

III. LIABILITY AND RESPONSIBILITY OF PLATFORMS VIS-À-VIS CONSUMERS

1. Consumer Protection Concerning Digital Platforms

In the case of some platforms, among others those for online marketplaces and flea markets, many users are consumers. Thus, independent from the direction pursued in the Growth Strategy 2018, the Consumer Commission has set up a special panel to look into consumer law issues arising in connection with

28 Arts. 548-2 to 548-3 of the Civil Code (as amended in 2017). See H. SONO/L. NOTTAGE/A. PARDIECK/K. SAIGUSA, Contract Law in Japan (Alphen an den Rijn 2019) 89.

29 Directive 2005/29/EC of the European Parliament and of the Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market, OJ L 149 (11.6.2005) 22.

30 The Interim Report of the Study Group, *supra* note 9, 10.

31 See R. TANAKA, New Commitment Procedure under Anti-Monopoly Act, NO & T Japan Legal Update, No. 18 (July 2019).

32 Policy Options, *supra* note 12, 13.

online platforms. The special panel published a Report in April 2019. It conducted an online survey and found that thirty per cent of users of platform-related services (shopping malls, internet auctions, online flea markets and shared services) experienced troubles. The largest number of complaints were about the quality of goods, such as the goods not satisfying certain standards or the delivered goods differing from what appeared in the photo.[33]

Having so found, the Report of the special panel stops short of proposing a new law or regulation. It takes note of the voluntary arrangements by platform operators and lists three alternatives to ensure the effectiveness of such arrangements: self-regulation or co-regulation, rules or guidelines issued by a government agency, and certification.[34] The Report also surveys how existing consumer law applies to transactions made by way of a platform, e.g. the Consumer Contracts Act is applicable to a sales contract when the supplier of the goods in an online shopping mall is a business entity and the buyer is a consumer.[35] It also notes that when a transaction is made with a foreign entity, a consumer has the right to rely on the mandatory (non-delegable) law of the place of its permanent residence under the Law on the General Rules of Applicable Laws,[36] and it suggests that some administrative law protecting consumers, such as the Law on Qualified Commercial Transactions and the Act against Unjustifiable Premiums and Misleading Representations, be made applicable to foreign entities providing goods and services to consumers in Japan.[37]

Refraining from immediately introducing new legal rules is in line with what was intended in the Growth Strategy 2018. Careful reading of the passage quoted above makes one realise that it mentions the "social responsibility" of platform businesses. The choice of this term, rather than the (legal) liability of platform businesses, indicates that the government had not planned on introducing any legal rules on the responsibility of the platform operator toward consumers. While the investigation by the special panel of the Consumer Commission was spontaneous, the Smart Commerce Sub-committee of the Industrial Structure Council deliberated on issues concerning this part of the Growth Strategy 2018. In its Interim Report, the Sub-committee concluded that the social responsibility and fairness of the

33 SHŌHI-SHA I'IN-KAI ONRAIN PURATTOFŌMU NI OKERU TORIHIKI NO ARIKATA NI KANSURU SENMON CHŌSA-KAI, *Onrain purattofōmu ni okeru torihiki no arikata ni kansuru senmon chōsa-kai hōkoku-sho* [Report of the Special Panel on Transactions Conducted on Online Platforms] (April 2019), *https://www.cao.go.jp/consumer/kabusoshiki/online_pf/doc/201904_opf_houkoku.pdf*, 12 (in Japanese).

34 Special Panel Report, *supra* note 33, 69–70.

35 See Special Panel Report, *supra* note 33, 34–36.

36 Art. 11 (1) of the Act on the General Rules on the Applicability of Laws.

37 Special Panel Report, *supra* note 33, 37–38.

platform operator is to be better achieved by promoting self-regulatory arrangements, such as by voluntary actions of individual platform operators and the use of a rating scheme created by a third party, rather than by introducing regulation by the government right away.[38] The conclusion is identical to the recommendations of the special panel of the Consumer Commission, what is probably not a coincidence.

