

THE MOBILE SOFTWARE COMPETITION ACT AND ITS IMPACT ON THE JAPAN FAIR TRADE COMMISSION



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Domestically, the Japan Fair Trade Commission ("JFTC") is often envisioned as a brigade of black-suited bureaucrats shuffling into corporate offices, lugging cardboard boxes for cartel raids. Naturally, companies have been hesitant to engage, but tides are shifting. In June of last year, Japan's parliament passed the Smartphone Software Competition Promotion Act, also known as the Mobile Software Competition Act, with overwhelming support. The Commission is now working at peak capacity to prepare for its full enforcement by the end of December 2025. The new law establishes Japan's ex ante regulatory scheme, akin to the Digital Markets Act in Europe but with key differences. While specific regulations and enforcement details are expected to be revealed around April, the success of this law in Japan hinges on three critical factors: proactive communication with stakeholders, internal capacity building, and international collaboration. To effectively craft and enforce these new policies, the JFTC must evolve. And it will.

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I. THE MOBILE SOFTWARE COMPETITION ACT (“MSCA”)

On June 12, 2024, Japan’s Smartphone Software Competition Promotion Act, or Mobile Software Competition Act (“MSCA”) was passed in parliament with a unanimous vote in the House of Representatives² and just two against in the House of Councillors,³ creating Japan’s first *ex-ante* competition framework.

After an extensive cross-ministerial market study reviewed the mobile ecosystem in Japan between 2021 to 2023, the government understood mobile operating systems, application stores, browsers, and search engines to systematically lack competition, and that the country’s traditional antitrust law, the Antimonopoly Act, had its limits in effectively promoting their competition.⁴ The market’s self-correction via new entries was seen as even more implausible in this ever important sector which affects almost every citizen’s day to day life.

As the world wakes up to the unique nature of digital platforms, it became clear to Japan’s government that they don’t fit into existing regulatory boxes. Large digital platforms may not be natural monopolies like public utilities, but characteristics like the speed of development and network and lock-in effects, and the grip their services have on our social fabric and economies have led to the conclusion that the traditional antitrust framework lacks in enforcement capabilities. To combat the hopelessness of establishing market definitions and theories of harm in rapidly evolving software landscapes, the government embarked on a journey to create a new legal framework to address key concerns.

II. MSCA CHARACTERISTICS

The MSCA serves as a supplementary law to the Antimonopoly Act. Unlike Europe’s Digital Markets Act (“DMA”), it does not aim to establish contestability in markets; rather, the MSCA primarily prohibits conduct and behavior that would be deemed illegal under Japan’s conventional antitrust framework. Notably, it overlooks business users in its provisions, and restricts its scope to smartphone operating systems, application stores, browsers, and search engines. Like the DMA, it designates companies subject to its regulations and stipulates “dos” and “don’ts” with hefty penalties, featuring reporting requirements as a compliance mechanism pillar.

The MSCA also has unique flexibilities. Compliance to certain obligations in the law – such as those relating to OS feature interoperability, application stores and billing, and self-preferencing in search results – can be adapted if measures necessary to achieve security, privacy, youth protection, or other vital concerns (that the Japan Fair Trade Commission (“JFTC”) raises through Cabinet Order) are deemed too challenging to implement through other less competition-restrictive means.

The law’s wording also helps defend against what is perceived as regulatory circumvention in other jurisdictions. Take, for example, the DMA’s specific language on enabling third-party applications and application stores.⁵ Companies directly regulated by the DMA may implement new solutions that might be seen as technically complying with the law, but is far from adequate in terms of fostering competition in the eyes of authorities. As the European Commission wrestles through further negotiations or non-compliance investigations, some critics argue that the DMA’s language may lack the flexibility needed to address all potential anti-competitive practices.

