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COMMENTS OF ITIF

Before the

Japan Fair Trade Commission

Tokyo, Japan

In the Matter of: The Japanese Smartphone Software Competition Promotion Act (Act on the Promotion of Competition Pertaining to Specified Software Used in Smartphones)	)	Public Comment

Sept 8, 2024

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INTRODUCTION

On June 24, 2024, the Japan Fair Trade Commission (JFTC) initiated coordination meetings to develop and enforce rules under the Smartphone Software Competition Promotion Act (SSCP). As described in Article 1 of the Act, the SSCP aims to promote fair competition in Japan's smartphone software markets by addressing alleged anticompetitive practices by major platform providers, ensuring a level playing field for smaller developers, and enhancing consumer choice.[1] The Information Technology and Innovation Foundation (ITIF), the world's top-ranked science and technology policy think tank, greatly appreciates the opportunity to respond to the JFTC's call for Information on the SSCP public consultation.[2]

RESPONSES TO QUESTIONS

Question 11

The Mobile Software Competition Promotion Act (Article 7.1) prohibits businesses that provide mobile operating systems above a certain size from preventing other businesses from providing app stores, including forcing them to use their own app stores. App stores (including app distribution within apps, and other similar) Please provide specific examples of cases in which you have abandoned the provision of an app store (including app distribution within apps, etc.), your vision for future provision, and any expectations and concerns you have for app stores other than the App Store (Apple Inc.) or Google Play Store (Google Inc.) (free description).

ITIF has concerns about the effects of the prohibition in Article 7.1, which prevents large smartphone providers from denying third-party app marketplaces access to their platforms. While the SSCP exempts from this per se ban refusals to deal that are necessary for ensuring cybersecurity, there are numerous other cases where large smartphone providers refusing to open their platforms to third-party app stores can be procompetitive and pro-consumer. For example, although in some cases refusals to deal of this kind can be anticompetitive, U.S. courts have recognized that they can also result in benefits, like Apple ensuring it is compensated for its investments in innovation, enhancing user privacy, and stimulating interbrand competition with more open platform rivals.[3] If enacted, Article 7.1 thus risks harming innovation and consumers.

[1] *See* SSCP, Article 1.

[2] Japan Fair Trade Commission's Call for Information on the Smartphone Software Competition Promotion Act.

[3] *See* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 986–89 (9th Cir. 2023).

Question 12

The Mobile Software Competition Promotion Act (Article 7, Item 2) prohibits businesses that provide mobile operating systems above a certain size from preventing the use of functions controlled by the operating system with the same performance as their own. For example, cases in which the use of voice functions such as speakers, microphones, and voice assistants, functions for positioning GPS (location information), and wireless communication functions in iOS (Apple Inc.) and Android (Google Inc.) was not allowed at the same level of performance as those of Apple, Google, etc. Please provide specific examples and reasons for not being allowed to use the same functions as Apple, Google, etc., as well as your vision and concerns for providing services using such functions (free description).

ITIF has similar concerns about the effects of the prohibition in Article 7.2, which forbids large smartphone providers from limiting platform access to certain ancillary services (e.g., voice functions) offered by rivals that are of equal quality to their own. However, not only does this prohibition also fail to account for procompetitive and pro-consumer justifications beyond the cybersecurity exemption, but as commentators have long recognized, the difficulties associated with determining what constitutes a third-party service of the same quality or which is equally efficient makes this sort of standard unadministrable, and especially so outside of contexts when the anticompetitive conduct is price-related.[4] For this reason, Article 7.2 also ultimately risks chilling behavior that, on balance, benefits consumers and innovation.

Question 13

The Mobile Software Competition Promotion Act (Article 8, Item 1) prohibits businesses that provide app stores above a certain size from forcing the use of their own billing systems or otherwise preventing the use of billing systems of other companies. For example, cases and reasons for abandoning the use of billing systems other than IAP (In App Purchase) in the App Store (Apple Inc.) and GPB (Google Pay Billing) in the Google Play Store (Google Inc.), or concepts and concerns for future use. Please provide specific details (free description).

ITIF has related concerns about the effects of the prohibition in Article 8.1, which specifically prohibits large app stores from requiring the use of their own billing systems or limiting the use of those offered by third parties. Again, a per se ban on this behavior, notwithstanding the cybersecurity exemption, would chill procompetitive behavior that benefits consumers and innovation. Indeed, although such behavior may be anticompetitive in certain instances, U.S. courts have recognized the benefits that Apple requiring the use of in-app payment processes can bring in the form of ensuring that it is compensated for its investments in innovation, enhancing user privacy, and providing a better overall user experience.[5] As such, if implemented Article 8.1 is also likely to have adverse effects on economic welfare and innovation.