2. The Platform Operator's Liability under Japanese Law as Compared with Korean Law

This conclusion is in sharp contrast with the position that one of Japan's neighbors has taken. The Republic of Korea's Act on Consumer Protection in Electronic Commerce, enacted in 2002 and most recently amended in 2016, imposes greater responsibility on platform operators. To be more precise, the Act introduces a number of duties owed by a "mail order broker", which is defined as a party intermediating mail order sales through a cybermall or otherwise as described by the Ordinance of the Prime Minister.[39] (It is suspected that the term "mail order" is used to denote distance sales and is unrelated to postal mail.) Firstly, the mail order broker must notify the consumer that the broker is not a party to the mail order sales. Failing such notification, the mail order broker will be liable jointly with the seller in the mail order sales ("requester of mail order brokerage", as referred to in the Act) for any damage that the seller causes to the consumer (buyer) intentionally or negligently.[40] Secondly, a mail service broker which performs an important part of mail order sales – including the provision of cancellation deadlines, confirmation of an order, and the establishment of measures preventing input errors with regard to payment and thus securing the confidence in the payment – assumes the duties applicable to the seller in the mail order sales.[41] Thirdly, the mail order broker is to take actions as prescribed by the Presidential Decree to resolve complaints and disputes arising from the use of a cybermall.[42] These responsibilities of a platform operator under the Korean Act seem even stricter than what the European

38 CONNECTED INDUSTRIES NI OKERU KYŌTSŪ SHŌ-TORIHIKI RŪRU KENTŌ SHŌ-I'IN-KAI, *Connected Industries ni okeru kyōtsū shō-torihiki rūru kentō shō-i'in-kai chūkan seiri* [The Interim Report of the Sub-committee on Common Rules for Commerce in Connected Industries] (December 2018), *https://www.meti.go.jp/shingikai/sankoshin/shomu_ryutsu/smartcommerce/pdf/20181228_01.pdf*, 21.

39 An English translation of the Act is available at *https://elaw.klri.re.kr/eng_service/lawView.do?hseq=38513&lang=ENG*.

40 Arts. 20 (1) and 20-2 (1) of the Korean Act on Consumer Protection in Electronic Commerce.

41 Art. 20-3 of the Korean Act on Consumer Protection in Electronic Commerce.

42 Art. 20 (3) of the Korean Act on Consumer Protection in Electronic Commerce.

Commission proposes in "a New Deal for Consumers" to enhance transparency for consumers in online marketplaces.[43]

The reluctance in Japan to introduce a legal scheme for digital platforms stands in stark contrast to these Korean and European approaches. However, it does not mean that a platform operator will be exempt from any legal liability. In the decision over a case where consumers sued Yahoo! for failing to exclude a fraudulent seller from an auction made on the online marketplace, the District Court of Nagoya held that the Yahoo! owed a duty to offer an online auction system without defects, this duty deriving from the principle of good faith.[44] To be more precise, the Court first examined the contractual relationship among the parties and found that the agreement to participate in the online auction system is not a broker *(Makler)* contract in the Commercial Code. As a result, it rejected the argument that Yahoo! is under a duty to strive to match the offer and bid in the auction system. According to the court, Yahoo!'s duty under the agreement is simply to offer a marketplace to sellers and buyers. Still, the court found that the contractual duty so defined entails the duty to keep the marketplace free of defects, and it based such unwritten duty on the good faith principle. The court further held that the extent of such duty depends on the social circumstances at the time, the relevant laws and regulations, the technical level of the system, the effects of the system and the benefit to users. Applying such a balancing test to the facts of the case, the court examined, one by one, what the plaintiffs alleged to be mandatory for the operator of the auction system. Among the alleged duties, the court affirmed the duty to alert the user to fraud and other illegal transactions generally, but it found that Yahoo! had taken sufficient actions. Other duties alleged, such as the duty to introduce a rating by an independent third party or an escrow service, or the duty to disclose information about a seller who had committed fraud in the past, were held inapplicable because the court found that they were practically or legally unfeasible (and not necessarily welcomed by the users, as in the case of an escrow service). The plaintiff appealed, but the Appeals Court of Nagoya upheld the District Court's decision.[45]

3. The Duty Based on the Good Faith Principle and Voluntary Arrangements

In fact, the voluntary arrangements that the Smart Commerce Sub-committee found worth promoting are more or less equivalent to those duties al-

43 Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee: A New Deal for Consumers, COM (2018) 183 final.

