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The Japanese Smartphone Act: Teaching Competition Law New Tricks

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Japan is now the fourth region in the World to have adopted complementary rules to its competition law regime to capture the power of Big Tech. Following Germany's, the UK's and the European Union's steps, Japan in June the Act on Promotion of Competition for Specified Smartphone Software (for short, the Smartphone Software Competition Promotion Act or SSCPA). The law was passed by the House of Councillors on the 12th of June and promulgated on the 19th.

Instead of being an all-encompassing regulation aimed at addressing digital ecosystems at large, the SSCPA focuses on the systemic problems posed by the two main players operating mobile operating systems: Alphabet and Apple, as explicitly recognised by the government. The Japan Fair Trade Commission (JFTC) will enforce the regulation in the coming years. Building on Japan's Act on Improving Transparency and Fairness of Digital Platforms, the SSCPA presents a verticalised regime applicable to a couple of undertakings with the end of promoting fair and free competition within mobile ecosystems.

The Smartphone Act's goals

Rivers of ink have been spilled to determine whether digital regulation should be incorporated into the wider competition law regime enforced by competition authorities. The DMA's example is a clear one in this respect: it took quite some time to square the circle and understand the European regulation is particularly aimed at ensuring contestability and fairness (in the sense defined under Recitals 32 and 33) and not the promotion of an undistorted system of competition.

In this same vein, Article 1 SSCPA declares its aim at promoting fair and free competition so as to discontinue the artificially generated competitive advantages by the operators of specified smartphone software in their products and services and to stop them from causing detriment to the activities of business operators using such services. The regulation's ultimate goal, as declared by Article 1, is to "*contribute to the improvement of people's lives and the sound development of the national economy*".

The SSCPA stands away from purely competition-driven objectives to take recourse to the wide notion of fairness. As opposed to the DMA, the Japanese SSCPA does not define the concept. This is, however, not completely new to Japanese tech regulation.

The previously enacted Act on Improving Transparency and Fairness of Digital Platforms in 2020 (shortly, Platform Transparency Act) explicitly stipulates that it aims "*to improve the transparency and fairness of specified digital platforms (…) and to improve the transparency and fairness of specified digital platforms*" through various measures. Similarly to the EU's P2B Regulation, the law requires certain digital platform providers designated by the government (including a few, Amazon Japan, Rakuten Group, LY Corporations, Apple, Google and Meta) to develop information disclosure systems regarding terms and conditions—such as criteria for rejecting transactions, reasons for requesting the use of certain services, amendments of terms, main factors determining search result rankings, and information about data acquisition and use—and mandates the establishment of internal dispute resolution mechanisms. Given these requirements, it can be construed that the focal point of the law is transparency and fairness in this context is rather procedural. Nevertheless, the law, as a platform regulation preceding the SSCPA, is still worth considering.

As is clearly stated in Article 1, considering that the SSCPA adopts a more proactive approach by directly prohibiting certain practices of specific operators to achieve its legislative purpose, fairness under the SSCPA seems to have a more substantive meaning compared to the Platform Transparency Act. However, the SSCPA does not provide any further explanation of what fairness in this context means.

From the standpoint of two non-Japanese observers, three lines of thought may follow from this lack of a definition. First, fairness (or better, unfairness) is so clear as a concept that anyone can grasp it with sufficient ease to determine if a given scenario is sufficiently 'fair' in absolute terms. Its definition would only work to its detriment by constraining its limitations. The second line of reasoning would follow that the obscurity of the concept operates in favour of the competition authority in charge of applying the SSCPA. Even though we might all know what fairness is all about, the concept is malleable enough to justify regulatory intervention in any given direction. Finally, the concept's lack of definition may be justified because it applies as a general principle of competition regulation. As such, its definition as an operable criterion and benchmark to measure regulation against it would only contribute to the multiplication of different manifestations of fairness, depending on the piece of regulation involved.

Furthermore, the policy discussion previously held by the JFTC regarding the SSCPA's adoption does provide some clues on what fairness might mean as a general objective of the SSCPA. Similarly to the DMA, the concept is not defined in the positive, but it is illustrated bearing in mind the unfair practices of Big Tech. As pointed out by Nowag and Patiño, this approach does not provide much clarity, since defining unfairness does not really contribute to painting the picture of what the 'fair' expected outcome is. In 2019, the JFTC's Report Regarding Trade Practices on Digital Platforms (the Report) noted that app developers, for instance, are treated unfairly by the mobile ecosystem holders by arbitrarily changing the terms and conditions related to the review of their apps. Moreover, the JFTC terms the mobile operator's anti-steering clauses as "*unfairly forcing the use of in-app payments*" (Chapter 2, Section 4 of the Report).

