



CCIA Comments on the Japan Digital Market Competition Headquarters' Final Report on Evaluation of Competition in the Mobile Ecosystem

The Computer and Communications Industry Association (CCIA)¹ welcomes the opportunity to submit comments on the Japan Digital Market Competition Headquarters' ("DMCH") Final Report on *Evaluation of Competition in the Mobile Ecosystem* ("Final Report"), released on June 16, 2023.²

As the DMCH notes in the Final Report, the so-called "digital platforms" that form the mobile ecosystem have made significant contributions to the digitized economy and society and have brought numerous benefits to consumers and business operators. However, as CCIA previously noted in its comments on the DMCH's Interim Report on Evaluation of Competition in the Mobile Ecosystem,³ to determine if there is a need to address possible competition concerns in this area, it is important for the DMCH to fully and accurately understand the business models of "digital platforms" as well as the broader mobile ecosystem.

CCIA's comments focus on the DMCH's proposals for digital platform regulation. CCIA wishes to underscore the benefits digital platforms provide for consumers and discuss important considerations the DMCH, competition authorities, and regulators should take into account when designing any proposed digital platform regulation. Without adopting some basic principles, an *ex-ante* regulation for digital platforms would run the risk of harming consumers, competition, and the competitive process. Therefore, our comments provide some suggested approaches in response to the DMCH's proposals regarding sharing user data, "equal access" obligations, self-preferencing prohibition, anti-steering obligations, and procedures.

¹ CCIA is an international, not-for-profit trade association representing a broad cross section of technology and communications firms. For over fifty years, CCIA has promoted open markets, open systems, and open networks. The Association advocates for sound competition policy and antitrust enforcement. CCIA members employ more than 1.6 million workers, invest more than \$100 billion in research and development, and contribute trillions of dollars in productivity to the global economy. For more, visit www.cciagnet.org.

² Final Report on Evaluation of Competition in the Mobile Ecosystem (Jun. 16, 2023), Japan Digital Market Competition Headquarters, <https://www.kantei.go.jp/jp/singi/digitalmarket/kyosokaigi/dai7/siryou2s.pdf>.

³ See CCIA Comments on the Japan Digital Market Competition Headquarters' Interim Reports on Evaluation of Competition in the Mobile Ecosystem (June 16, 2022), <http://ccianet.org/wp-content/uploads/2022/06/CCIA-Comments-on-the-Japan-DMCHs-Interim-Reports.pdf>.



I. Key Considerations and Principles to Guide Regulatory Proposals

Digital platforms in the mobile ecosystem provide Japanese consumers and businesses with tremendous benefits. Given the dynamic and innovative nature of digital markets and the mobile ecosystem, any new regulation for platforms needs to be flexible and take into account wider potential implications for businesses and consumers. Therefore, CCIA encourages the DMCH to thoroughly assess whether the benefits of any proposed digital platform regulation would outweigh its potential negative impact on Japanese consumers, businesses, and the economy. As such, an overly burdensome and heavy-handed regulation could significantly hinder innovation and harm economic growth. In addition, it could undermine intellectual property rights with significant implications for businesses operating in Japan. Moreover, it could compromise security and privacy for consumers and businesses, thereby inadvertently aiding cyber attackers in their pursuit to access sensitive information.

Overall, in the Final Report, it appears that the DMCH would need to present additional “legislative facts” (“立法事実”) to justify the need for new regulation. New regulations should be supported by evidence-based findings and a comprehensive cost-benefit analysis, to ensure that the benefits of any new regulation would outweigh the potential adverse effects on users, businesses, and the Japanese economy. In this regard, a key consideration is whether the existing enforcement frameworks, including competition, consumer protection, data privacy, and the Digital Platform Transaction Transparency Act (“Transparency Act”) already provide more proportionate, efficient, and collaborative ways to achieve the desired outcomes. Therefore, clarifying the expected outcomes of a proposed new framework would be particularly important for Japanese consumers and businesses alike.

CCIA would also encourage the DMCH to review evidence and past experience to further focus the proposed regulatory framework on the types of conduct that are recognized to be demonstrably harmful, rather than seeking to address theoretical or speculative harm, which would risk overregulation to the detriment of innovation. Considering the advantages that digital platforms offer to the daily lives of Japanese consumers and businesses, any intervention must be carefully planned and thoroughly considered to prevent any unintended negative consequences. In addition, it is important to acknowledge that economy-wide harms (such as online scams and



opaque data practices) are better addressed by economy-wide reforms, rather than platform-specific regulation. CCIA's recommendation is for the DMCH to embrace a balanced, evidence-based approach toward data limitation and access, which would take into account consumer benefits, business confidentiality, and privacy and security aspects.

