



September 30, 2019

BSA Comments on Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc. (draft)

BSA | The Software Alliance (BSA)¹ welcomes the opportunity to provide our response and recommendations regarding the “Guidelines Concerning Abuse of a Superior Bargaining Position in Transactions between Digital Platform Operators and Consumers that Provide Personal Information, etc. (draft)” (**Draft Guidelines**)² released for public comment by the Japan Fair Trade Commission (**JFTC**) on August 29, 2019.³ Our submission raises some issues concerning (1) the possible overlap between the Draft Guidelines and existing obligations under the Act on the Protection of Personal Information (**APPI**)⁴ and the authorities granted to the JFTC under the Act on Prohibition of Private Monopolization and Maintenance of Fair Trade (**Antimonopoly Act**);⁵ (2) the scope of the information covered under the Draft Guidelines; and (3) the scope of the business entities covered under the Draft Guidelines.

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**). BSA members 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 has a significant interest in the Draft Guidelines and their potential impact on BSA members and the technology sector in general. BSA members are committed to ensuring the protection of personal information and consumer privacy. We support the implementation of thoughtful approaches to personal information protection that increase the transparency of personal information collection and use; enable and respect informed choices by providing governance over that collection and use; provide consumers with control over their personal

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 At <https://www.jftc.go.jp/en/pressreleases/yearly-2019/August/190829rev.pdf>

³ At <https://www.jftc.go.jp/en/pressreleases/yearly-2019/August/190829-2.pdf>

⁴ English translation at https://www.ppc.go.jp/files/pdf/Act_on_the_Protection_of_Personal_Information.pdf

⁵ English translation at https://www.jftc.go.jp/en/legislation_gls/amended_ama09/index_files/The_Antimonopoly_Act_2.pdf

information; provide robust security; and promote the use of personal information for legitimate business purposes. In order to drive trust in the digital economy and to contribute to discussions regarding effective and internationally interoperable approaches to protecting consumer privacy and personal information, BSA developed the **Global Privacy Best Practices**.⁶

BSA supports the objectives of the JFTC to ensure that consumers that provide personal and other information in return for services are not treated unfairly. However, we would like to respectfully raise the following observations and concerns regarding the Draft Guidelines for the JFTC's consideration.

1. The Conduct Related to the Acquisition or Use of Personal Information is the Subject of the Act on the Protection of Personal Information

By design, the Draft Guidelines are focused on conduct related to digital platforms that acquire and use personal information. However, this raises some potential challenges for businesses, consumers, and regulators given that the conduct is already the subject of the APPI.

The challenges are at least two-fold. First, many of the examples of conduct that may constitute an abuse of superior bargaining position described in the Draft Guidelines are already prohibited by the APPI. For example, acquiring personal information without stating the purpose to consumers (Assumed Example (i)) is already prohibited by Article 15 and/or 18 of the APPI. Furthermore, the obligation to “specify as precise as possible about the purpose for which it uses that information” applies to all business operators handling personal information, not just digital platforms that may be abusing their superior bargaining power. Similarly, the conduct described in Assumed Example (ii) — acquiring personal information against consumers’ intention beyond the scope necessary to achieve the purpose of use — is already prohibited by Article 16 of the APPI, and again applies to all business operators handling personal information.

Conversely, although express consent is recognized as a legitimate mechanism for transferring personal information to third parties under the APPI, the Draft Guidelines suggest that express consent can be deemed involuntary and therefore void under the Antimonopoly Act if consumers have “no other alternative but to use the services” (Assumed Example (vi), Note 7). The Draft Guidelines lack any explanation about the circumstances in which a consumer can be said to have “no other alternatives to use the service” and include the proposal that a superior bargaining position may be established even when it is “practically difficult [for a consumer] to stop using the service provided by the existing digital platform operator even if an alternative service exists.”⁷ As a result, the Draft Guidelines could create uncertainty for service providers who rely on their users’ express consent for the purposes of effectuating transfers of personal data to third parties. Moreover, Article 17 of the APPI already includes safeguards to prevent service providers from obtaining user consent through “deceit or other improper means.”

Similar issues arise in the other Assumed Examples in the Draft Guidelines. It is unclear how imposing such duplicative obligations or contradictory requirements on businesses will achieve

⁶ See https://www.bsa.org/~media/Files/Policy/Data/2018_BSA_Global_Privacy_Best_Practices.pdf.

⁷ Draft Guidelines – Section 3(2) (Page 3)

the stated goal of the Draft Guidelines to “improve the predictability for digital platform operators”.

A second challenge is that the Draft Guidelines do not appear to recognize some of the careful elaborations that exist within the APPI and related Cabinet Orders, Commission Rules, notices and guidelines for the handling of personal information.⁸ For example, the Draft Guidelines acknowledge that there should be no issue if the digital platform operator receives the consumer’s “express consent”, but the Draft Guidelines do not explicitly acknowledge the other legal bases provided by the APPI, in addition to consent, for business operators handling personal information to acquire and use personal information.