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[4] *See, e.g.*, A. Douglas Melamed, *Exclusive Dealing Agreements And Other Exclusionary Conduct—Are There Unifying Principles?*, 73 ANTITRUST L.J. 375, 389 (2006) (noting that "the objective of excluding an equally efficient competitor is neither sufficiently precise nor sufficiently administrable to be a desirable antitrust rule in itself").

[5] *See* Epic Games, Inc. v. Apple, Inc., 67 F.4th 946, 986–89 (9th Cir. 2023). Despite these benefits, Apple's anti-steering provisions were nonetheless deemed "unfair" under California's unfair competition law. *Id.* at 999.

Question 14

The Mobile Software Competition Promotion Act (Article 8, Item 2) prohibits businesses that provide app stores above a certain size from displaying information such as outlinks (links that lead to websites, etc.) and prices for non-app purchases in their apps, and from selling products and services outside their apps, including on websites. For example, the App Store (Apple Inc.) and the App Store (Apple Inc.) prohibit the sale of products and services outside the app. For example, in the App Store (Apple) and Google Play Store (Google), it is prohibited to display information to induce purchases other than in-app purchases, to display out-links to one's own website, etc., or to sell items, etc. on websites other than the app. Please provide specific examples and reasons for abandoning the following services, or your plans and concerns for the future provision of these services (free description).

ITIF has analogous concerns about the effects of the prohibition in Article 8.2, which specifically precludes third-party apps from communicating information like out-of-app payment methods using in-app links. However, a per se ban on this conduct, even with the cybersecurity exemption, would still chill procompetitive behavior. To be sure, while some anti-steering restrictions can be anticompetitive, U.S. courts have recognized the benefits that Apple's anti-steering processes can bring in the form of ensuring that smartphone providers are compensated for their investments, enhancing user privacy, and providing a better user experience.[6] In sum, if made law Article 8.2 is also likely to have negative effects on consumers and innovation.

Question 15

The Smartphone Software Competition Promotion Law (Article 8, Item 3) prohibits businesses that provide app stores above a certain size from preventing the use of other browser engines. For example, please provide specific examples and reasons for abandoning the use of browser engines other than those of operators of app stores such as the App Store (Apple Inc.) and the Google Play Store (Google Inc.), or any concepts and concerns for future use (free description).

ITIF has comparable concerns about the effects of the prohibition in Article 8.3, which specifically appears to prevent large app store providers from making their browsers the default (e.g., on the home screen) or otherwise limiting the ability for users to access rival browsers. But a per se ban on this conduct, again notwithstanding the cybersecurity exemption, would constrict procompetitive behavior. Of course, U.S. courts have been clear that certain types of restrictions can have anticompetitive effects, such as making a rival browser incompatible with the platform..[7] However, allowing a firm like Google to feature its Chrome browser on the Android home screen has procompetitive benefits like improving user experience and increasing overall browser quality through increased usage.[8] In sum, if implemented Article 8.3 is also likely to have negative effects on consumers and innovation.

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[6] *Id.*

[7] *See, e.g.*, U.S. v. Microsoft, 253 F.3d 34 (D.C. Cir. 2001) (finding that *inter alia* that Microsoft's limiting of interoperability between it's Windows operating system and Internet Explorer was anticompetitive).

[8] The recent district court decision in U.S. v. Google, Case Nos. 20-cv-3010 (APM), 20-cv-3715 (APM) (Aug. 5, 2024) does not contradict this position, as it focused on default agreements concerning search, not browsers.

Question 16

The Mobile Software Competition Promotion Law (Article 6) prohibits businesses that provide a mobile OS or app store above a certain size from unfair treatment, such as unreasonably discriminatory treatment, with respect to the terms and conditions of use or transactions of the mobile OS or app store. For example, specific cases and reasons for unfair treatment, such as differences without reasonable grounds among app providers in iOS and App Store (Apple Inc.) and Android and Google Play Store (Google Inc.), or imposing unreasonable technical restrictions. Please describe any (free description).

ITIF also has concerns about the effects of the prohibition in Article 6, which broadly prohibits smartphone or app store providers from engaging in unfair and discriminatory behavior. However, not only does this prohibition fail to account for the welfare enhancing nature of some discriminatory behavior, but as commentators have long recognized, the difficulties associated with determining what constitutes "unfair" business conduct makes this standard unadministrable, especially in contexts that involve exclusionary conduct.[9] For this reason, Article 6 also ultimately risks chilling behavior that, on balance, benefits consumers and innovation.