The MSCA, which is designed for Japan’s needs and systems, for example, has provisions that prohibit “unfair discrimination” against, or “unfair treatment” of app developers in transactions and usage conditions of operating systems and application stores (Article 6), as well as provisions on “preventing” other businesses from providing application stores (Article 7), and “preventing” application developers from using third

2 House of Representatives, National Diet of Japan, List of Deliberated Bills, 213th Parliamentary Session, https://www.shugiin.go.jp/internet/itdb_iinkai.nsf/html/gianrire-ki/213_213_kakuho_62.htm (accessed Feb. 3, 2025)

3 House of Councillors, National Diet of Japan, List of Deliberated Bills, 213th Parliamentary Session, <https://www.sangiin.go.jp/japanese/joho1/kousei/gian/213/meisai/m213080213062.htm> (accessed Feb. 3, 2025)

4 Japanese Prime Minister’s Office, Headquarters for Digital Market Competition, Prime Minister of Japan and His Cabinet, https://www.kantei.go.jp/jp/singi/digitalmarket/index_e.html, <https://www.kantei.go.jp/jp/singi/digitalmarket/kyosokaigi/index.html> (Accessed Feb. 3, 2025)

5 Regulation (EU) 2022/1925, art. 6, § 4 (EU 2022). https://www.eu-digital-markets-act.com/Digital_Markets_Act_Article_6.html (accessed Feb. 3, 2025).

Article 6.4: “The gatekeeper shall allow and technically enable the installation and effective use of third-party software applications or software application stores using, or interoperating with, its operating system and allow those software applications or software application stores to be accessed by means other than the relevant core platform services of that gatekeeper...”

party billing systems (Article 8).⁶ The JFTC's concrete thoughts on how these are to be interpreted will be revealed in April onwards, but the JFTC will have the authority and flexibility to assess whether designated operators' compliance mechanisms are genuinely not hindering competition, facilitating constructive dialogue with stakeholders to develop win-win solutions.

These subordinate legislations and guidelines are drafted by the JFTC and do not require parliamentary approval. The MSCA's text is designed to be articulated by these regulations, with the guidelines offering maximum transparency into compliance expectations. Drafts for the package of Cabinet Ordinances, Rules, and guidelines are slated for simultaneously release around April and will undergo public comments before finalization.

As for the law's full schedule, companies providing smartphone operating systems, application stores, browsers, and search engines that may have 40 million or more domestic monthly active users (the designation criteria for all four types of software) in Japan crunched and submitted their user numbers in January 2025. Companies that will fall within the MSCA's regulatory scope will be identified and designated by the JFTC most likely in March of this year, with full enforcement of the law beginning by the end of December.

III. THE ROAD TO ENFORCEMENT

These qualities grant the JFTC much needed flexibility in establishing regulations. The tradeoff is that in order to make these rules effective, the JFTC must proactively engage with application developers, industry organizations, academics, and actual companies that may be designated, all of whom have the knowledge and experiences for informed policymaking. While implementing straightforward yes-or-no blanket rules might be simpler, such an approach may not yield the desired outcomes of business entry into key mobile software markets and new innovations. Much of the enforcement for the MSCA will be handled on a case by case basis, despite the clarity provided in the guidelines. This engagement with business must continue sustainably beyond December when the law is in full effect.

To keep up with the rapid pace of technological advancements and adeptly manage negotiations, the JFTC will also need to revamp its staffing, both in quantity and quality. This will involve integrating more technologists and other external specialists into their ranks.

Finally, the colossal technology companies that antitrust agencies aim to regulate operate on a global scale, offering similar services across various jurisdictions. These companies wield substantial legal and financial power to contest regulatory actions. As such, it is natural for regulators, which are often resource-constrained, to collaborate on multiple levels. While some of this cooperation is symbolic, practical measures such as sharing best practices and synchronizing remedy outcomes are essential.

This is all easier said than done.

