



CCIA Comments in Response to the Japan Fair Trade Commission’s Request for Information Regarding the Japan Smartphone Competition Act

The Computer & Communications Industry Association (CCIA)¹ welcomes the opportunity to submit comments in response to the Japan Fair Trade Commission’s (JFTC) Request for Information (RFI) regarding the enforcement procedures and subordinating regulations (Guidelines) under the recently passed *Act on Promotion of Competition for Specified Smartphone Software* (SSCPA), released on July 31, 2024.²

As the Japan Digital Market Competition Headquarters (DMCH) noted in its Final Report (Final Report) on the Evaluation of Competition in the Mobile Ecosystem,³ 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. As CCIA previously noted in its comments on the DMCH’s Interim Report on Evaluation of Competition in the Mobile Ecosystem⁴ as well as the DMCH’s Final Report,⁵ before moving forward with regulation in this area that may prove overly burdensome, it is important for regulators and policymakers to fully and accurately understand the business models of digital platforms as well as the broader mobile ecosystem, and the impact these regulations would have on the sector and the overall Japanese economy. Therefore, CCIA would like to underscore the importance of a neutral, transparent, and appropriately tailored regulatory process.

CCIA’s comments focus on the general principles to constructing new Guidelines for the operation and enforcement of the SSCP. As the JFTC engages in designing and implementing subordinate regulations for the SSCP, CCIA encourages the JFTC to consider the many benefits digital platforms provide for consumers, including the procompetitive or competitively neutral aspects of digital ecosystems. Without adopting some basic principles, *ex-ante*

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.ccianet.org.

² Japan Fair Trade Commission, Request for Information Regarding the Smartphone Software Competition Promotion Act (July 31, 2024), https://www.jftc.go.jp/soudan/jyohoteikyosmartphone_software.html.

³ Final Report on Evaluation of Competition in the Mobile Ecosystem, Japan Digital Market Competition Headquarters, (Jun. 16, 2023), <https://www.kantei.go.jp/jp/singi/digitalmarket/kyosokaigi/dai7/siryou2s.pdf>.

⁴ See CCIA Comments on the Japan Digital Market Competition Headquarters’ Interim Reports on Evaluation of Competition in the Mobile Ecosystem (Jun. 16, 2022), <http://ccianet.org/wp-content/uploads/2022/06/CCIA-Comments-on-the-Japan-DMCHs-Interim-Reports.pdf>.

⁵ See CCIA Comments on the Japan Digital Market Competition Headquarters’ Final Report on Evaluation of Competition in the Mobile Ecosystem (Aug. 18, 2023), https://ccianet.org/wp-content/uploads/2023/08/2023-08-18-CCIA-Comments-on-Japan-DMCH-Final-Report_English.pdf.

regulations for digital platforms may run the risk of harming consumers, innovation, and competition.

I. Key Considerations and Principles to Guide Japan’s Regulatory Proposal

Digital platforms in the mobile ecosystem provide Japanese consumers and businesses with tremendous benefits. They have enabled small and medium businesses, as well as larger corporations, to overcome barriers and reach overseas markets.⁶ For example, in 2022, Japanese app developers gained JPY 2.8 trillion in revenue through Google Play, equivalent to 0.43 percent of Japan’s GDP, and reached 116.5 billion overseas active users.⁷ The exceptional adaptability of the Japanese app market has resulted in tremendous growth, making it the third largest app market in the world by consumer spending.⁸

Given the dynamic and innovative nature of digital markets and the mobile ecosystem, any new regulation needs to be flexible and take into account wider potential implications for businesses and consumers. Overly burdensome and heavy-handed regulation could significantly hinder innovation and harm economic growth in Japan. Therefore, CCIA encourages the JFTC to thoroughly assess whether the benefits of any new regulation would outweigh its potential negative impact on the Japanese economy.