44 Nagoya District Court, 28 March 2008, Hanrei Jihō No. 2029, 89.

45 Appeals Court of Nagoya, 11 November 2008, Jiho Jānaru No. 1840, 160.

leged to derive from the good faith principle.[46] During the ten years since the Nagoya District Court's decision, Yahoo! and other major platform operators in Japan have introduced rating systems, escrow services and even a compensation scheme for the sake of users suffering damages from transactions on the marketplace. Still, there has been hesitation in upgrading these duties that exist under the good faith principle to legal rules. Probably the key lies in the flexible (and possibly adaptive) approach that the District Court adopted. As mentioned, by referring to "the social circumstances at the time, relevant laws and regulation, the technical level of the system, effects of the system as well as the benefit to users", the court adopted a kind of balancing test that will be made on a case-by-case basis. Given that Japan's policy interest is not simple – protecting against the giant platforms from the US, competing with Chinese giants in Asia and facilitating the emergence of sharing services in the domestic market – there may be good reasons to maintain the flexible and adaptive approach.

IV. The Possibility of Defining and Regulating Platformers as Such

1. China's Regulation on Online Platform Operators

Apart from the preference for a flexible and adaptive approach, the difficulty foreseen if a new regulation were to be introduced was the definition of a "platform". The European draft regulations on promoting fairness and transparency for business users of online intermediation services avoid this problem by focusing on the type of activity termed "intermediation." The same applies to the Korean Act on Consumer Protection in Electronic Commerce, which focuses on "mail order brokerage." One might say that, ultimately, these are not directly addressing platforms.

On the other hand, China has dared to introduce a regulation directly addressed to "platforms." Under the E-Commerce Law of the People's Republic of China, enacted in 2018 and in force since 1 January 2019,[47] an e-commerce platform operator is defined as a party that "provides online business premises, transaction matching, information distribution and other services to two or more parties to an e-commerce transaction so that the parties may engage in independent transactions."[48] The idea is to capture a party that is not a party (seller or buyer of goods or services) to individual

46 On the use of good faith principle in Japanese contract law, see Sono et al., *supra* note 28, 46–47.

47 An English translation of this Law can be found at *https://ipkey.eu/sites/default/files/documents/resources/PRC_E-Commerce_Law.pdf.*

48 Art. 9 (2) of China's E-Commerce Law.

transactions made via an online platform. In other words, if a party is involved in an e-commerce transaction but denies that it is a platform operator, it is likely to be regarded as a party to the e-commerce, which the Law refers to as an "e-commerce operator."[49]

The platform operator as so defined is under several duties. First, the law requires that an e-commerce operator that uses the platform supply information about its identity; further, the platform operator is to verify and record such information in the registration file that it establishes.[50] It is noted that the platform operator is under a duty to submit this information about the identity of e-commerce operators to the market regulator and the tax authority.[51] Secondly, the platform operator is to take necessary measures to ensure that the goods and services traded on its platform are in compliance with relevant regulations as well as safety and environmental requirements.[52] When the platform operator knows or should know that the goods or services are in breach of these regulations and requirements but fails to take necessary measures, it is jointly and severally liable for damages suffered by the consumer together with the e-commerce operator.[53] Thirdly, the platform operator is to take necessary measures to ensure the network's security and stable operation.[54] Fourthly, the platform operator is to keep records about the goods, services and transactions on the platform.[55] Last, but not least, the platform operator is, pursuant to the principles of "open, fair and impartial" behavior, to develop a service agreement for use of the platform and rules for transactions on the platform.[56]