IV. COMMUNICATION

While there are commendable instances where industry has voluntarily provided information without the need for official enforcement, the MSCA will necessitate proactive outreach from the JFTC to companies to truly understand the market. This approach to communication is relatively new for the Commission and will require time and effort to foster an environment of mutual trust with those subject to regulation. Perhaps more crucial, the Office of Policy Planning and Research for Digital Markets, or "Digital Markets Office," responsible for preparing and enforcing the

⁶ Smartphone Software Competition Promotion Act 2024, art 6, art 8 (Japan 2024). https://www.jftc.go.jp/en/policy_enforcement/digital/index.html (accessed Feb. 3, 2025).

Article 6: "A designated provider (limited to those that have received a designation relating to a basic operation software or application store) must not unfairly discriminate against, or otherwise unfairly treat individual application developers in the conditions relating to the method of displaying the specifications, etc. of the individual software displayed... other conditions relating to the use of the basic operation software or application store and the conduct of transactions based on the conditions with respect to the basic operation software or application store..."

Article 7.1: "A designated provider must not conduct any of the following acts with respect to basic operating software relating to its designation... to limit the application store provided through the basic operating software to that provided by the designated provider... to prevent other business operators from providing application stores.... Or smartphone users from using application stores provided by other business operators..."

Article 8.1: "A designated provider... must not conduct the following acts against individual application developers with respect to application stores relating to its designation... to make it a condition for providing individual software through the application store that the individual application developer does not use any payment management service... other than the payment management service provided by the designated provider... to prevent the individual application developer from using payment management services other than the payment management services provided by the designated provider, or to prevent the individual application developer from allowing smartphone users to use payment methods without using payment management services..."

Note: the law's English translation provided by the Japan Fair Trade Commission is a tentative draft for reference purposes, and will be replaced in the future.

MSCA, is currently insufficiently equipped, lacking the necessary staff and resources to engage in the extensive discussions it envisions with stakeholders.

In July 2024, the JFTC established a hotline for developers to share information regarding mobile ecosystems and the conduct of platform operators, which met with a certain amount of success. However, fears of retaliation from to-be-designated companies persist, and these platform operators themselves require a foundation of trust to fully and meaningfully engage with the JFTC.

To address developer concerns, the Digital Markets Office will create a support desk for consultation. Coupled with the MSCA's provision banning designated operators from retaliating against businesses in their ecosystems who raise their concerns to the JFTC, this initiative is expected to foster the bold discussions that have long been overdue.

The JFTC's policymaking approach to working with businesses in digital markets must evolve from an intimidating, top-down authoritative stance to a cooperative, communication-based method. Nevertheless, the Digital Markets Office will not shy away from taking swift remedial actions when necessary while taking this new approach.

V. STAFFING

The Office of Policy Planning and Research for Digital Markets, or "Digital Markets Office," was established in April of 2020 to address competition issues relating to large platform operators. Today, the office encompasses a wide array of digital market concerns, from online news to generative AI. As part of the Economic Affairs Bureau, the Digital Markets Office functions as the policymaking and advocacy wing for big tech issues at the JFTC.

The Digital Markets Office collaborates with an external panel of specialists that helps guide specific rulemaking, and confers with other relevant Japanese ministries to prepare for the MSCA's enforcement. The reliance on external resources, however, has its limits.

The JFTC is among the few central government entities expanding its headcount. Staffing for the Digital Markets Office will be bolstered, and the office will soon report into a newly created "Director General for Digital and International Affairs" role, who will also oversee general international affairs for the Commission as of April 1st. The Digital Markets Office will be run by the "Counsellor for Digital Affairs," also a new post, with a team of 35 additional full time personnel dedicated to the ex-ante framework. This new structure will be pivotal in finalizing policies and kickstarting the operationalization of the MSCA. Despite these much needed updates, staffing challenges remain, and the JFTC will need to enhance its digital markets workforce both in quantity and quality.

