

Japanese Legislature Passes Act to Regulate Big Tech Platforms

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Digital platforms are under ever-increasing regulation across the globe, with Japan being among the latest countries to pass new legislation concerning their operations. On May 27, 2020, the National Diet of Japan enacted the Act on Improvement of Transparency and Fairness in Trading on Specified Digital Platforms (the Act).^[1] The Act requires digital platform providers to (i) disclose certain terms and conditions to sellers and consumers, (ii) develop fair procedures and systems, and (iii) submit an annual report on their business operations to the Ministry of Economy, Trade and Industry (METI). It also empowers the government to assess compliance, publicize the results of its assessment, and take necessary actions to enforce compliance, including issuing fines for violations. The Act provides that it will become effective on or before June 2, 2021,^[2] but the government is moving forward the enforcement date to Spring 2021.^[3]

This post covers the Act's key provisions and the details it delegates to subordinate agencies for future regulations and offers predictions about the content of those forthcoming regulations. It also discusses the similarities and differences between the Act and regulations on digital platforms in the United States and the European Union.

Who will be regulated?

The Act requires that "Specified Digital Platform Providers" improve transparency and fairness in trading on their digital platforms.^[4] The Cabinet Order that will set forth criteria by which to designate "Specified Digital Platform Providers" has not yet been issued. Once it has been enacted, the METI minister will designate particular entities that satisfy the criteria as "Specified Digital Platform Providers."^[5] The entities that satisfy the criteria but are not designated by the METI minister must submit a notification to the METI minister.^[6] Media reports speculate that the Act will cover at least Amazon, Google, and Apple, as well as domestic providers, including, for example, Yahoo! Japan.^[7]

What will Specified Digital Platform Providers be required to do?

The Act states as a basic principle that platform providers shall voluntarily and proactively undertake innovative initiatives to improve transparency and fairness in trading on their platforms.^[8] The Act has two core pillars based

upon this foundational principle: (i) disclosure obligations to ensure appropriate transparency, and (ii) fairness and effective redress through a combination of legal obligations and voluntary industry initiatives.

1. Disclosure obligations^[9]

The Act imposes upon Specified Digital Platform Providers disclosure obligations designed to enhance transparency for third-party sellers and consumers and to prevent the Providers from making unfair decisions that harm third-party sellers, such as refusals to deal. The Act specifically addresses the potential for misappropriation of data by requiring the Providers to disclose the terms and conditions by which they acquire and use any data collected from third-party sellers about their merchandise. In addition, the Act protects against preferential or discriminatory treatment by the Providers (e.g., use of self-preferencing ranking systems) by requiring Providers to disclose on their platforms the classification methodology they use.

The items to be disclosed are as follows:

(1) Disclosure to third-party sellers^[10]

ITEMS TO BE DISCLOSED	PURPOSE ^[11]
Criteria for a refusal to a deal	<ul style="list-style-type: none">✓ Enhance transparency✓ Prevent unfair action
If third-party sellers are asked to purchase goods or services to use the platform, the reason for such request and the details regarding the goods or services that must be purchased	<ul style="list-style-type: none">✓ Enhance transparency
Basic factor used to determine search ranking	<ul style="list-style-type: none">✓ Enhance transparency✓ Prevent unfair action
Terms and conditions to acquire data about items provided by third-party sellers, such as changes in sales volume	<ul style="list-style-type: none">✓ Prevent data misuse

(2) Items to be disclosed to consumers^[12]

ITEMS TO BE DISCLOSED	PURPOSE
Basic factor used to determine search ranking	<ul style="list-style-type: none">✓ Enhance transparency✓ Prevent unfair action

ITEMS TO BE DISCLOSED	PURPOSE
Terms and conditions to acquire data about their buying behavior	✓ Prevent data misuse

With respect to requiring disclosure of the basic factor used to determine search ranking, METI has announced it will not require providers to disclose their specific algorithms for ranking. This is important, because each provider's ranking system is a trade secret.^[13] However, as described below, future implementing regulations will cover the method of disclosure and additional items for disclosure. The regulations are still under discussion, and thus it is important to carefully monitor developments in this area.

