

**Asia Internet Coalition (AIC) Industry Submission on
Interim Report About Competition in the Mobile Ecosystem, Japan**

10 June 2022

To the
Secretariat of the Headquarters for Digital Market Competition (DMCH)
Cabinet Secretariat

The [Asia Internet Coalition](#) (AIC or We) submits the following comments and recommendations on [an interim report](#) about competition in the mobile ecosystem. As an introduction, AIC is an industry association of leading Internet and technology companies in the Asia Pacific region with an objective to promote the understanding and resolution of Internet and ICT policy issues. AIC has previously submitted [several policy positions](#) to the key agencies in Japan including the MIC.

As such, please find appended to this letter detailed comments and recommendations, which we would like the Digital Market Competition Headquarters (DMCH) to consider.

Lastly, we are grateful to the Government of Japan (GOJ) for upholding a transparent, multi-stakeholder approach and further welcome the opportunity to offer our inputs and insights, directly through meetings and participating in the official consultations. Should you have any questions or need clarification on any of the recommendations, please do not hesitate to contact our Secretariat Mr. Sarthak Luthra at Secretariat@aicasia.org or at +65 8739 1490.

Thank you

A handwritten signature in blue ink that reads "Jeff Paine".

Sincerely,

Jeff Paine
Managing Director
Asia Internet Coalition (AIC)

Introduction

Japan's Digital Market Competition Headquarters published [an interim report](#) about competition in the mobile ecosystem. The report makes explicit references on a few members companies' products and signals that the Japanese Government intends to introduce new regulations, also inspired by the European approach (DMA - Digital Markets Act).

The DMCH report identifies barriers to entry, network effects and switching costs in the mobile ecosystem. DMCH considers that existing competition laws are not able to resolve these concerns because of the complexity of those matters which involve several layers of the ecosystem.

Global Inputs are Indispensable for Matters which have Global Implications: Billions of people on the planet use smartphones nowadays, and smartphones and Apps are integral parts of everyday life for individuals and businesses. How the ecosystem surrounding smartphones and Apps should be, the role that OS should play in protecting security and privacy, and so on, are not issues confined to Japan, but ones that could have global implications. From this perspective, we would like to raise the following procedural issues.

First, the Interim Reports touch upon a wide range of issues, and each issue requires thorough and careful deliberations. The duration of deliberation by the Digital Market Competition Council Working Group (WG) is extremely short compared to cases in other regions. We recommend the Government of Japan (GOJ) to take sufficient time and conduct very careful deliberations to make the final report.

Second, the Interim Reports were published all in Japanese and contain almost 500 pages. It requires a long time and many resources for the English translation, which makes it difficult for global industry associations to provide comments. For matters that may have global implications, we do not believe it is a good policy-making process since global inputs will bring valuable information and considerations to the GOJ. We urge the GOJ to provide meaningful opportunities for global stakeholders before reaching any conclusions.

Third, we observe that the meetings at the WG were held in a closed door setting, secretariat materials are not open to the public, which lacks transparency. As mentioned above, we believe the mobile ecosystem matters to global stakeholders, and therefore global experts and stakeholders should have opportunities to know the progress of the discussions and make timely inputs. Lacking transparency is a serious problem because it makes it impossible for better policy making to take place based on valuable inputs from such experts and stakeholders. We urge the GOJ to improve the policy making process and take more transparent procedures, including making meetings open to the public.

Key considerations about digital platform regulation in Japan

1. Mobile ecosystems provide Japanese consumers and businesses with significant benefits.
 - a. Consumers have access to high quality smartphones at lower prices than ever before, giving them access to a wide range of services and content.
 - b. Businesses have more opportunities than ever to reach vast user audiences.
2. Introducing new regulation needs to take into account wider potential implications for businesses and consumers that use platforms, especially given the dynamic and innovative nature of digital markets.
3. Given the benefits that the mobile ecosystem brings Japanese people in their daily lives, any intervention must be well thought through to prevent unintended harm.
4. Heavy handed regulation could hinder innovation, impose a costly burden on industry participants and harm economic growth. It could also undermine intellectual property rights with implications on businesses investing in and maintaining a presence in the Japanese market.
5. Proposals for regulatory intervention should also consider the economic security implications of heavy handed regulation on current players in Japanese digital markets.
6. We encourage the DMCH to:
 - a. assess whether there are sufficient “legislative facts” (“立法事実”) to make new legislation necessary and consider how existing enforcement frameworks (including antitrust, P2B and privacy) provide a more proportionate means of achieving desired outcomes;
 - b. thoroughly assess whether the benefits of any proposed regulation outweigh its potential negative impact;
 - c. consider a co-regulation approach (i.e. information disclosure and reporting to Government), which is more appropriate than ex-ante rules and with a significantly lower risk of harming innovation and investment
 - d. clarify the expected outcomes of proposed regulatory interventions;
 - e. leverage evidence and past experience to focus any proposed regulation on types of conduct that are recognised to be particularly harmful, rather than seeking to address theoretical or speculative harm - this risks overregulation to the detriment of innovation;
 - f. acknowledge that economy-wide harms (such as opaque data practices) are better addressed by economy-wide reforms, rather than platform-specific regulation; and
 - g. embrace a balanced approach toward data limitation and access, that takes into account consumer benefits, business confidentiality, privacy and security aspects.