In addition to ensuring that new regulation does not hinder economic growth, it is important that regulatory frameworks carefully balance the interests of all stakeholders to avoid unintended negative trade-offs for consumers and businesses. For example, the experience with the European Union’s Digital Markets Act (DMA) suggests that rigid *ex-ante* regulations, which do not adequately consider their impact on consumers, can lead to worse user experiences and diminished access to beneficial digital services. The implementation of such regulation has not only affected consumer access to information but has also harmed smaller businesses by, in some cases, redirecting traffic away from them.⁹ In addition, the uncertainty and compliance costs

⁶ AlphaBeta, “Economic Impact Report: The Value of Digital Transformation to Japan and Google’s Contributions” (Jul. 2021), at 33, <https://accesspartnership.com/wp-content/uploads/2023/03/Japan-Economic-Impact-Report-2021.pdf>.

⁷ Access Partnership “Economic Impact Report: Embracing AI and boosting cybersecurity in Japan with Google” (Oct. 6, 2023), at 16, <https://accesspartnership.com/embracing-ai-and-boosting-cybersecurity-in-japan-with-google/>. This figure counts users across all Japanese developers in the Google Play platform.

⁸ Sensor Tower, “Mobile App Trends 2024: Japan Edition” (Jul. 2024), at 3, <https://go.sensortower.com/rs/351-RWH-315/images/JapanAppTrends2024.pdf?version=0>.

⁹ See, e.g., Javier Delgado, Mirai, “DMA implementation sinks 30% of clicks and bookings on Google Hotel Ads” (May 7, 2024), <https://www.mirai.com/blog/dma-implementation-sinks-30-of-clicks-and-bookings-on-google-hotel-ads/>; Le Monde, “Digital Markets Act: How the way you use Google Maps and Messenger is changing” (Mar. 6, 2024), https://www.lemonde.fr/en/pixels/article/2024/03/06/digital-markets-act-how-the-way-you-use-google-maps-and-messenger-is-changing_6591969_13.html#.

associated with these new rules in Europe have also led to reduced and delayed launches of new products.¹⁰

New regulations in other jurisdictions need to ensure that they do not replicate these challenges, thereby avoiding potential harm to users, innovation, and smaller market participants. Therefore, it is important that the enforcement of Art. 9 of the SSCPA, which permits operators to engage in certain conduct on the basis of “justifiable reasons,” explicitly consider the benefits to consumers and the micro, small, and medium-sized local businesses in Japan.

The JFTC should likewise be wary of over-regulating in a manner that results in operating system (OS) vendors having to delay or restrict the deployment of new features in the Japanese market, with harm for Japanese developers. By contrast, proportionate application and enforcement of the SSCPA can help ensure that the global benefits of app distribution platforms can be maintained and developers can continue to leverage uniformity in the functionality, feature-set, and technology of a platform across multiple markets. A regulatory framework that fractures a thriving unified ecosystem, or that compromises trust in mobile transactions, will both increase costs and diminish potential business opportunities for developers.

The JFTC should consider the potential adverse impacts that a heavy-handed framework could have on other areas of pre-existing law and policy frameworks. For example, such an approach could undermine Japan’s protection of intellectual property rights, with significant implications for businesses operating in Japan. Distorting the intellectual property system by regulatory intervention that forces companies to share their intellectual property and trade secrets could seriously impede businesses’ efforts toward innovation. Any requirements for digital platforms and OS vendors to share access to technology with other developers should be narrowly tailored, and limited to specific functionality that an OS vendor is using for widely used services in Japan.