2. Developing fair procedures and systems

The Act also requires the Specified Digital Platform Providers to establish procedures and systems to promote mutual understanding with platform users with respect to trading. To promote proactive and innovative initiatives, the Act provides for some flexibility in the procedures and systems used, so long as they comply with guidelines that METI will issue. The Act requires that these forthcoming guidelines address (i) measures to promote mutual understanding of the terms of the trading relationships, (ii) the development of systems to ensure the fair provision of services to third-party sellers, (iii) the development of systems for handling complaints and resolving disputes, and (iv) the appointment of persons domiciled in Japan and responsible for the business operations in Japan to closely communicate with third-party sellers.^[14] The specific content of the guidelines is left to METI.

3. Report to METI

The Act requires Specified Digital Platform Providers to submit an annual report to METI regarding the status of their compliance and a self-assessment of their performance with respect to their obligations under the Act. METI will review the report for transparency and fairness in trading, and publicize the results of its review along with an outline of each Provider's report.^[15] The Act aims to ensure the Specified Digital Platform Providers improve fairness and transparency in trading in response to METI's review of their report.

How will the Act be enforced?

The Act sets forth administrative measures and criminal punishment for non-compliance with the regulations.^[16] Non-disclosure and failure to establish fair procedures and systems are subject to a public recommendation to take necessary measures issued by the METI minister. Where a Provider does not follow the recommendation regarding required disclosures, the METI minister may issue a public order. Failure to comply with such an order leads to a fine of up to 1 million JPY. A company that fails to submit a required report to METI or makes a false statement in such a report can be fined up to 500,000 JPY.^[17] Under the joint punishment provision, these fines are imposed on both the person who commits the violation and the person's employing entity.^[18]

To the extent necessary for enforcement, METI officials may enter a Specified Digital Platform Provider's office or place of business to inspect books and documents.^[19]

In addition, the METI minister may request the Japan Fair Trade Commission (JFTC) to take necessary measures when the METI minister finds any conduct of a Specified Digital Platform Provider impairs transparency and fairness, and the METI minister deems that the conduct is an unfair trade practice as set forth in the Antimonopoly Act.^[20] Although the JFTC can initiate an investigation on its own without a request from METI, this Act will open up more opportunities for antitrust law enforcement. Companies operating in Japan should keep a close watch on the JFTC's enforcement efforts in this arena, since the JFTC has announced that it will strictly enforce any violations by digital platform providers.^[21]

Under the Act, platform users (including third-party sellers and consumers) may report to the METI minister if they believe that the Specified Digital Platform Provider has not taken required measures, and they may request that appropriate measures be implemented.^[22] The Act also prohibits the Specified Digital Platform Provider from refusing to deal or otherwise retaliating against the platform user for making such a report and request to METI. Platform users are likely to take advantage of this reporting system and help METI collect information about violations.

What are the next steps?

The Act sets forth a framework for implementing regulations and grants the power to determine their details to (i) the Cabinet, the highest institution in charge of executive power, which is composed of the Prime Minister and the other Ministers, and (ii) the competent authority for the Act, namely METI. The government working group, which includes academic experts, has held regular meetings and provided advice on these subordinate regulations. At a November 30 working group meeting, METI presented discussion materials describing a detailed proposal for these subordinate regulations.^[23] The discussion materials state that after obtaining comments from the working group, METI intends to draft these orders and guidelines swiftly and then initiate the procedures for gathering public comments. To meet the government's proposed timeline for implementing the Act in Spring 2021, the subordinate regulations are likely to be drafted in accordance with METI's proposal, which is outlined below.

1. Criteria to designate "Specified Digital Platform Providers"

Targeted businesses are online shopping malls and mobile app distribution platforms.