Principles for regulating digital platforms in Japan

We believe that new regulation of digital platforms anywhere in the world should consistently be guided by a set of common foundational principles that spur innovation, maintain security and expand user choice across the ecosystem, whether on mobile, desktop or gaming consoles.

Therefore, when designing any proposed regulation, we recommend the DMCH to consider **below features:**

First of all, competition regulations should aim for creating more benefits for consumers and opportunities for companies to invest in innovation and compete with existing and new market players. A thorough assessment should be conducted in order to identify areas in which the existing legal framework is inadequate and therefore there is clear evidence that new rules are justified. This assessment should take into account input from diverse stakeholders in Japan and beyond. It should also carefully assess consistency and/or overlap with other regulatory regimes in Japan and avoid that this happens. The rules should also aim to prevent competitive harm and permits reasonable justifications and prevent unfettered regulatory discretion.

In addition any new rules need to be proportionate to the seriousness of anticipated harm and the likelihood of it occurring, while protecting the integrity of mechanisms and of applicable .

******Please refer to the detailed comments and recommendations in the following page in Annex A and Annex B.******

Annex A

Detailed comments and recommendations

Relevant Section / Topic	Comment
<p>Mobile Ecosystem Interim Report, 65 – 277</p> <p>New Customer Contact Points, 49 – 138 165-189</p>	<p>Emphasis on Security and Privacy: AIC emphasizes that robust security and privacy protection are keys to the continuous success of mobile ecosystem by earning trust from consumers and business users, especially when considering evolving cyberattacks and malware. If the level of security and privacy protection will be decreased once, serious risks to people's property and social stability would increase, and we may not be able to return to the original condition. Thus, we recommend the GOJ to fully consider damages that could be caused to the society by diminishing security and privacy protection during the deliberation. We also recommend the Digital Market Competition Headquarters to work with other ministries which have been promoting security and privacy such as NISC and PPC to leverage their expertise.</p> <p>We understand that digital platforms possess the multi-sided nature and are always seeking the best balance considering the interests of both businesses and users. As security and privacy are significantly important for the protection of users' interests, the GOJ must hear users' voices as well and ensure potential regulatory requirements do not limit the ability of the platform to protect consumers from the security and privacy risks.</p> <p>In addition, we also would like to highlight that the lack of deliberation from the security/privacy standpoint will discourage the digital transformation that the GOJ is encouraging. In particular, corporate users strictly care about security and privacy risks, and therefore it is extremely important to consider how proposals could affect security/privacy protection thoroughly. The DMCH also should bear in mind that the reports will have a larger ramification to a wider variety of industries and users than they think.</p> <p>We urge the GOJ to take enough time for a detailed analysis and examining the possible impacts to general/corporate consumers from a broader perspective before imposing obligations to OS vendors.</p>
<p>Mobile Ecosystem Interim Report, 65 – 277</p> <p>New Customer Contact Points, 49 – 138</p>	<p>Harm to Innovation: The Interim Reports propose a regulatory intervention such as reporting from OS vendors to the regulator and monitoring review process where multi-stakeholders involve in multiple areas including OS updates. However, it is very important to fully take into account the role and ability of government and private sector. The innovation can never be achieved by the government intervention. The commitment and investment by private sector and the efforts and enthusiasm of most-advanced engineers can facilitate the innovation. Considering that the digital market is fast-changing, the burdensome</p>