In turn, the Market Study Report on Mobile OS and Mobile App Distribution (the Market Study herein) issued in 2023 set forth as a proposal from the competition policy perspective to ensure fairness in rule-making within mobile ecosystems, which is mirrored by the SSCPA's approach. The Market study presents the general purpose of ensuring the fairness of rules and transactions within mobile ecosystems vis-à-vis the rule-making power of both Google and Apple as operators of their mobile ecosystems.

Therefore, the SSCPA reveals an initial obscurity which may be narrowed down to the approach of fairness in the three-pronged manifestation presented by Crémer, Crawford, Dinielli, Fletcher, Heidhues, Schnitzer and Scott Morton. Fairness may correspond, depending on the context it is addressed, as a means to: i) allocate surplus within the mobile ecosystem depending on the efforts dedicated by each one of the business users to it; ii) prohibit certain use of terms that may unfairly burden the business users; and iii) ensure similar treatment of business users applies across the whole mobile ecosystem.

The obligations enshrined under the SSCPA appear to reflect those different manifestations, depending on the type of conduct which it seeks to eliminate.

The regulation's institutional setting

Designation in digital policy regulation is a thing. Moving away from the horizontal approach of competition law regimes, digital regulation impinging on Big Tech market power prefers to explicitly select those undertakings compelled to comply with it. The SSCPA's scope is, however, limited to touch upon specified smartphone software, and not a whole list of core platform services, as the DMA does.

According to Article 2(7) SSCPA, the services comprised under the regulation are: i) basic operating software (software incorporated into the smartphone performing information processing); ii) app stores; iii) browsers (individual software primarily used to view web pages via the Internet); and iv) search engines. These four categories constitute the specified smartphone software captured by the SSCPA and the JFTC designates those business operators providing them when they are "*capable of excluding or dominating the business activities of other business operators and whose scale is equal to or exceeds the scale specified by Cabinet Order for each type of specified software, based on the number of users or other indicators showing the scale of the business*" (Article 3(1) SSCPA). In a similar vein to the European regulation, the undertakings must notify their status to the JFTC and upon the notification, the competition authority will designate the undertakings in writing indicating the type of specific software (Articles 3(2) and (3) SSCPA).

The designation is operated via quantitative means. However, the specific thresholds for designation are not explicitly included under the SSCPA. It will be up to the Government via a Cabinet Order to make such a determination. There is no substantial delay between the moment of designation and the deadline of compliance, as there is under the DMA.

Once again, this is the same legislative technique the Japanese legislator used with the Platform Transparency Act. Considering the precedent set by the Platform Transparency Act—under which the Cabinet Order establishing the quantitative thresholds was issued on January 29, 2021, eight months after the Act was promulgated on June 3, 2020—it is anticipated that the Cabinet Order setting the designation thresholds under the SSCPA framework will also be issued soon. In all honesty, there does not seem to be much scope for unpredictability. The Japanese legislator's intentions in adopting the SSCPA are quite clear: to address the anti-competitive problems in oligopoly markets posed by the two major ecosystem holders (Google and Apple).

According to the Market Study, nearly 100% of the mobile operating systems sold in Japan correspond to Google's Android (53,4%) and Apple's iOS (46,6%). In this same vein, since the

configuration of Apple's devices is that of a walled garden, it occupies 100% of the market share in the distribution of apps, whereas Android accounts for 97,4%, despite having an open-source mobile ecosystem. Therefore, the SSCPA aims at discontinuing the dynamics arising from their supra-dominant positions in both players.

What provisions are covered and how will they be enforced

The SSCPA is constantly referred to as the 'App Store' Act. It is certainly true that its provisions open mobile digital ecosystems in a similar vein to the mandates contained in the DMA under Article 6(4) (see a comment on Apple's compliance strategy with that particular provision here). To stay close to the truth, the SSCPA introduces prohibitions pertaining to fourteen of the 'same' remedies initially introduced by the DMA.

For the sake of simplicity, the table below illustrates the different mandates presented by the SSCPA vis-à-vis their DMA equivalents:

