



## **CCIA Comments on the Japan Digital Market Competition Headquarters’ Interim Reports on Evaluation of Competition in the Mobile Ecosystem and New Customer Contacts (Voice Assistants and Wearables)**

The Computer and Communications Industry Association (CCIA)<sup>1</sup> welcomes the opportunity to submit comments on the Japan Digital Market Competition Headquarters’ (“DMCH”) Interim Reports on *Evaluation of Competition in the Mobile Ecosystem* and *New Customer Contacts (Voice Assistants and Wearables)* (hereinafter “Interim Reports”), released on April 26, 2022.<sup>2</sup>

As the DMCH notes, 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. However, as CCIA previously noted regarding the DMCH’s interim report on evaluation of competition in the digital advertising market,<sup>3</sup> CCIA believes that for the DMCH to determine whether there is a need to address possible competition concerns in this area, it is important to fully and accurately understand the business models behind the so-called “platforms” as well as the broader mobile ecosystem.

To this end, CCIA encourages the DMCH to take into account business realities. As such, it is important that the DMCH continue to reexamine its positions detailed in the Interim Reports to fully reflect the underlying business models of these complex services and revisit its preliminary proposals and recommendations accordingly.

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<sup>1</sup> CCIA is an international, not-for-profit trade association representing a broad cross section of communications and technology firms. For 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](http://www.ccianet.org).

<sup>2</sup> Interim Reports on Evaluation of Competition in the Mobile Ecosystem and New Customer Contacts (Voice Assistants and Wearables) (Apr. 26, 2022), Japan Digital Market Competition Headquarters, <https://www.kantei.go.jp/jp/singi/digitalmarket/kyosokaigi/dai6/index.html>.

<sup>3</sup> See CCIA Comments on the Interim Report on Evaluation of Competition in the Digital Advertising Market from the Headquarters for Digital Market Competition of the Cabinet Secretary (July 25, 2020), <https://www.ccianet.org/wp-content/uploads/2020/10/Final-CCIA-Comments-to-DMCHs-Interim-Report.pdf>.



CCIA’s comments focus on the DMCH’s proposals for digital platform regulation in Japan. As such, our comments underscore the benefits digital platforms provide for consumers and discuss that there are important considerations the DMCH and competition authorities and regulators should take into account when designing any proposed digital platform regulation. Without adopting some basic principles, an *ex ante* regulation for digital platforms would run the risk of harming consumers, competition, and the competitive process alike. Therefore, our comments provide some suggested approaches in response to the DMCH’s proposals regarding sharing user data, suggested *ex ante* rules, and procedural steps.

## **I. Key Considerations and Principles to Guide Regulatory Proposals**

Digital platforms in the mobile ecosystem provide Japanese consumers and businesses tremendous benefits. Given the dynamic and innovative nature of digital markets and the mobile ecosystem, any new regulation for platforms needs to take into account wider potential implications for businesses and consumers. Therefore, we encourage the DMCH to thoroughly assess whether the benefits of any proposed digital platform regulation would outweigh its potential negative impact for Japanese consumers and the economy. As such, an overly burdensome and heavy-handed regulation could significantly hinder innovation and harm economic growth. In addition, it could undermine intellectual property rights with significant implications for businesses operating in Japan. In this regard, a key consideration is whether the existing enforcement frameworks, including competition, consumer protection, and data privacy, already provide more proportionate ways to achieve the desired outcomes. Therefore, clarifying the expected outcomes of a proposed framework is particularly important for Japanese consumers and businesses alike.

CCIA would also encourage the DMCH to review evidence and past experience to focus the proposed framework on types of conduct that are recognized to be demonstrably harmful, rather than seeking to address theoretical or speculative harm, which would risk overregulation to the detriment of innovation. In addition, it is important to acknowledge that economy-wide harms (such as online scams and opaque data practices) are better addressed by economy-wide reforms, rather than platform-specific



regulation. CCIA’s recommendation is for the DMCH to embrace a balanced, evidence-based approach toward data limitation and access, which would take into account consumer benefits, business confidentiality, and privacy and security aspects.

CCIA recommends that prior to proposing a new platform regulation, the DMCH and policy-makers gather evidence through extensive consultation to confirm and justify that there is a need for the rules to be changed. If the need for new rules is identified and confirmed, those new rules should be proportionate to the impact of the potential harm and should take into account the chances that such a harm may take place. New rules should aim to promote competition and enable continuous innovation in the marketplace, while preventing competitive harm and unfettered regulatory discretion.

The integrity of a new regime should also be secured by suitable procedural protections and review mechanisms. In particular, full merits review by a court should be available for decisions that have legal consequences for affected companies. Finally, the rules should be consistent with other regulatory regimes in Japan and overlapping obligations are to be avoided.

## **II. Concerns Regarding Mandating Platforms to Share Data with Third Parties and Granting Third Parties Access to Data**

The DMCH’s proposals to mandate platforms to share data with third parties and grant third parties access to data (*e.g.*, click-and-query search data) 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 they have to share the benefits, and by the rivals, who know that if someone else develops a successful asset, they also get access to it, so there is no incentive or need for rivals to create their own.

Forced data sharing poses risks to user privacy as well: Japanese users would have less control over their data if digital platforms are mandated to share their data with third parties. Even though the Interim Reports contemplate ensuring that such proposals come with controls to protect privacy, ensuring that any such controls are robust and cannot be reverse-engineered by determined parties would be an ongoing challenge. For example, many platforms interact with their users on the basis of implicit



or explicit consent with respect to how data is used, processed and transferred to third parties; in such cases, it would be extremely burdensome, and in many cases simply infeasible, to obtain consent from all subscribers before transferring data. One out of a million users refusing consent, or simply not responding to a data transfer request could put a platform in significant legal jeopardy. In addition, there is the risk of disclosing businesses' confidential information and facilitating collusion. Lastly, and very importantly, forced data sharing could enable even more dramatic harms, such as theft or corruption of data, unauthorized cyber intrusion, widespread disinformation and manipulation.