Further, CCIA recommends that before proposing a new regulation, the DMCH and policymakers gather evidence through extensive consultation with various stakeholders to confirm and justify that there is, in fact, a need for the new regulation. If such a need is identified, a new regulation should be proportional to the impact of the potential harm and should take into account the likelihood of the occurrence of such harm. While considering the need for the new legislation, it should be noted that the Transparency Act already addresses some of the areas mentioned in the Final Report. The new framework, if adopted, should promote competition, avoid imposing unjustified burdens on the companies in scope, and enable continuous innovation in the marketplace, while preventing competitive harm and unfettered regulatory discretion.

The integrity of a new regime should also be secured by suitable procedural protections and review mechanisms. In particular, businesses in the scope of the new rules should be able to defend a conduct that is necessary, objectively justified, efficient, or contributes to innovation and consumer welfare. Procedurally, full merits review by a court should be available for decisions that have legal consequences for affected companies. Finally, the rules should be consistent with other regulatory regimes in Japan and overlapping obligations are to be avoided.

II. Need for a Cost-Benefit Analysis

Due to the potentially significant economic and social impact of digital platform regulation in Japan, it is crucial that the DMCH and the Japanese Government actively engage with relevant stakeholders and market players in the development of any *ex-ante* regime. Introducing new regulations for platforms is not costless, especially given the dynamic and innovative nature of digital markets and the rapidly changing global situation where cybersecurity threats are increasing and could threaten sound business activities. As a result, the



ultimate objective of any new regime should be to promote competition and innovation while protecting users' privacy and security.

Further, new regulation should be introduced only after a comprehensive analysis of the costs and benefits of the regulatory proposals. This should involve an assessment of whether available tools, such as the use of existing competition, consumer protection, data privacy laws, and the Transparency Act, are sufficient or if there are any gaps these existing frameworks do not capture. It is worth noting that Art. 3 of the Transparency Act embraces a spirit of "co-regulation," stating: "based on voluntary and proactive initiatives [...] by Digital Platform Providers [...] and with government involvement or other regulations kept to the minimum."

To ensure that the cost of any new regime does not outweigh its benefits, the rules should allow conduct that is clearly procompetitive or competitively benign or that is needed to provide consumers and businesses with advanced security and protection of their privacy. Legitimate protections such as user safety, security, quality, and functionality should be recognized and valued. Without such appropriate safeguards, an *ex-ante* regime may outlaw legitimate and pro-competitive forms of conduct, to the detriment of consumers and businesses that use these platforms.

III. Concerns Regarding a Mandate for Platforms to Share Data with Third Parties

The DMCH's proposals to mandate platforms to share data with third parties would reduce incentives to compete and innovate. The prospect of having to share assets with rivals discourages innovation — both by the asset owner, who knows they have to share the benefits, and by the rivals, who know that if someone else develops a successful asset, they also get access to it, thereby eliminating any incentive for rivals to develop their own.

The Final Report acknowledges that it is difficult to say that third-party developers are being treated fairly when third-party developers are mandated to show a form text emphasizing the risks of unspecified numbers of other companies tracking users. The DMCH seems to take this risk excessively light.

Forced data sharing poses risks to user privacy because Japanese users would have less control over their data if digital platforms are mandated to share their data with third parties. Even though the Final Report contemplates ensuring that such proposals come with controls to



protect privacy, ensuring that any such controls are robust and cannot be reverse-engineered by determined parties would be an ongoing challenge. For example, many platforms interact with their users on the basis of implicit or explicit consent with respect to how data is used, processed, and transferred to third parties; in such cases, it would be extremely burdensome, and in many cases simply infeasible, to obtain consent from all subscribers before transferring data. In addition, there is the risk of disclosing businesses' confidential information and facilitating collusion. Last, and very important, forced data sharing could enable even more dramatic harms, such as theft or corruption of data, unauthorized cyber intrusion, and widespread disinformation and manipulation.

Moreover, CCIA would recommend that the DMCH consider the "consumer survey" as well as "the survey on business operators (*i.e.*, developers)" in the Final Report. Consumers' awareness and involvement cannot be overlooked when it comes to sharing or not sharing their data and privacy-friendly options.

Data portability can help drive innovation and competition by enabling consumers to securely switch between services from different providers, empowering them to try new services, and allowing them to choose the offering that best suits their needs. Measures to promote common frameworks and open systems for consumers to move data between services are the best way to achieve such portability, provided that the actual data sharing would be at the consumers' request.

IV. Risks of Limiting the Ability of Platforms to Share User Data Internally

Rigid rules that limit or ban cross-service use of data could prevent users from enjoying the benefits that such data usage brings. For example, as long as users have transparency, provide their consent, and can control the process, data sharing across products allows for information to be properly accessed or controlled centrally by the company across multiple products, rather than needing to separately manage this for each service. In addition, cross-device and cross-product data sharing provides consumers with additional security measures and fraud detection. Introducing measures to limit cross-service data would entail a risk of severely impacting the value that digital platforms offer to the Japanese market and ultimately consumers.