2. The Debates over the Restructuring of Regulation in Japan

The idea of defining the platform operator as a party who is not a party to the individual transaction sounds similar to the situation of an internet service provider. Beginning with the Digital Millennium Copyright Act of the United States,[57] major jurisdictions, including Japan and Europe, have re-

49 See X. JAN, *Chūgoku no denshi shō-torihiki rippō ni okeru shuyō kadai: riron-men no ronsō to kaiketsu ni muketa kangaekata* [Major Issues in Legislation on Electronic Commerce in China: Theoretical Debates and the Approach towards the Solution], Sofuto Lō Kenkyū 28 (2018) 19, at 26 (in Japanese, translated by Haruo Hirano and Hu Jianfang).

50 Art. 27 of China's E-Commerce Law.

51 Art. 28 of China's E-Commerce Law.

52 Art. 29 of China's E-Commerce Law.

53 Art. 38 of China's E-Commerce Law.

54 Art. 30 of China's E-Commerce Law.

55 Art. 31 of China's E-Commerce Law.

56 Art. 32 of China's E-Commerce Law.

57 17 USC 512.

garded internet service providers as a mere conduit and not made them directly liable either for overseeing uploaded content that infringes another person's copyright (vis-à-vis the copyright holder) or for taking down content that is claimed to infringe a person's copyright (vis-à-vis the uploader of the content at issue).[58] Likewise, a platform operator under the Chinese E-Commerce Law is not subject to the duties and liabilities of a party to an individual transaction, though their own duties are not insignificant.

In Japan, reforming the regulation governing platforms was debated during the deliberations at the Smart Commerce Sub-committee. On one occasion, the Japan Association of New Economy (JANE) made an argument for the restructuring of regulations to adapt to the emerging sharing economies.[59] JANE is the industry organisation consisting of companies in tech and digital businesses, such as Rakuten, Cyber Agent, Gree, Mercari and LINE. However, its point was entirely different from the regulation of platforms as a non-party to the individual transactions. Rather, it contended that the existing regulation should be functionally dismantled and distributed to the platform operator and the individual parties according to their roles. In other words, JANE demanded that the regulator redefine the purpose of existing regulations and establish a new set of rules, applicable partly to platform operators and partly to a party to an individual transaction, so that the entirety of these rules ensures the regulatory purpose as redefined. It praised as a successful example the Law on Accommodation Business by Residential Houses, where the purpose of the existing Hotels Act is ensured by a combination of the duties of the platform operator and the duties of those who offer their residential homes for accommodation under the new Act.

The Smart Commerce Sub-committee was not persuaded by this argument. While its Interim Report sympathised with the more flexible approach to regulation, including the employment of RegTech, it did not accept the argument for the "dismantling" of regulation as a general rule. Still, JANE's argument was effective enough to exclude the idea of regulating the platform as such, as is done in the Chinese E-Commerce Law. The outcome was a conclusion to refrain from enacting any new legal rules but to keep an eye on developments in practice.

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58 See S. KOZUKA, Self-regulation induced by the State in Japan, in: Baum/Bälz/Dernauer (eds.), Self-regulation in Private Law in Japan and Germany, ZJapanR/J.Japan.L. Special Issue 10 (2018) 109, at 117–119.

59 M.OGISO, *Nyū ekonomi ni taiō shita kisei seido no arikata to kisei kaikaku kōmoku* [Adapting Regulation to the New Economy and Items for Regulatory Reform], *https://www.meti.go.jp/shingikai/sankoshin/shomu_ryutsu/smartcommerce/pdf/002_05_00.pdf* (PowerPoint presentation in Japanese).

V. CONCLUSIONS

Digital (online) platforms are a new phenomenon. States respond to this phenomenon in a variety of ways, affected partly by the policy interests that each state has and partly by the legal tradition of each jurisdiction. The Japanese approach, which has emerged after deliberations of several months, relies mainly on the Antimonopoly Act to bring about transparency and fairness in commerce involving platforms. Much hesitation is seen over introducing new contract law rules.