Question 17

The Mobile Software Competition Promotion Law (Article 5) prohibits businesses that provide mobile operating systems, app stores or browsers above a certain size from using data on app usage and sales to provide services that compete with those of other businesses. For example, please provide any specific examples and reasons why you suspect Apple or Google may have used the collected data to develop or provide services that compete with your business (free description).

ITIF also has concerns about the effects of the prohibition in Article 5, which condemns large smartphone providers from engaging in so-called "data misappropriation," or using data gathered on the platform, app store, or browser to benefit other of their products. But, a per se ban on this conduct—which lacks any cybersecurity exemption—would chill procompetitive behavior. For example, while the leveraging of non-aggregated data to gain market power in a second market by excluding rivals can be problematic, using data across multiple markets can be a crucial way to correct information asymmetries and, in particular, better target applications to satisfy consumer preferences—and especially so with aggregated data.[10] The reality is that consumers are better off when companies can do this. For this reason, Article 5 risks banning behavior that, on balance, can benefit consumers and innovation.

Question 18

The Mobile Software Competition Promotion Act (Article 9) prohibits businesses that provide search services above a certain size (search operators) from giving priority to their services over those of other companies in a competitive

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[9] *See, e.g.*, Yitzchak Besser, *How to Restore Limiting Principles for "Unfair Methods of Competition" in Antitrust Law*, ITIF at 4 (May 30, 2023) (noting how in U.S. antitrust law "[t]he lack of a definition for the term 'unfairness' has created over a century of confusion" with respect to the FTC's standalone authority to police "unfair methods of competition").

[10] *Cf.* Joseph V. Coniglio and Lilla Nóra Kiss, *Comments to the Indian Ministry of Corporate Affairs Regarding Digital Competition Law*, ITIF at 8 (May 15, 2024) (discussing the benefits of so called "data misappropriation" in the context of Amazon's e-commerce platform).

relationship in the display of search results without a valid reason. For example, please describe any specific cases in which a search provider's products or services were given priority over your company's products or services in the display of Google search results, and the reason (free description).

The Mobile Software Competition Promotion Act (Article 9) addresses a significant issue by prohibiting large search operators, like Google, from giving preferential treatment to their services over those of competitors in search results without a valid reason. Although, the intent behind this regulation is to foster a fair competitive environment, it does not distinguish between "good" and "bad" self-preferencing. On the one hand, "bad" self-preferencing—where a search operator unfairly prioritizes its services regardless of quality or relevance in order to ban its competitors from being shown to users—can indeed harm competition and consumer welfare as well. From a consumer welfare perspective, the key issue is ensuring that search results remain relevant, serving users.

On the other hand, in many cases, it allows search operators to integrate their services more deeply and innovatively, offering enhanced user experiences. For example, when Google promotes its own specialized search services, like maps or shopping, it often results in more relevant and timely results, providing consumers with a seamless experience that best aligns with their needs. This type of "good" self-preferencing can drive innovation and benefit consumers by offering them more integrated and efficient solutions. However, the lack of distinction in the law between beneficial and harmful self-preferencing could stifle such innovation. By applying a blanket, per se prohibition on self-preferencing, the law risks preventing search operators from showcasing their more relevant services, even when doing so would genuinely improve the consumer experience. This could lead to a more fragmented and less effective marketplace, where innovation is hampered, and consumers miss out on the best possible options.

Therefore, ITIF also has concerns about the effects of the prohibition in Article 9. Condemning large search providers from engaging in self-preferencing or, in some way, giving one of their products favorable treatment on their platforms relative to that of rivals is indeed a practice that is ubiquitous throughout the digital economy. However, and in keeping with the above, while self-preferencing can be anticompetitive in some circumstances, it is often procompetitive and innovative behavior that improves economic welfare. And, although Article 9 does appear to allow firms to engage in this behavior if they have a procompetitive justification, it does not make clear that the JFTC will not engage in any attempt to balance potential anticompetitive harms with procompetitive benefits, which as U.S. courts have recognized is an unadministrable exercise that ultimately chills procompetitive conduct.[11]

Question 19

In addition to the cases you have filled in from Q11 to Q18, please provide specific examples of businesses that provide mobile OS such as iOS and Android, app stores such as App Store and Google Play, browsers such as Safari and Chrome, or search services such as Google Search that use their position to gain a competitive advantage in the products or services they provide, specific examples of businesses that are disadvantageous to the business activities of

[11] *See, e.g.*, Allied Orthopedic Appliances Inc. v. Tyco Health Care Group LP, 592 F.3d 991, 1000 (9th Cir. 2010) ("To weigh the benefits of an improved product design against the resulting injuries is not just unwise, it is unadministrable.").

app developers, etc., and specific examples of businesses that obtain economic benefits from app developers, etc. Please provide any specific examples of businesses that have used their position to gain a competitive advantage in the products or services they provide, or have disadvantaged the business activities of app developers, etc., or have gained economic benefits from app developers, etc., and the reasons for this disadvantage (please write freely).

