November 22, 2019

BSA Comments on the "Final Report on the Comprehensive Review of Competition Rules in the Telecommunications Business Sector (draft)"

BSA | The Software Alliance (BSA)[1] welcomes the opportunity to provide our response and recommendations regarding the "Final Report on the Comprehensive Review of Competition Rules in the Telecommunications Business Sector (draft)" (**draft Final Report**) released for public comment by the Ministry of Internal Affairs and Communications (**MIC**) on October 23, 2019.

BSA members are at the forefront of data-driven innovation, including cutting-edge advancements in data analytics, machine learning, and the Internet of Things (**IoT**) and have made significant investments in Japan and are proud that many Japanese organisations and consumers continue to rely on BSA member products and services to support Japan's economy. BSA and our members thus have a significant interest in MIC's draft Final Report and their potential impact on BSA members and the technology sector in general.

BSA and our members support MIC's objective of enhancing consumer protection and fostering competition. However, we would like to respectfully raise or reiterate[2] the following observations and concerns for MIC's consideration as the recommendations of the draft Final Report are further considered.

Part 1 / Chapter 3 Specific Direction of Policies to Respond to Global Issues / Section 1: Securing the Interests of Users in Globalized Telecommunication Market

The draft Final Report proposes to expand obligations under the Telecommunications Business Act (**TBA**) relating to the 'protection of secrecy of communications', 'fairness in use', 'reporting on suspension/abolishment of telecom services to users', and 'reporting on the suspension, etc. of business activities' to foreign business operators without local facilities. Furthermore, the draft Final Report suggests that the TBA should establish a new mechanism for MIC to enforce such obligations against these foreign business operators.

The draft Final Report rightfully refers to the importance of striving to achieve international harmonization to facilitate business operators' global operations. We are concerned that the draft Final Report's proposal to authorize the extra-territorial application of the TBA poses a risk to this goal and may instead encourage international fragmentation of the legal and regulatory environment for entities providing certain cross-border software-enabled services. Such an

[1] BSA | The Software Alliance (www.bsa.org) is the leading advocate for the global software industry before governments and in the international marketplace. BSA's members include: Adobe, Akamai, Amazon Web Services, Apple, Autodesk, AVEVA, Bentley Systems, Box, Cadence, Cisco, CNC/Mastercam, DataStax, DocuSign, IBM, Informatica, Intel, MathWorks, Microsoft, Okta, Oracle, PTC, Salesforce, ServiceNow, Siemens PLM Software, Sitecore, Slack, Splunk, Symantec, Synopsys, Trend Micro, Trimble Solutions Corporation, Twilio, and Workday.

[2] See "BSA Comments on the Interim Report on the Comprehensive Review of Competition Rules in the Telecommunications Business Sector" June 27, 2019 at https://www.bsa.org/files/policy-filings/en06272019reviewcompetitionrulestelebusiness.pdf

22F Shibuya Mark City West
1-12-1 Dogenzaka Shibuyaku,
Tokyo 150- 0043

P +81 3 4360 5473
F +81 3 4360 5301
W bsa.org

Japan Representative Office

approach could, for example, encourage other countries to impose their own laws extra-territorially on Japanese companies. Rather than enhancing consumer protections, this can lead to confusion in the market for both enterprises and consumers, and may lead to a conflict of legal obligations for multi-national platform providers operating in the global marketplace.

Therefore, **we urge MIC to avoid efforts to impose and enforce TBA obligations internationally** and instead work with enterprises to leverage existing and emerging best practices to support consumer protection and facilitate trust in the digital economy. This will be most effectively accomplished by engaging with Japanese and international software service providers in international fora, including the US-Japan Policy Cooperation Dialogue on the Internet Economy, where such concerns can be resolved in a manner that ensures the harmonization of policies to continue to promote cross-border free data flows and innovative new software services globally.[3]

We also encourage MIC to work with stakeholders to ensure clarity of which entities and business practices would fall under the scope of any proposed amendments or expansion of the TBA. Consumers are exposed to different levels of risk through different software service providers.