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165-189	<p>regulatory approach will not only harm OS vendors’ innovation but also innovation of users of the platform and ultimately benefits of end users as a whole.</p> <p>Further, policies which require OS vendors to provide free solutions or ban compensation mechanism from developers to OS vendors are not desirable at all to ensure the continuous investment by OS vendors in talented engineers and operate the ecosystem sustainably. The GOJ should not promote policies which facilitate freeriding on another business’ investment and break good innovation cycle.</p>
Mandating platforms to share data with third parties / granting third parties access to data (e.g. search query data)	<p>a. These types of proposals 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 it has to share the benefits, and by the rivals, who can sit back knowing that if someone else develops a successful asset, they get to access to it, so they don’t have to invest in creating their own.</p> <p>b. Forced data sharing poses risks to user privacy: Japanese users would have less control over their data if digital platforms are mandated to share their data with third parties. Sharing user data with third parties without their prior consent would be contrary to most users’ expectations. Ensuring that data sharing is subject to privacy controls that are robust and cannot be reverse engineered by determined parties is an ongoing challenge.</p> <p>c. There is the risk of disclosing businesses’ confidential information and facilitating collusion: Forced data sharing could enable even more dramatic harms, such as widespread disinformation and manipulation.</p> <p>Recommendation Data portability can help drive innovation and competition by enabling consumers to securely switch among services from different providers, empowering them to try new services, and allowing them to choose the offering that best suits their needs.</p> <p>Measures to promote common frameworks and open systems for consumers to move data between services could have similar benefits as for data portability, provided that the actual data sharing would be at consumers’ request.</p>
Limiting the ability of platforms to share user data internally (e.g. by way of an outright ban on such sharing)	<p>a. Rigid rules to limit or ban cross-service use of data could prevent users from enjoying the benefits that such data use brings. For example:</p> <ul style="list-style-type: none"> ● enabling sharing of data across products allows for information to be accessed or controlled centrally across

Relevant Section / Topic	Comment
	<p>multiple products, rather than needing to separately manage this for each service;</p> <ul style="list-style-type: none"> • cross-device or product data sharing is also used for security measures and fraud detection. <p>b. Introducing such measures entail a risk of severely impacting the value that digital platforms offer to the Japanese market and in particular to consumers.</p> <p>Recommendation Encourage data portability and interoperability 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.</p>
<p>“Equal access” obligations</p>	<p>a. Rules imposing obligations on vertically integrated participants to provide third parties with ‘equal access’ to services can seek to promote competition but harm customers by increasing complexities, creating compliance burdens, and impeding product development and innovation.</p> <p>b. The stated aim of such a proposal might be to level the playing field to prevent self-preferencing by requiring certain participants to provide the same information and access to products and services to all market participants.</p> <p>c. However, an “equal access” obligation would make it much slower and more difficult to bring product improvements to market, significantly slowing innovation. It would be unlikely to result in any real benefits for market participants because, in order to provide third parties with equal access to products and features at the same time, the industry would need to move at the pace of the slowest player.</p> <p>Recommendation Equal access obligations should not be adopted. Encourage data portability and interoperability 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.</p>
<p>Rigid <i>ex ante</i> rules (e.g. without scope for justifications / defences)</p>	<p>a. Due to the potential significant economic impacts of <i>ex ante</i> regulation, it is crucial the DMCH plays an active role in engaging with relevant stakeholders and market players before developing any new regulatory regime.</p> <p>b. New regulation should only be introduced after a comprehensive analysis of the costs and benefits. This should involve an assessment</p>

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	<p>of whether existing tools, such as use of existing competition and privacy laws are sufficient or there are gaps.</p> <p>c. In the current “Transparency Act” for digital platforms, the Japanese authorities have embraced a spirit of “co-regulation”: “<i>based on voluntary and proactive initiatives [..] by Digital Platform Providers [..] and with government involvement or other regulations kept to the minimum</i>” (Article 3 original text: <i>共同規制の精神の下、デジタルプラットフォーム提供者が自主的かつ積極的に行うことを基本とし、国の関与その他の規制を必要最小限のものとする</i> (第三条)</p> <p>d. To ensure the cost of any new regime does not outweigh its benefits, it should allow scope for justification of conduct where it is clearly pro-competitive or competitively benign; it should allow defenses for legitimate protections such as user safety, security, quality, functionality. 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 platforms.</p> <p>Recommendation As a starting position the DMCH should consider whether existing laws can potentially address concerns.</p> <p>The government should only introduce new regulation after a comprehensive cost / benefit analysis. Part of that analysis should consider whether existing antitrust, P2B and privacy laws, properly enforced, are capable of addressing potential concerns and might be a more proportionate means to achieve these outcomes.</p> <p>A co-regulation approach is recommended, in line with the current Transparency Act, to promote voluntary and proactive initiatives of platformers and minimize any unintended impact on market players and on consumers.</p>
<p>Relevant stakeholders including digital platforms should have the opportunity to comment on specific new rules before the DMCH recommends them to government</p>	<p>a. The Interim Report is a useful starting point for the debate on digital platforms regulation in Japan.</p> <p>b. The report canvasses a wide range of topics with competition concerns. We support DMCH’s open approach to consultation, which allows for genuine debate on the issues. We urge DMCH to consider input from all relevant stakeholders especially on the need and form of ex ante regulation. A thorough dialogue, leveraging perspective from market players and other stakeholders, would be necessary to identify issues.</p> <p>c. We believe that DMCH should allow sufficient time for input, before publishing their Final Report.</p> <p>Recommendation Given the significant potential consequences of the introduction of a new</p>