SSCPA provision	DMA equivalents
Article 5 SSCPA – prohibition of improper use of acquired data.	Article 6(2) DMA – not use data generated by the business users in competition with them.
Article 6 SSCPA – prohibition of unfair treatment of individual app providers .	Article 6(12) DMA – FRAND-like conditions for operating the app stores (+ potential overlap with Articles 6(5) – prohibition of self-preferencing and 6(11) – fair access to search generated data).
Article 7(i) SSCPA – prohibition of limitations relating to third-party app stores and default settings engrained into the operating system.	Article 6(4) DMA – opening up of alternative distribution of apps and app stores on CPSs and changes in default settings.
Article 7(ii) SSCPA – negative and positive mandates relating to interoperability with functions on the operating system.	Article 6(7) DMA – interoperability with functions on the operating system (mainly positive).
Article 8(i) SSCPA – prohibition of tying payment processing services or preventing end users from accessing alternative providers.	Articles 6(3) and 5(7) DMA – change of default settings and not requiring interoperation with payment service.
Article 8(ii) SSCPA – prohibition of anti-steering.	Article 5(4) DMA – gatekeepers should allow 'steering' of users to other promotional offers/webpages.
Article 8(iii) SSCPA – tying of browser engine to the operating system.	Article 6(3) DMA – change of default settings.
Art, 8(iv) SSCPA – tying of user identification.	Article 5(7) DMA – tying of identification services.
Article 9 SSCPA – prohibition of self-preferencing (without a justifiable reason).	Article 6(5) DMA – prohibition of self-preferencing (unconditional).
Article 10 – disclosure of conditions for data acquisition.	Article 6(10) DMA – disclosure of data relating to the business user's operations within the CPS.
Article 11 SSCPA – portability rights exercised by users of a smartphone.	Article 6(9) DMA – real-time portability right recognised in favour of end users.
Article 12 SSCPA – measures relating to default settings.	Article 6(3) DMA – change of default settings.

Article 13 SSCPA – change of terms and conditions and obligation to disclose the change.	No equivalent.

'Self-executing' prohibitions and obligations subject to further specification

The SSCPA cannot be simply described as opening mobile ecosystems for the sake of it. As shown in the table above, most of the mandates contained in the Japanese digital regulation mimic those obligations contained under Article 6 DMA, i.e., those provisions that are subject to further specification via a regulatory dialogue.

This is particularly salient in the SSCPA's context, insofar as it also presents its obligations into two groups. First, the obligations under Articles 5 to 9 SSCPA are 'self-executing' prohibitions. The direct consequence of their categorisation as 'self-executing' entails that before a violation of any of the obligations the JFTC can order the designated undertaking to: i) cease the conduct; ii) divest some of its business; or iii) take any other measures necessary to eliminate the conduct standing in breach of the SSCPA (Article 18(1) SSCPA). Fines of 20% of the undertaking's turnover of the goods or services pertaining to the violation supplied by the designated undertaking can be imposed, but only for violations with Articles 7 and 8(i) and 8(ii) SSCPA (Article 19 SSCPA). The fine will be increased to 30% in those cases where the undertaking incurs the same type of conduct within a period of ten years (Article 20 SSCPA). In other words, the punitive mechanisms engrained in the regulation are only triggered for those cases where the undertaking does not comply with the obligations relating to the opening of the mobile ecosystems in terms of app distribution and the tying of the processing of payments.

As opposed to the nature of Article 5 DMA, these obligations are not directly excluded from regulatory dialogue. In fact, their nature entails that these obligations can be further specified by the undertaking (not the competition authority). In the case the JFTC spots non-compliance, it can allow the designated undertakings to submit commitments aimed at eliminating the conduct (Article 23(1) SSCPA) after it has released a Statement of Objections (SO) detailing the undertaking's breach (Articles 22 and 26 SSCPA).

Following the JFTC's SO, the undertaking submits an 'elimination of measures plan' to the competition authority detailing how it will implement the measures and by what deadline. The competition authority will only accept those measures which are sufficient to eliminate the alleged conduct and, in those cases, where it expects their implementation to be reliable enough (Article 23 SSCPA).

Finally, the SSCPA goes into great detail relating to the private enforcement of the mandates under Articles 5 to 9. Unlike the DMA, which keeps silent on how it should be enforced before the national courts, the SSCPA paves the way for individuals to bring an action against the designated undertakings, be that for seeking an injunction or strict liability for the damages they may have suffered as a consequence of the regulation's violation. For the particular case of the actions for damages, however, Article 32 SSCPA limits their exercise to follow-on actions, whereas those individuals seeking injunctions under Article 31 SSCPA may bring both standalone and follow-on actions, complementarily to the JFTC's enforcement actions.

Second, the obligations under Articles 10 to 13 of SSCPA play out in a different manner. They

explicitly detail the measures that the designated undertakings must take in order to comply with the letter of the law, but the means to concretise them into reality are not set out in the regulation. Instead, it is up to the designated undertaking to establish how it intends to comply with those mandates. For instance, the designated operators must implement the necessary measures to enable smartphone users to change their standard settings in line with Article 12(i)(a) SSCPA, but it is up to the designated operator to operationalise the conduct into its business model. against the designated operator is most evident in this context. This is precisely the point where the obligation to submit a compliance report at the start of each fiscal year takes the most relevance, despite that all substantive mandates must be included (Article 14 SSCPA).