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. Measures to promote common frameworks and open systems for consumers to move data between services are the best way to achieve such portability, provided that the actual data sharing would be at the consumers' request.

### **III. Risks of Limiting the Ability of Platforms to Share User Data Internally**

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, as long as users have transparency, give consents and maintain control, enabling sharing of data across products allows for information to be properly accessed or controlled centrally by the company across multiple products, rather than needing to separately manage this for each service. In addition, cross-device and cross-product data sharing provides consumers with additional security measures and fraud detection. Introducing measures to limit cross-service data would entail a risk of severely impacting the value that digital platforms offer to the Japanese market and ultimately consumers. Instead, we recommend that the DMCH encourage data portability and interoperability where necessary 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.



#### IV. Need for a Cost-Benefit Analysis vs. Overly Rigid *Ex Ante* Rules

Due to the potentially significant economic impacts of digital platform regulation in Japan, it is crucial that DMCH and the Government play an active role in engaging with relevant stakeholders and market players in the development of any *ex ante* regime. Introducing new regulation for platforms is not costless, especially given the dynamic and innovative nature of digital markets. As a result, the ultimate objective of any new regime should be to promote competition and innovation while protecting users' privacy and security at the same time.

New regulation should only be introduced after a comprehensive analysis of the costs and benefits. This should involve an assessment of whether existing tools, such as use of existing competition, consumer protection, and data privacy laws, are sufficient or there are any gaps these existing frameworks do not capture. As an important example to follow, CCIA would underscore that in Art. 3 of the Transparency Act for digital platforms, the Japanese authorities have embraced a spirit of “co-regulation,” which suggests “based on voluntary and proactive initiatives [...] by Digital Platform Providers [...] and with government involvement or other regulations kept to the minimum.”

To ensure that the cost of any new regime does not outweigh its benefits, the rules should allow conduct that is clearly pro-competitive or competitively benign or that is in need for security and privacy protections. They should recognize justifications for legitimate protections such as user safety, security, quality, and 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 these platforms.

#### V. Concerns Regarding Potential Scoping of New Rules to Specific Platforms

CCIA encourages the DMCH to avoid arbitrary scoping of new rules to specific digital platforms. There are concerns that any proposed new rules might only apply to, or enforced against, a few companies originating from the United States.

The application of new rules to only designated companies raises concerns and potential conflicts with international trade commitments. The USTR's Foreign Trade Barriers 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.<sup>4</sup> 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.*, winners and losers in the marketplace. While there are other services and websites or digital devices, which also have indirect network effects, barriers to entry and switching costs, the DMCH reports seem to target only products and services of specific U.S. companies. Furthermore, where a domestic-like service supplier is not subject to these requirements and Japan has national treatment commitments in the WTO for such services, such targeting risks running afoul of those trade obligations. Therefore, CCIA would like to underscore the importance of a neutral, transparent, and appropriately tailored regulatory process, which should also include multi-stakeholder engagement.

## **VI. Importance of Protecting Intellectual Property**

The protection of intellectual property forms the foundation for innovation, enhancing businesses' investment by enabling monetization of investments. The strategic use of intellectual property, such as open-closed strategy, is a core of business strategy for companies. In light of these business realities, distorting the intellectual property system by regulatory intervention could seriously impede businesses' efforts toward innovation. For example, 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 this cautiously by applying strict criteria (keeping in mind that it is impossible to enter a market without the relevant intellectual property). In particular, copyright and trade secrets can be developed by multiple parties independently without using other's copyright and trade secret, which makes it even less necessary for the government to force parties to share copyright and trade secrets.

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<sup>4</sup> 2021 National Trade Estimate Report on Foreign Trade Barriers, United States Trade Representative, <https://ustr.gov/sites/default/files/files/reports/2021/2021NTE.pdf>.



## VII. DMCH Should Be Cautious in Relying on Untested International Proposals

CCIA would like to caution against relying on international regulatory experiments in this area. Digital reforms are being considered in various jurisdictions. However, as of today, only one jurisdiction has introduced an *ex ante* regulatory framework, and the results of this reform are not yet available. While it is clearly useful to understand international proposals, CCIA is concerned that the context to those reforms is often lost. For example, some proposed reforms are the result of particular political dynamics and there are emerging concerns about the impact of digital-specific reforms. Also, other international reforms are approaching implementation, which will introduce further issues and challenges as those reforms take effect. For this reason, CCIA urges the DMCH to avoid rushing to adopt reforms potentially reflecting international regulatory experiments, without first allowing some time to gauge how those are working or whether the reforms are harming consumers and innovation. The DMCH and the Government's role is to ensure that Japan's competition regime is fit for purpose and supports the domestic economy, promotes innovation, and delivers benefits to consumers.

## VIII. Digital Platforms Should Have the Opportunity to Comment on Specific *Ex Ante* Rules before the DMCH Recommends Them to Government

The Interim Reports provide a useful starting point for the debate on *ex ante* regulation in Japan. The Interim Reports canvass a wide range of topics with potential competition concerns. CCIA supports the DMCH's open approach to consultation, which allows for genuine debate on the issues. Given the significant potential consequences of the introduction of an *ex ante* regulatory regime, we encourage the DMCH to consult extensively with relevant stakeholders before publishing its Final Report. We would also like to stress the importance of the Government ensuring that there is a sufficient consultation process on the DMCH's recommendations, especially in areas in which the regulation can have significant economic impacts.