The smartphone space is generally competitive and innovative. Specifically, that Apple and Google are leading providers of mobile operating systems that benefit from network effects does not mean there is market failure that the SSCP is needed to correct. On the contrary, what matters is market performance and, in particular, metrics like price, output, and innovation. Here, as commentators have pointed out, the app economy in Japan is booming, which belies any notion of market failure that the SSCP needs to correct.[12] Moreover, concerning app marketplaces, there are several alternatives to Apple and Google, such as Amazon Appstore, Samsung Galaxy Store, and more which actively compete to attract both app developers and consumers.

Question 20

The Act on the Promotion of Competition in Smartphone Software will be fully enforced on the date specified by a Cabinet Order within one year and six months (December 19, 2025) from the date of promulgation of the Act (June 19, 2008). Please write any opinions or requests you have regarding the operation of the Act or the policies and initiatives of the Fair Trade Commission (free description).

Rather than adopt digital regulation, and specifically regulation targeted at the smartphone industry and two leading American companies (Apple and Google), ITIF encourages the JFTC to consider the findings of its market study report, which states that the smartphone space continues to expand.[13] Further, the JFTC should take into account the Cabinet Secretariat's Headquarters for Digital Market Competition's report, which also found a consistently growing smartphone market.[14] Moreover, to the extent the JFTC wishes to implement the SSCP to address broader non-economic concerns like fairness, it should also evaluate the potential harms from the SSCP in the context of China's quest for techno-economic dominance and the potential tensions it creates with the United States by virtue of targeting two successful American firms.[15]

RECOMMENDATIONS

For these reasons, ITIF has significant concerns about the SSCP and offers the following recommendations:

- **Reevaluate the need for the SSCP:** Japan's existing Antimonopoly Act already empowers the JFTC to take action against anticompetitive practices in the smartphone space. The JFTC first should leverage its existing tools to address specific anticompetitive behaviors as they occur and only implement new laws if the current ones are incapable of responding to new challenges. This approach would avoid the potential unintended consequences of a DMA-like preemptive regulation, which could stifle innovation and disrupt the rapid growth of Japan's mobile ecosystem.

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[12] *See, e.g.*, Adjust and data.ai Find Japan App Usage Surge In 2023, Marking Strong Recovery (prnewswire.com).

[13] JFTC, Market Study Report on Mobile OS and Mobile App Distribution 7–11 (Feb. 2023).

[14] Secretariat of the Headquarters for Digital Market Competition, Competition Assessment of the Mobile Ecosystem Final Report: Summary 2 (June 16, 2023).

[15] *See* Robert D. Atkinson, *Japan's proposed app store law would do not good*, NIKKEI (May 29, 2024).

- **Avoid** per se **bans:** The SSCP's broad, per se prohibitions fail to distinguish between practices that harm competition and those that enhance consumer welfare. If enacted, the SSCP is highly likely to chill procompetitive conduct that benefits consumers and innovation, thus stifling the growth of the very markets it seeks to promote.
- **Evaluate the geostrategic implications of the SSCP:** Japan's strong alliance with the United States is critical amidst the global technology race against China. In this vein, the JFTC should consider how the SSCP could have negative effects not just in the form of hindering Japanese innovation, but by targeting American companies like Apple and Google.
- **Finally, focus on the welfare of Japanese consumers:** The competitive position of Japanese companies should not be the focus of the SSCP, especially in the digital space. Many, if not all, of the proposed changes here would end up making Japanese digital consumers' lives worse, not better.

CONCLUSION

In conclusion, ITIF recommends the JFTC carefully assess the potential impact of the SSCP on innovation, consumer welfare, the growth of its digital markets, and its broader geopolitical situation amidst a rising China. Specifically, while the SSCP aims to enhance competition, it should instead be focusing on enhancing consumer welfare and overall innovation. And its broad per se prohibitions and limited cybersecurity exemption are likely to chill the very innovative behavior that is key to allowing Japan's smartphone markets to thrive and risk targeting one of its closest allies leading firms.

Thank you for your consideration.

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