Contrary to the 'self-executing' obligations, those mandates under Articles 10 to 13 SSCPA cannot be subject to the punitive mechanisms outlined before. Instead, Article 30(1) SSCPA establishes that the JFTC may 'recommend' to the designated business operator that it promptly ceases in the act related to a violation of those provisions. Subsequently, Article 30(2) of the SSCPA states that if the party (who received the recommendation) does not formulate it without justifiable reasons, the competition authority can impose orders to take measures in accordance with it.

Violations of these orders may be subject to criminal pecuniary penalties, but the amount is only up to 1 million yen (Article 52 SSCPA). This is indeed relatively minor compared to the penalties for violations of the remedial 'elimination' order imposed for breaches of Articles 5-9 obligations under Article 18 SSCPA, which may be subject to up to 2 years of imprisonment and/or a criminal fine of up to 3 million yen (Article 50 SSCPA).

Some substantive differences with the DMA's no-effects approach

Despite both the DMA and the SSCPA being fundamentally based on the premise of the failure of public enforcement to address Big Tech market power, the Japanese digital regulation does not take such a black-and-white approach in terms of the justification relating to the conduct of the designated operators.

For instance, Article 9 SSCPA, prohibiting self-preferencing in the context of search engines stands in stark contrast to Article 6(5) DMA. The SSCPA provision reads that the designated operator must not "*give preference to a product or service provided by (it) over other products or services in competition with them, without a justifiable reason*". Following the explicit prohibition under Article 9 of SSCPA, the Japanese legislator seems to leave wide open the real enforceability of the provision. By doing so, the SSCPA presents a nuanced view on self-preferencing, bearing in mind that its anti-competitive effects have not undoubtedly demonstrated that the conduct is inherently harmful. In parallel, the designated undertaking's compliance with the provision may be easily undermined as a result. Only the JFTC's interpretation of what a 'justifiable reason' might mean will contribute to narrowing that gap.

In a similar vein, Articles 7 and 8 of SSCPA allow the JFTC to consider broad justifications like security, privacy, juvenile protection, or other purposes specified by a Cabinet Order when assessing mobile OS and app store operators' practices. It appears that the scope of justifications under the SSCPA is broader than that of the DMA, which only provides for some instances of justification for particular provisions, such as Article 6(4) DMA.

Meanwhile, other provisions such as Article 6 of SSCPA prohibiting the unfair treatment of

individual app providers may tip the scales in the opposite direction. The prohibition states the designated operator "*shall not (…) engage in unreasonably discriminatory treatment or other unfair treatment of (apps) with regard to the conditions related to the method of displaying them within the (operating system)*". By taking recourse to the criteria of discrimination and unfairness, it appears that the Japanese legislator opens the door for speculative enforcement on the JFTC's side.

What to expect – DMA replication or drive my car into another overlapping regulation?

The SSCPA follows the lead of capturing the existing duopoly in the context of mobile ecosystems. But, what will this mean in practice for the gatekeeper's operations? At the big picture scale, one of two things may happen, depending on the compliance strategies the designated operators come up with.

On one side, the SSCPA would fully enter into force no later than the end of 2025. Apple and Alphabet may, in this regard, replicate the compliance solutions they have presented to the European Commission within their obligations relating to the European DMA. This aspect already provides grounds for speculation. Since the JFTC, in its capacity as the competition authority and regulator, enforces the SSCPA, then divergence may arise as a consequence of their distinct interpretation of the same implementation measures. In other words, the same technical implementation measure may well be unlawful in Europe and lawful in Japan at the same time.

Let's think about the opening of Apple's venues of app distribution. Apple rolled out its technical implementation and the European Commission has recently decided to open a non-compliance procedure under the terms of the DMA given that the current terms and conditions contradict the spirit and letter of the European regulation. And in 2025, in the midst of the controversy between the gatekeeper and the European Commission, the SSCPA's obligations will start to apply. Then, should the JFTC stand as a competition authority and wait and see what the European Commission decides to fill the missing gaps? Or, on the contrary, should it issue its own enforcement actions in parallel with the European Commission's? Isn't the SSCPA more targeted to address this problem, in the fashion of a *lex* (extraterritorial) *specialis*? This all sounds a whole lot like Groundhog Day from the early 2000s when the European Commission stood as the main competition authority prohibiting transcontinental mergers.

On the other side, the SSCPA demonstrates the DMA's success. The Japanese legislator builds on the European Union's experience, and these are, indeed, the first fruits of the DMA's Brussels effect. By this token, the designated operators, before the awaited tide of fresh regulations to be adopted abroad replicating the European and Japanese efforts, choose to apply the DMA's implementation measures worldwide. But then, what is the role to play by the JFTC?

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