The criteria to designate providers under the Act will be based on the gross merchandise volume, with the threshold level set according to market concentration and in consideration of the degree to which third-party sellers depend on any particular platform for trade.

2. Method of disclosure and additional items to be disclosed

Disclosures must be (i) drafted in plain and intelligible language, (ii) easily available to users before or while using a digital platform, and (iii) followed by Japanese translation if written in a foreign language.

Providers must also disclose any (i) most-favored-nation clauses, (ii) discriminatory treatment of third-party sellers, (iii) requirements that third-party sellers pay return costs, and (iv) clauses to withhold payment of sales.

3. Guidelines for fair procedures and systems

The proposal briefly describes desirable approaches and examples of concrete initiatives in relation to each item that the Act requires the guidelines to include, as described above.

4. Matters to be reported

The proposal set forth the minimum necessary matters to be reported with respect to the following items: (i) business summaries, (ii) handling complaints and resolving disputes, (iii) the status of disclosures, (iv) steps taken to promote mutual understanding in terms of trading relationships with third-party sellers, and (v) self-assessments.

5. Matters METI will evaluate in its review

(i) The impact of a Specified Digital Platform Provider's activities on third-party sellers and the market share of the digital platform, (ii) challenges between a Specified Digital Platform Provider and third-party sellers and the status of efforts to resolve such challenges, and (iii) the status of required disclosures and the development of fair procedures and systems.

Comparison with international trends

Japan's interest in regulating digital platforms is part of an international trend that has been gaining momentum. For example, on October 6, 2020, the United States House Judiciary Committee's Antitrust Subcommittee released a report entitled "Investigation of Competition in the Digital Marketplace" (House Report).^[24] The European Union's Platform-to-Business regulations came into force on July 12, 2020 (EU Regulation) and is focused on creating a fair, transparent, and predictable business environment for business users of online intermediation services.^[25] While the House Report refers to the "Big Tech" companies by name and proposes direct measures, such as requiring

ownership separations or functional separations and implementing non-discrimination rules, the EU Regulation focuses on ensuring appropriate transparency, fairness, and effective redress through the co-regulatory approach, the combination of legal obligations represented by the disclosure and voluntary industry initiatives. Japan's approach is similar to that taken by the EU in the EU Regulation. But the EU Regulation does differ from the Act, particularly by allowing representative associations or organizations that have a legitimate interest in representing platform users to take action to redress non-compliance by platform providers.^[26] As pointed out in METI's discussion material,^[27] it remains to be seen whether the Act's monitoring system will work without any threat of judicial proceedings like those allowed by the EU Regulation.

More recently, the EU published drafts of a new legislative package, which seeks to introduce enhanced responsibilities and controls for a range of players across the digital ecosystem, including an ability to impose fines for non-compliance. The new package additionally envisages the creation of new rules for large platforms that are designated as so-called 'gatekeepers', prohibiting their engagement in a number of practices considered to be unfair and detrimental to the functioning of the EU's internal market.

Key takeaway

Under the Act, the Specified Digital Platform Providers are required to disclose various matters and develop their internal procedures and systems to promote greater transparency and fairness. Although the regulations are yet to be codified and the criteria for designation of the Specified Digital Platform Providers is still unclear, METI has firmed up the details in pending matters, as shown in the latest discussion material. Digital platform providers with substantial sales in Japan should assess their business practices to prepare to comply with the Act. We will keep you posted on any further updates.

[1] The Act is available in Japanese at http://www.shugiin.go.jp/internet/itdb_gian.nsf/html/gian/honbun/houan/g20109023.htm

A brief outline of the Act in English is available as METI's press release regarding the Cabinet Decision on the bill for the Act (https://www.meti.go.jp/english/press/2020/0218_002.html).

[2] See Supplementary Provisions paragraph (1) of the Act.