Furthermore, the formulation of the Draft Guidelines to apply directly to business-to-consumer transactions could raise additional uncertainty in the marketplace, confuse the application of existing consumer protection laws such as the APPI and the Consumer Contract Act,⁹ and discourage the development and deployment of innovative consumer related products and services.

In sum, we observe that the Draft Guidelines may complicate, rather than clarify, the rights and obligations of business operators and consumers with respect to handling personal information and we respectfully submit that the primary determination of whether business operators are properly and lawfully handling personal information should rest with the Personal Information Protection Commission (**PPC**) under the authority of the APPI.

2. Scope of the Information Covered

The Draft Guidelines are focused not only on conduct related to personal information, which the Draft Guidelines define consistent with Article 2(1) of the APPI, but also “personal information, etc.” which the Draft Guidelines define as “personal and other information”.¹⁰ As the Draft Guidelines note, digital platform operators are providing substantial benefits to the Japanese society and economy by investing in innovation and providing new economic opportunities for Japanese companies large and small.¹¹ Indeed, the enterprise software solutions provided by BSA members are transforming the global economy.

In order to drive this economic development, job creation, and innovation, the software industry depends on data.¹² Much of the data driving the global economy is NOT personal information. As stated above, BSA shares the goal of driving trust in the digital economy, including through robust personal information protection. We are concerned, however, that the expansion of such safeguards to non-personal information could have significant negative consequences without the concomitant benefits of consumer protection or enhanced privacy.

Although as mentioned above, it is not clear what new oversight function the JFTC proposes to conduct beyond that which is already the responsibility of the PPC, we respectfully urge the

⁸ See <https://www.ppc.go.jp/en/legal/> for English translations of relevant documents.

⁹ English translation at http://www.japaneselawtranslation.go.jp/law/detail_download/?ff=09&id=2036

¹⁰ Draft Guidelines – Definition of “Personal Information” and “Personal Information, etc.” (Page 2)

¹¹ Draft Guidelines – Introduction (Page 1)

¹² See the BSA report “What’s the Big Deal with Data” at <https://data.bsa.org/>

JFTC to proceed cautiously when considering whether to scrutinize the use of “other information” for the purposes on enforcing the Antimonopoly Law. We suggest that JFTC either drop the reference to “other information” in the Draft Guidelines or provide additional explanation of specifically what kinds of information might be subject to JFTC’s scrutiny of business conduct so that interested stakeholders may provide meaningful input into the development of the Draft Guidelines.

3. Scope of the Business Entities Covered

The Draft Guidelines specifically raise concerns over the acquisition or use of consumers’ “personal information, etc.” by digital platform operators that provide free goods and services in exchange for the acquisition of “personal information, etc.” These concerns arise from the possibility that the digital platform operator may abuse their superior bargaining position and engage in acts of unfair trade practices, as defined by the Antimonopoly Act.¹³

However, the definition of “digital platform” in the Draft Guidelines is far too broad¹⁴ and could encompass a wide range of business practices regardless of whether and how “personal information, etc.” is acquired or used.

Cloud computing and other enterprise software solutions are a critical component to creating economic opportunities for Japanese consumers and companies, driving economic growth and job creation in Japan, and providing world class solutions from data analytics and machine learning, to cybersecurity and infrastructure protection. Although companies providing these services do not appear to be the focus of the Draft Guidelines, they may be unintentionally deemed “digital platforms” for the purpose of the Draft Guidelines.

While we encourage the JFTC to consider our observations on the two issues above, we also respectfully suggest that it be made clearer in the Draft Guidelines which kinds of businesses might be within the scope of the Draft Guidelines. For example, it might be helpful to narrow the scope of the definition of “digital platforms” by explicitly explaining that enterprise solutions, such as cloud computing services providers, are excluded from the Draft Guidelines’ scope.

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 related issues in a way that balances the associated concerns. In our experience, working closely with regulators in jurisdictions around the world on best practices in legal and policy frameworks, the most successful regulations are proportionate, principles-based, outcomes-focused, and not unduly prescriptive. Data privacy and consumer protection regulations should balance the rights, needs, and responsibilities of regulators, consumers, technology providers, third party stewards of data, and innovators.

BSA looks forward to further engaging with the Government of Japan and the JFTC on this important matter and to explore ways in which BSA can work with the Government of Japan and other stakeholders to develop effective and balanced regulatory policies with respect to digital platforms.

¹³ Draft Guidelines – Introduction (Page 1)

¹⁴ Draft Guidelines – Definition of “digital platform” (Page 2)