Many enterprise services, such as cloud computing service providers (**CSPs**), invest in state-of-the-art data security technologies and procedures and act as processors, following the instructions of their business customers acting as personal data controllers with direct interaction with consumers. CSPs offering cross-border services often make commitments regarding the protection of information, including personal information, to their customers through contractual arrangements. CSPs and the contracts between CSPs and their enterprise customers are already governed under personal data protection laws, such as the Act on the Protection of Personal Information (**APPI**). We, therefore, recommend **explicitly excluding enterprise software enabled services, such as cloud computing service providers**, from the application of any expanded TBA obligations.

Part 2 / Chapter 5 Response to Issues Regarding Platform Service /
Section 6: Direction of Future Discussion and Status of Efforts Undertaken etc.

The draft Final Report recommends extraterritorial application of secrecy of communications, and further describes recommendation from the members of the Study Group on Platform Service to add the protection of personal information in TBA, which may not be covered by the scope of Japan's "secrecy of communications" concept; a step that might require further amending the TBA. At the same time, as is often pointed out, it is not necessarily clear what is covered within the scope of "secrecy of communications". The uncertainness of scope and the overlap authority of MIC and Personal Information Protection Commission (PPC) may impair predictability of business operations in Japan, imposing an unnecessary burden on business operators and undermining innovation.

As we raised in our June 2019 submission,[4] under the APPI, the Government of Japan has largely taken a principles-based, outcomes-focused approach to privacy and data protection. Japan already has an established legal system for the protection of personal information which stipulates personal information is to be used within the scope of purpose presented to users, requiring entities to manage personal information in an open and transparent way, while having a clearly expressed and up-to-date privacy policy.

[3] op. cit. footnote 2

[4] op. cit. footnote 2

As the implementation of APPI is under the supervision of the Personal Information Protection Commission (PPC), which is entitled to take action against disclosures or breaches by business operators located outside of Japan, and given the PPC's continued dialogue with relevant overseas stakeholders, including enforcement authorities, PPC is in a strong position to ensure the protection and utilization of personal information in Japan and maintain international interoperability with other personal data protection legal regimes. Indeed, Japan's privacy protection regime was recently recognized by the European Union as one of the few systems assessed as "adequate" by the European Commission.[5]

For these reasons, and others,[6] **we urge that the Government of Japan retain primary oversight and enforcement of personal data protection and consumer privacy to the PPC**. Establishing a system where two or more administrative agencies are authorized to enforce against foreign business operators for similar and overlapping activities will remove the significance of the PPC as the central, independent authority on privacy, creating confusion for many software service providers offering services to users in Japan.

If MIC determines that additional guidance is required regarding reasonable approaches to the protection of personal information in specific circumstances, this guidance should be developed and implemented in accordance with the existing system for personal information protection, rather than via the introduction of another layer of prescriptive requirements. It is also important that any such guidance is developed taking into account stakeholder input and that the existing flexibilities under the PPC to enable legitimate business operations are preserved.

Conclusion

Addressing challenges associated with the impact of digital platforms on competition and consumer protection is not an issue that is unique to Japan. BSA has been involved in discussions with governments, policy makers, and industry bodies around the world for several years on these issues. In our experience, the most successful regulations are proportionate, principles-based, outcomes focused, not unduly prescriptive, and informed by stakeholder input. Effective data privacy and consumer protection rules should empower the rights and expectations of consumers, while also enabling innovation and the commercialization of cutting-edge products and services.

BSA looks forward to further engaging with the Government of Japan on this important matter and to contribute, as appropriate, for the development of effective regulations.

[5] https://www.ppc.go.jp/enforcement/cooperation/cooperation/310123/

https://ec.europa.eu/info/law/law-topic/data-protection/international-dimension-data-protection/adequacy- decisions_en

[6] op.cit footnote 2