Beyond the five Commissioners and administrative staff, the majority of JFTC officials including the top brass are career civil servants who join the Commission directly after school and rotate among departments within the organization every one to three years. The system is conducive to maintaining a robust organization as a whole by creating a cadre of competent generalists and mitigates chances for information leaks and corruption, but most officials possess limited accumulated knowledge in specialized IT issues. It is almost unheard of for career civil servants to have the opportunity to return once they resign.

Technical verifications are crucial for enforcing digital ex-ante regimes. Receiving compliance information from designated operators through MSCA powers is one thing; comprehending it is another. Personnel to review this information need to be hired in-house to ensure confidentiality and trust.

Recruiting top IT talent is arduous in any industry in Japan, and even more challenging in government due to salary constraints imposed by laws. Managerial positions are also reserved for career officials.

Despite a number of hurdles, the JFTC managed to create posts for and hire several part-time in-house technologists with hourly salaries equivalent to senior management positions. A new Chief Technologist position was also recently announced that boasts an hourly salary on par with that of chief executives of Japanese ministries. The job is for two days out of the week, however, and the wage pales in comparison to that which giant tech companies offer to the same limited talent pool.

The JFTC is also actively recruiting subject matter experts that play into the new framework, including lawyers and accountants specialized in digital issues and those who have experience in international coordination. The Commission's leadership understands that integrating diverse backgrounds and experiences is not only beneficial, but essential for effective MSCA operations.

VI. INTERNATIONAL COOPERATION

Those who have been tracking the developments of the Digital Markets Act in the European Union can perhaps appreciate the JFTC's call for enhanced international cooperation to ensure the success of its digital ex-ante regime. With the passage of the MSCA, the JFTC leadership is poised to usher in a new era of collaboration among competition agencies focused on digital markets.

Moving beyond the traditional approach of dispatching attaches to embassies, the JFTC took a bold step last year by seconding an official to the European Commission's Directorate General for Competition. This initiative is set to continue, with the official now actively working on the frontlines of DMA enforcement serving as a vital link between the European Commission and the JFTC.

On January 31, 2025, the JFTC hosted the inaugural Global Forum on Digital Competition. Distinguished speakers from Google, Apple, Microsoft, the European Commission, the U.S. Federal Trade Commission, the UK Competition and Markets Authority, the Australian Competition & Consumer Commission, and others key stakeholders convened in Tokyo for spirited discussions on international cooperation, the dynamic interplay between businesses and regulators, and the evolution of digital regulations. Prior to the forum, closed-door sessions were held for competition authorities to delve into details on shared challenges in digital markets and how to navigate differences in legal frameworks and institutions to better systematically share best and worst practices, views on various corporate practices, and ideal remedy outcomes, all in pursuit of common goals. These discussions are set to continue.

VII. THE FUTURE OF THE JFTC

When hearing the organization's name, those in Japan familiar with the JFTC often conjure images of stern, bespectacled middle-aged men in black suits, donning armbands and carrying cardboard boxes, marching in a single file line to raid offices.

Within many executive, legal, and public policy teams of corporations, especially foreign firms, there exists an unwritten rule: don't interact with the Commission unless absolutely necessary. Your author knows this all too well, having worked in the public policy teams of two tech companies prior to joining the JFTC.

The Digital Markets Office's efforts to proactively engage in good faith with MSCA-designated companies and find common ground represent a significant investment. Although this type of communication requires time and resources, it ultimately fosters trusted relationships and leads to well-crafted and appropriately enforced regulations that benefit consumers, enhance the long-term profitability of regulated companies, and bolster economies.

With a mandate that commands attention and budget, one can imagine that the Digital Markets Office will help guide the culture and practices of the Commission. By absorbing external experts and embracing diverse talent, the revamped office set to launch in April will embody new mentalities, engage in proactive discussions with external parties, and adopt an inherently international approach to rulemaking and enforcement in digital markets.

The JFTC is readying itself for greatness.



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