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	regulatory regime, we encourage the DMCH to extensively consult with relevant stakeholders. We expect that the government will ensure there is a sufficient consultation process on the DMCH’s recommendations, especially in areas where the regulation could have significant economic impact.

Annex B

Other related topics

1. Importance of protection of intellectual property

- a. Protection of intellectual property forms the foundation for innovation, enhancing businesses' investment by enabling monetization of investments. Strategic use of Intellectual property, such as open-closed strategy, is a core of business strategy for companies.
- b. In light of the above, distorting the intellectual property system by regulatory intervention could seriously impede businesses' efforts toward innovation.
- c. 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 cautiously by applying a strict criteria (e.g., it is impossible to enter the market without the relevant intellectual property).
- d. Especially, copyright and trade secrets can be developed by multiple parties independently without using other’s copyright and trade secret, and in that sense there is even less need for the government to force parties to share copyright and trade secrets.

2. Regulation in multi-sided markets may unintentionally benefit one industry participant / group at the expense of another

- a. There are key risks and disadvantages of regulation that intervenes in complex multi-sided markets (i.e. markets bringing together multiple, diverse stakeholders). The complexity and fierce competition in such markets may result in tension among market players . Digital platforms help to strike a balance among those interests. Regulations can be helpful if they aim for ensuring balance, without intervening in favor of any particular group.
- b. A thorough stakeholder dialogue can minimize the risk of creating significant compliance costs for stakeholders like OEMs and app developers.

3. Regulation in Japan could unfairly target US companies

- a. The [USTR's Foreign Trade Barriers Report](#) has noted concerns that digital platforms regulation in Japan may be cumbersome and unfairly target US companies, unduly hampering US investment and commerce in Japan.
 - b. 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.
 - c. While there are other web services/websites or digital devices, which also have indirect network effects, barriers to entry and switching costs, the DMCH reports target only products and services of US companies.
 - d. The United States is monitoring these developments and encourages transparency, appropriately tailored regulation, and multi-stakeholder engagement in the process.
- 4. Regulation in Japan should avoid extraterritorial effect:** Proposals that have extraterritorial effect should be carefully considered, as they require structural change to global businesses. This risks putting Japan out of step with other jurisdictions, and erects barriers to trade, thereby discouraging global businesses from doing business in Japan to the detriment of Japanese consumers.
- 5. Regulating in a globalized digital economy calls for a balanced approach and a wide stakeholder dialogue with an international mindset.**
- a. The ultimate objective is to promote competition and innovation for the benefit of the consumer. Introducing new regulation for platforms needs to take into account wider potential implications for businesses and consumers that use platforms, especially given the dynamic and innovative nature of digital markets.
 - b. Strictly local solutions will unlikely work in a truly global digital economy.
 - c. At the same time, other markets' approach may not be suitable for Japan and may not serve its economy and consumers
 - d. Therefore, we encourage DMCH to consider viewpoints from a range of stakeholders in Japan and in other markets, to minimize the risk of unintended consequences.
- 6. Scope of regulation must be clearly defined to ensure legal certainty**
- a. For any new regulation, there should be clear, objective standards for legal certainty; There should be objective standards governing which digital platforms fall within the scope of the regulation, and appeal rights.
 - b. Regulation should not be based on arbitrary thresholds, and selectively / arbitrarily target platforms.
 - c. Further, the burden of proof should be on the regulator; there should be reasonable access to file and an opportunity to respond to allegations of