The lack of enthusiasm about contract law rules does not mean that the liability of a platform operator is left in a legal vacuum. When a dispute is brought before a court, the court will rely on the principle of good faith to supplement the written obligations of parties to the agreement. The major platform operators in Japan take note of such an approach of the court and develop voluntary arrangements so as to offer better services to the users. It is against such a background that advocates for the emerging platform businesses argue only for deregulation and lobby against new regulation, and it is against this same background that policymakers choose to monitor how effective the voluntary arrangements turn out be rather than introducing new, possibly radical, regulations.

The notion of a platform is an evolving concept, and it requires policymakers to continually review their approach. At the meeting of the Council on Investments for the Future held on 13 February 2019, Prime Minister Abe mentioned the need for a new organisation for platforms "within the government, beyond bureaucratic sectionalism".[60] The planned organisation will probably be something equivalent to the Observatory on the Online Platform Economy that the European Union plans to have. Whether Japan's current approach change at some point in the future will depend on the findings of this Japanese version of the Observatory.

SUMMARY

In response to the ever greater role of platforms in the digital economy, the Japanese government decided to introduce "business rules" concerning digital platforms in its Growth Strategy 2018. The motivation appears similar to what is driving the European Union to propose a regulation governing contracts between platforms and business users, as well as governing consumers' rights

60 Minutes of the 23rd meeting of the Council on Investments for the Future, available at *http://www.kantei.go.jp/jp/singi/keizaisaisei/miraitoshikaigi/dai23/gijiyousi.pdf* (in Japanese).

against platforms. After deliberations within the government, however, Japan has chosen to pursue a different path. It has decided to employ primarily the Antimonopoly Act to regulate the relationship between platform operators and retailers (business users), and to monitor how well the voluntary arrangements work in protecting consumers' interests vis-à-vis platforms. The approach of Japan also differs significantly from neighbouring economies in Asia, namely the Republic of Korea, where the consumers' interests are addressed by a statute, and the PR China, where regulation over digital platforms has recently been introduced as part of its E-commerce Law. While Japan's choice is apparently influenced by the interests of its digital platform operators and the sharing economy sector of the industry, underlying thoughts about private law – such as the tendency to avoid policy considerations in contract law rules and a flexible use of the good faith principle – also seem to be relevant.

ZUSAMMENFASSUNG

Als Reaktion auf die stetig wachsende Rolle von Plattformen in der Digital Economy erklärte die japanische Regierung in ihrer Wachstumsstrategie 2018, „business rules" für digitale Plattformen einzuführen. Das Motiv scheint dasselbe zu sein wie das für den Vorschlag der EU zur Regulierung des Verhältnisses zwischen Plattformen und geschäftlichen Nutzern, sowie von Verbraucherrechten gegenüber den Plattformen. Allerdings hat Japan nach Beratungen innerhalb der Regierung beschlossen, einen anderen Weg einzuschlagen: In erster Linie soll das Antimonopolgesetz dazu eingesetzt werden, um das Verhältnis zwischen dem Plattformbetreiber und den Einzelhändlern (geschäftlichen Nutzern) zu regeln und zu überwachen, inwiefern die freiwilligen Vereinbarungen zum Schutz der Verbraucherinteressen gegenüber den Plattformen funktionieren. Dieser Ansatz unterscheidet sich von den asiatischen Nachbarländern Japans, nämlich sowohl der Republik Korea, wo die Verbraucherinteressen gesetzlich geschützt werden, als auch von der Volksrepublik China, wo die Regulierung digitaler Plattformen kürzlich als Teil des E-Commerce-Gesetzes eingeführt wurde. Während die Entscheidung Japans offenbar auf Interessen der digitalen Plattformen und dem Sharing Economy-Sektor seiner Industrie beruht, scheinen grundlegende Gedanken zum Privatrecht wie die Tendenz, politische Erwägungen aus dem Vertragsrecht herauszuhalten oder eine flexible Anwendung des Prinzips des guten Glaubens zu vermeiden, ebenfalls relevant zu sein.

(Die Redaktion)