Moreover, an overly burdensome regulatory framework could negatively impact the trustworthiness of digital ecosystems as a whole, leaving both developers and consumers worse off. In particular, any new regulatory framework should consider the need for digital platforms and OS vendors to adopt and maintain policies needed to provide consumers and businesses with advanced security and protection of their privacy. The JFTC must ensure that regulations do not undermine the security standards that OS vendors provide, as these are crucial for a trusted

¹⁰ See, e.g., Richard Lawler, The Verge, “Apple may delay AI features in the EU because of its big tech law” (Jun. 21, 2024), <https://www.theverge.com/2024/6/21/24183251/apple-eu-delay-ai-screen-mirroring-shareplay-dma>.

ecosystem that fosters consumer confidence and developer entry. Allowing OS vendors to review apps from alternative app stores and manage web downloads is essential to preserving this trust. Therefore, Japan should permit OS vendors to uphold the same security protections on third-party marketplaces as in other regulated markets.

Similarly, regulations on payment systems on digital platforms should be narrowly tailored to guard against over-enforcement, which could result in fragmentation and an overall decrease in platform security. Absent a coherent and organized repository of information about what apps have been downloaded, at what cost, and through what mechanism of payment, consumers are likely to shy away from certain transactions, and potentially have less easy recourse in the event of a dispute or complaint. This interconnectedness of policy areas in the digital space requires a careful implementation of *ex-ante* regulatory frameworks.¹¹

Finally, the integrity of a new framework 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.

II. Fair Designation and Conformity with International Agreements

While the designation process to determine which companies will be covered by the SSCPA will occur later, there are some indications that scoping of the law may be overly narrow. Through its reliance on the market definition and market share analyses included in the Final Report, it seems that the JFTC will target only products and services of specific U.S. companies in its analysis.¹²

In this regard, it is important to consider that accurate definition of market shares is critical for the SSCPA designation process, as it determines which companies will be subject to the new law. The Final Report refers to market share estimates that seem to disproportionately target U.S. companies. For example, the Final Report states that Google commands about 80.7 percent of the mobile search market in Japan, while Yahoo! Japan holds around 17.8 percent.¹³

¹¹ See, e.g., “The Age of Digital Interdependence,” Report of the UN Secretary-General’s High-level Panel on Digital Cooperation (2019), at 6, <https://www.un.org/en/pdfs/DigitalCooperation-report-for%20web.pdf>; “Achieving Inclusive Growth in the Face of Digital Transformation and the Future of Work,” OECD report to G-20 Finance Ministers (Mar. 19, 2018), <https://www.oecd.org/en/about/oecd-and-g20.html>.

¹² Gen Tadao, XTech, Nikkei Crosstech, “New law to make app stores competitive seems like a reality, with the FTC facing a long-term battle with Apple and Google” (May 16, 2024), <https://xtech.nikkei.com/atcl/nxt/column/18/00001/09276/>.

¹³ *Supra* n. 3, at 18.

However, these figures are derived from third-party referral data that only counts users who click on search result links, not taking into consideration those who directly access Yahoo! Japan's homepage for its first-party services like Yahoo! Travel, News, or Mail. This approach may significantly under-represent Yahoo! Japan's market influence, as shown by JFTC's 2020 survey, where 65 percent of respondents used Yahoo! Japan for search services.¹⁴ Additionally, Yahoo! Japan reports having 89 million average monthly users, representing over 80 percent of Japan's daily internet users,¹⁵ which surpasses Google's monthly user numbers according to Nielsen.¹⁶

If the JFTC bases its designation thresholds on such narrowly defined and potentially flawed data, it risks creating an inaccurate portrayal of the market, leading to regulations that may unfairly target U.S. companies. A comprehensive definition of market shares that accounts for all relevant forms of user engagement is essential to ensure a balanced and equitable application of the law. Without such precision, the designation process may overlook significant competitive dynamics, resulting in disproportionate regulatory burdens for specific companies.