As stated in previous comments,⁴ CCIA encourages data portability where necessary to increase ‘market contestability’ issues such as barriers to entry and expansion, multi-homing, and switching, to help keep markets open to entry and expansion.

V. “Equal Access” Obligations and Their Potential Impact

The Final Report proposes rules imposing obligations on vertically integrated participants to provide third parties with “equal access” to features or services. These rules might seek to promote competition, but can, in fact, harm customers by creating additional compliance burdens and severe security threats. Importantly, these rules might not only impede product development and innovation but also harm the mobile ecosystem itself. In fact, even though the stated aim of access obligations might be to “level the playing field” by preventing certain market participants from self-preferencing – that is, to require them to provide other market participants with the same access to products and services that certain firms provide to their own customers – the outcome might be different than intended. Moreover, OS providers have every incentive to make the mobile ecosystem, including app developers, attractive, rather than to harm them. Thus, there is no sufficient rationale to impose “equal access” rules.

“Equal access” rules would make it much slower and burdensome to bring product improvements to the market, which would significantly slow innovation. It would also mean that, if only certain market participants were required to provide third parties with equal access to products and features, the industry as a whole would need to move at the pace of the slowest market player. It is necessary to do this analysis on case-by-case, examining the economic, legal, and technological aspects in detail. Otherwise, such an obligation could potentially endanger user safety, create cybersecurity threats, and harm data privacy or otherwise impair users. Thus, this proposed rule would bring no real benefits for market participants and actually slow down the innovative forces in the market.

⁴ See, e.g., Comments of the Computer & Communications Industry Association (CCIA) before the National Telecommunications and Information Administration (NTIA) of the United States Department of Commerce (May 23, 2022), https://ccianet.org/wp-content/uploads/2022/05/CCIA-NTIA-submission_May-23.pdf.



VI. Missed Benefits of Self-Preferencing

The Final Report suggests prohibiting certain Operating System (“OS”) providers from requiring all apps to use their own browser engine. It should be noted that neither the Final Report, nor the JFTC Fact-Finding Report on Mobile Operating Systems⁵ seem to have presented sufficient “legislative facts” (“立法事実”) to support the necessity to introduce this prohibition. Moreover, the industry would benefit from additional adequate consultation and substantive details regarding the potential application of this measure to search services.

The DHMC’s proposal fails to acknowledge the procompetitive features of self-preferencing and the advantages it may bring to Japanese consumers and businesses. Incorporating product integrations and enhancements may elevate the quality of services offered and contribute to consumer welfare. Imposing a complete prohibition on self-preferencing without actual evidence of competitive harm would unjustifiably put Japanese users at a disadvantage, depriving them of valuable information and opportunities. Additionally, significant security issues could arise when platforms are forced to integrate third-party services into their own offerings, ultimately creating more harm to consumers and businesses.

CCIA urges the DMCH to abstain from prohibiting self-preferencing until sufficient “legislative facts” (“立法事実”) and evidence of harm are presented, and the identified harm outweighs procompetitive features of the specific conduct. If the issue is to be further examined, various stakeholders should be consulted to ensure that consumers and businesses in Japan, as well as the country’s innovation aspirations, remain unharmed.

VII. Potential Risks of Anti-Steering Measures

The DMCH suggests introducing an obligation for digital platforms to allow “linking-out” to third-party payment options in in-app purchases. CCIA encourages the DMCH to assess the potential negative consequences this obligation may entail for both consumers and businesses in Japan. Insufficient deliberation on the merits and possible implications of this provision may

⁵ Market Study Report on Mobile OS and Mobile App Distribution (February 9, 2023), Japan Fair Trade Commission, <https://www.jftc.go.jp/en/pressreleases/yearly-2023/February/230209.html>.



lead to harmful effects on the ecosystem that countless Japanese developers utilize to reach a global market.

Operators of application marketplaces are disincentivized to operate where it is unclear how they could recover the costs it incurs in maintaining the mobile application marketplace. Allowing link-outs could potentially enable developers to circumvent the payment of app store service fees, thereby diminishing the economic incentives for app store providers to enhance and introduce innovations.⁶

Further, such an obligation may hinder app stores from receiving just compensation for the investments they dedicate to upholding and advancing a secure app ecosystem. Allowing link-outs could potentially enable developers to circumvent the payment of app store service fees, thereby diminishing the economic incentives for app store providers to enhance and introduce innovations. Consequently, the reduction of innovation would lead to the detriment of both developers and users.