[3] See Ministry of Economy, Trade and Industry “特定デジタルプラットフォームの透明性及び公正性の向上に関する法律の施行に向けた論点3” [Issues for enforcement of Act on Improvement of Transparency and Fairness in Trading on Specified Digital Platforms III] (November 2020) at 13, available in Japanese at https://www.kantei.go.jp/jp/singi/digitalmarket/kyosokaigi_wg/dai17/siryou3.pdf.

[4] See Article 4, paragraph (1) of the Act. At the same time, the Act explicitly provides that the scope must be limited to the minimum extent necessary to protect interests of third-party sellers on a digital platform. Article 3 and Article 4, paragraph (3) of the Act.

[5] See Article 4, paragraph (1) of the Act.

[6] See Article 4, paragraph (2) of the Act.

[7] See Asahi Shimbun “巨大IT規制法が成立 ネット通販で公正性高まるか” [Big tech regulation enacted – fairness in online shopping to improve?], available in Japanese at <https://www.asahi.com/articles/ASN5W5RCXN5WULFA01C.html>.

[8] See Article 3 of the Act.

[9] In addition to the disclosure obligations, the Act requires a Specified Digital Platform Provider to notify a third-party seller of statutory matters such as changes on the terms and conditions beforehand (See Article 5, paragraphs (3) and (4)).

[10] See Article 5, paragraph (2), item (i) of the Act.

[11] See Ministry of Economy, Trade and Industry “特定デジタルプラットフォームの透明性及び公正性の向上に関する法律の施行に向けた論点” [Issues for enforcement of Act on Improvement of Transparency and Fairness in Trading on Specified Digital Platforms] (August 2020) at 7, available in Japanese at https://www.kantei.go.jp/jp/singi/digitalmarket/kyosokaigi_wg/dai14/siryou1.pdf.

[12] See Article 5, paragraph (2), item (ii) of the Act.

[13] See Ministry of Economy, Trade and Industry “特定デジタルプラットフォームの透明性及び公正性の向上に関する法律案の概要” [Outline of the bill for the Act on Improvement of Transparency and Fairness in Trading on Specified Digital Platforms] (February 18, 2020) at 1, available in Japanese at <https://www.meti.go.jp/press/2019/02/20200218001/20200218001-1.pdf>.

[14] See Article 7, paragraph (3) of the Act.

[15] See Article 9 of the Act.

[16] See Articles 6, 8, 23 and 24 of the Act. The sanctions against non-disclosure are applicable to the violation of notification obligations mentioned in footnote 7.

[17] Failure to submit a notification that is required when the platform provider satisfies the criteria to be a Specified Digital Platform Provider, as well as obstruction of the METI minister’s inspection, are also each subject to a fine of up to 500,000 JPY.

[18] See Articles 25 of the Act.

[19] See Article 12, paragraphs 1 and 2 of the Act.

[20] See Article 13 of the Act and Article 19 of the Antimonopoly Act. If the requirements set forth in Article 13 of the Act—such as a great detriment suffered by third-party sellers—are satisfied, METI ministry must make the above-mentioned request.

[21] See Japan Fair Trade Commission “Report regarding trade practices on digital platforms

(Business-to-Business transactions on online retail platform and app store)” (October 31, 2019), available in English at <https://www.jftc.go.jp/en/pressreleases/yearly-2019/October/191031.html>.

[22] See Article 10 of the Act.

[23] See Ministry of Economy, Trade and Industry, *supra* note 3.

[24] See Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary “Investigation of Competition in Digital Markets” (October 6, 2020), available at https://judiciary.house.gov/uploadedfiles/competition_in_digital_markets.pdf?utm_campaign=4493-519 and our Competition Corner blog post “[Congress Issues Antitrust Report on Large Tech Platforms](#)”.

[25] See “Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services”, available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32019R1150>.

[26] See European Commission “Questions and Answers Establishing a Fair, Trusted and Innovation Driven Ecosystem in the Online Platform Economy” at 57, available at https://ec.europa.eu/newsroom/dae/document.cfm?doc_id=68300.

[27] See Ministry of Economy, Trade and Industry, *supra* note 11, at 14.

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