Additionally, a designation of only U.S.-based companies might appear to give discriminatory or "less favorable treatment" to U.S. service suppliers, potentially violating Japan's non-discrimination obligations under the World Trade Organization's General Agreement on Trade in Services (GATS).¹⁷ Designated companies will be subject to significant prohibitions and obligations that do not apply to domestic service providers that are not in scope—due to arbitrary thresholds based on size or definition of service provider that spare domestic suppliers—but compete against U.S. providers. These hindrances that would provide preferential treatment to domestic suppliers include the requirement for designated suppliers not to self-prefer their own digital products, and take some actions concerning default settings and user data. Designated companies will also be at risk of receiving fines, sanctions, and the payment of damages to parties who suffer "extreme damage" as a result of violations of the prohibitions.

¹⁴ Japan Fair Trade Commission (JFTC), "Questionnaire survey for consumers on digital advertising,"

<https://www.jftc.go.jp/en/pressreleases/yearly-2020/April/20092903.pdf>

¹⁵ See e.g., Digital Marketing for Asia, "Yahoo! Japan Q&A - everything you need to know," (accessed Sep. 3, 2024),

<https://www.digitalmarketingforasia.com/yahoo-japan-qa-everything-you-need-to-know/>.

¹⁶ Nielsen Report, (Dec. 20, 2023), https://www.netratings.co.jp/news_release/2023/12/Newsrelease20231220.html.

¹⁷ World Trade Organization, Art.V(1)(b), "General Agreement on Trade in Services" (accessed Aug. 21, 2024), https://www.wto.org/english/docs_e/legal_e/26-gats_01_e.htm; Japan's schedule of specific commitments (accessed Aug. 26, 2024), at <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/SCHD/GATS-SC/SC46.pdf&Open=True>.

Examples of competing Japanese services that will not be subject to these burdensome requirements include competing online search services and online distribution platforms for games for game consoles, which would implicate Japan's commitments in services including computer and related services, travel services, and distribution services. Similarly, to the extent that third-country suppliers are not subject to such requirements, designation focusing only on U.S. firms could implicate Japan's Most-Favored Nation¹⁸ obligations under the GATS as well. For example, many Russian and Chinese firms that offer competing services will likely not be subject to requirements flowing from this law, implicating both security and trade concerns, particularly when these firms may be beneficiaries of specific requirements (*e.g.*, access to data or interoperability mandates).

As highlighted in previous CCIA comments in response to the Final Report,¹⁹ the JFTC should avoid arbitrary, overly narrow scoping of new rules to specific digital platforms. Any new regulation governing digital platforms must be applicable to all 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 specific categories such as mobile devices. In addition, companies potentially in the scope of the new regulations should comprise both domestic and non-domestic businesses to ensure non-discriminatory intent.

The United States Trade Representative's National Trade Estimate Report has noted concerns that digital platform regulation in Japan may unfairly target U.S. companies, unduly hampering U.S. investment and commerce in Japan.²⁰ The same report warned against regulation that arbitrarily targets companies according to indefinite or imprecise criteria, allowing the government wide discretion to pick and choose affected companies (*i.e.*, picking winners and losers in the marketplace). There are other digital services and websites that also have indirect network effects, barriers to entry, and switching costs that should be considered in the determination of scoping of the SSCPA. Furthermore, where a domestic-like service supplier is not subject to these requirements and Japan has national treatment commitments in the World

¹⁸ *Id.*, Art. II.

¹⁹ See CCIA Comments on the Japan Digital Market Competition Headquarters' Final Report on Evaluation of Competition in the Mobile Ecosystem (Aug. 18, 2023), https://ccianet.org/wp-content/uploads/2023/08/2023-08-18-CCIA-Comments-on-Japan-DMCH-Final-Report_English.pdf.

²⁰ 2021 National Trade Estimate Report on Foreign Trade Barriers, United States Trade Representative, (Mar. 31, 2021), <https://ustr.gov/sites/default/files/files/reports/2021/2021NTE.pdf>.



Trade Organization for such services, such targeting risks running afoul of those trade obligations.

III. Conclusion

CCIA appreciates the JFTC's efforts to consult stakeholders 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 JFTC and the Japanese Government.

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