Therefore, CCIA urges the DMCH to reexamine the benefits of this obligation and confront it with the potential risks it may entail for consumers and businesses.

VIII. Concerns Regarding Potential Scoping of New Rules to Specific Platforms

CCIA encourages the DMCH to avoid arbitrary scoping of new rules to specific digital platforms. Any new regulation governing digital platforms must be applicable to suppliers of relevant services in similar positions. This regulatory parity should be achieved through the use of objective criteria and thresholds. Further, to avoid possible discrimination, the new rules must encompass relevant services across all devices, and not be limited to mobile devices; in addition, companies potentially in the scope of the new regulation should comprise both Japanese and non-Japanese businesses.

Moreover, the application of new rules to only designated companies may raise concerns and potential conflicts with international trade commitments. The USTR's Foreign Trade Barriers Report has noted concerns that digital platform regulation in Japan may unfairly target

⁶ See Comments of the Computer & Communications Industry Association regarding Foreign Trade Barriers to U.S. exports for 2022 reporting (October 26, 2021), <https://ccianet.org/wp-content/uploads/2021/10/CCIA-Comments-2022-National-Trade-Estimate-Reporting.pdf>.



U.S. companies in sectors where Japanese companies are significant participants, unduly hampering U.S. investment and commerce in Japan.⁷ Therefore, CCIA underscores the importance of a neutral, transparent, and appropriately tailored regulatory process, which should include multi-stakeholder engagement.

IX. Importance of Protecting Intellectual Property and Conformity with International Agreements

The Final Report suggests that certain providers of mobile OS should be required to grant third parties access to mobile OS and other functions. The Final Report considers that such access might be mandated free of charge. Since mobile OS and other functions are often protected by intellectual property rights (“IPRs”) such as patent rights, utility model rights, design rights, copyrights, and trade secrets, mandating access to mobile OS and other functions, possibly free of charge, raises certain issues pertaining to IPRs.

The protection of IPRs forms the foundation for innovation. The strategic use of intellectual property, such as an open-closed strategy, is a core of business strategy for companies. In light of these business realities, distorting the intellectual property system by regulatory intervention could seriously impede businesses’ efforts toward innovation. For example, given that standard-essential patents are only limited to those patents that must be used to comply with the technical standard, when the regulators consider restricting the exercise of the intellectual property including system or data, it is necessary to consider this cautiously by applying strict criteria (– (keeping in mind that it is impossible to enter a market without the relevant intellectual property). In particular, protection for copyright and trade secrets can be developed by multiple parties independently without using others’ copyright and trade secrets, which makes it even less necessary for the government to force parties to share copyright and trade secrets.

Imposing restrictions on IPRs may run the risk of violating the TRIPs Agreement since there is no evidence that the ministries with primary responsibility for intellectual property rights have thoroughly reviewed it through a hearing including subject matter experts. Therefore,

⁷ 2023 National Trade Estimate Report on Foreign Trade Barriers, United States Trade Representative, <https://ustr.gov/sites/default/files/2023-03/2023%20NTE%20Report.pdf>.



CCIA asks the Japanese Government to ensure that proposed reforms conform to international agreements and treaties.

X. The DMCH Should Be Cautious in Relying on International Regulatory Proposals

Digital reforms are being considered in various jurisdictions. However, the results of some of the recently adopted *ex-ante* regulatory frameworks are not yet available or the detailed implementation is yet to be seen. While clearly it is useful to study and understand international proposals, CCIA is concerned that the context of those reforms is often lost. For example, some proposed reforms are the result of particular political dynamics and there are emerging concerns about the impact of digital-specific reforms. Also, other international reforms are approaching implementation, which will introduce further issues and challenges as those reforms take effect.

For this reason, CCIA urges the DMCH to avoid relying on international regulatory proposals, without first allowing some time to gauge how those are working or whether the reforms are harming consumers and innovation. The DMCH and the Government’s role is to ensure that Japan’s competition regime is fit for purpose and supports the domestic economy, promotes innovation, and delivers benefits to consumers.

XI. The DMCH Should Continue to Consult with Stakeholders before Enacting *Ex-Ante* Rules

CCIA welcomes the DMCH’s efforts to consult stakeholders while working on the Final Report and urges it to continue this dialogue to find the most workable solution to the identified issues that will benefit Japanese consumers and businesses alike. Given the scale of the potential impact of the new rules, various stakeholders including subject matter experts, consumers, and businesses should continue to have a meaningful opportunity to share their views on the proposals with the DMCH and the Japanese Government. It is essential for such dialogue to be conducted transparently, allowing stakeholders the opportunity to express their concerns or approval regarding the proposals.

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CCIA thanks the DMCH for inviting input on these vital issues. CCIA is available to provide any additional information that the DMCH may require.