

Agile Platform Regulation: The First Experimental Period of the Act on Improving the Transparency and Fairness of Digital Platforms in Japan

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Extended Abstract

Introduction

The first ministerial review under Japan's Act on Improving the Transparency and Fairness of Digital Platforms (TFDPA) was published in December 2022. The TFDPA aimed to supplement the nation's competition law—the Antimonopoly Act (AMA)—by promoting fair and free competition amongst digital platforms through improved transparency. Notably, the TFDPA followed the agile governance model, which emphasises the experimental nature of a regulation and encourages dialogue amongst stakeholders and the regulator/government to facilitate the exchange of information and feedback in the process of establishing rules and norms.

When the TFDPA's overseeing body, the Ministry of Economy, Trade and Industry (METI), began enforcing the Act on the basis of the agile governance concept in April 2021, many doubted whether such a regulation could be effective in relation to big tech, but METI seems to have delivered a substantial positive outcome. In the following, we describe the TFDPA and why and to what extent it was effective.

1. Agile Governance and the Enactment of the TFDPA

Toward the end of the 2010s, Japan gradually became aware of emerging unfair trading terms and practices, particularly in relation to online shopping malls and app stores, whose sellers and app developers were economically dependent on a few intermediary online platforms. The percentage of sellers who saw the two largest online shopping malls essential for their business was 77% and 64%, while such percentage of app developers relating to two largest app stores was 51% and 41%.

One way to address the issue was to enforce the AMA. The potential was great, as the AMA prohibits unfair trade practices. It encompasses not only anticompetitive practices that have not yet resulted in market dominance by excluding rivals but also unfair competition methods and the abuse of a superior bargaining position (ASBP). This low threshold for intervention could provide greater and flexible power to the AMA and the Japan Fair Trade Commission (JFTC). Indeed, the JFTC had already begun enforcing the AMA against the digital platforms and conducting comprehensive fact-finding, focusing on several digital services. The Japanese government, however, making reference to the European Union's Regulation (EU) 2019/1150 on promoting fairness and transparency for business users of online intermediation services (P2B Regulation), considered that the first step should be improving transparency. As the AMA does not impose disclosure obligations in a comprehensive manner, the TFDPA was enacted and METI charged with its enforcement.

A. Minimum necessity and co-regulation concepts under the TFDPA

When the TFDPA was drafted, METI was already promoting the agile governance/regulation model, which it contended was the best approach in a rapidly evolving digital society. Unlike a model in which regulators impose specific obligations and penalise those who do not comply, agile governance emphasises a process of implementation, evaluation and improvement in the context of dialogue with stakeholders. In this model, the government is no longer the rule-setter but rather a facilitator of the rule-setting process. Furthermore, Japan's government and business communities were reluctant to establish far-reaching, stringent regulation that obliged many platforms, whether large or small, to be transparent.

Thus, the 'minimal necessary' regulation and 'co-regulation' became the basic philosophy of the TFDPA. Only the largest designated platforms (those exceeding a specific size) in the designated areas were addressed by the Act. In April 2021, the METI designated the relevant platforms, which were Amazon, Rakuten and Yahoo! Shopping among online shopping malls and Google and Apple among app stores (hereinafter *designated platforms*).

The TFDPA and the METI Ordinance obligated the designated platforms to clearly disclose certain matters, including ranking, tying and bundling, self-preferencing, reasons for suspending accounts, complaint-handling systems and the collection, use of and access to data. However, the manner of disclosing this information was largely left to the designated platforms. The TFDPA also provided that platforms must act fairly and implement measures to facilitate mutual understanding, but those concepts were undefined and left open to

interpretation. The main tools to encourage compliance and secure fairness and transparency were the platforms' annual reports and METI's review. Upon receipt of the latter, the platforms were to endeavour to further improve fairness and transparency, but this effort was meant to be voluntary.

A basic philosophical foundation was co-regulation, but nowhere did the TFDPA describe the role of codes of conduct established by the industry. In fact, no association, whether business or consumer, plays a significant role under the TFDPA. The TFDPA allows METI to consider experts', users' and associations' opinions, but this is not mandatory. What is meant by co-regulation appears to be a combination of the designated platforms' own reflections on their practices and METI's nudging of such reflections, primarily by issuing reviews.

B. Criticism of the TFDPA and anticipated challenges

There were reasons to suspect that the TFDPA would fail to achieve its stated goal, namely promoting fair and free competition. Many suspected that METI would not only fail to promote competition but also fail to ensure fairness and transparency. We, too, initially shared these pessimistic views on the following grounds.

First, we suspected that the designated platforms would have no incentive to cooperate; rather, there would be an incentive on their part to remain opaque. They would have no incentive to act fairly, and they would have no incentive to make the market competitive. Consequently, we suspected that external pressure and penalties to drive them to comply and cooperate would be critical, but the TFDPA seemed to lack such powers.

Admittedly, the TFDPA has some provisions relating to stringent regulatory measures and penalties. For instance, a criminal fine may be imposed in case of a breach of the disclosure obligation. However, the amount may not exceed JPY 1 million (about 7,000 euros).

Furthermore, METI is not known for enforcing any law through a criminal procedure.

Another mechanism to enhance the effectiveness of the TFDPA is that METI may request the JFTC to take action, but that does not necessarily mean that the JFTC will actually take action, and the decision rests with the JFTC. The JFTC's taking action was considered unlikely, as the JFTC has been reluctant to resolve competition issues in digital services through formal measures and sanctions. Furthermore, METI can request only measures under AMA Article 19 (concerning the prohibition of unfair trade practices), meaning that the most severe outcome is the imposition of an administrative fine of 1% of the affected turnover (in cases in which the JFTC finds ASBP) or a cease-and-desist order (in other cases).

Second, METI's resources and various inputs required for enforcement appeared insufficient. METI had only a limited number of officials in the department who specialised in the TFDPA, which reinforced the suspicion that METI would be unlikely to pursue penalties. One type of regulatory input was information, as both sellers in online shopping malls and app developers could prompt METI to enforce the regulation vigorously, but this, too, seemed unlikely given serious concerns about retaliation by the designated platforms. Although the TFDPA includes a non-retaliation rule, its effectiveness depends on METI's authority to enforce it, which seemed to be too weak. Unlike the P2B Regulation, the TFDPA does not have special provisions allowing for civil suits or for business associations to act upon infringement. Given these factors, it appeared that the only way to manage the conduct of the designated platforms was METI's proactive approaches of fact-finding surveys and interviews with sellers and app developers. For this, the small number of relevant METI officials appeared to be fatal.

Third, we were strongly concerned that METI would fail to make trading relationships fairer. As far as the TFDPA and the Ministerial Order were concerned, the focus appeared to be exclusively on transparency, and we suspected that, given the strong bargaining power of the designated platforms, trading conditions would remain unfair even after they become transparent. In theory, the designated platforms could openly articulate clearly unfair terms and conditions when they did not fear losing their sellers and app developers to rivals.

Fourth, and closely related to the third concern, the meaning of fairness was defined neither in the TFDPA itself nor in the Ministerial Ordinance. On this point, the TFDPA's approach may have been that the government would not define the meaning of fairness but merely facilitate the generation of fair trading norms in accordance with the agile governance model. We feared that such an approach was impractical and unrealistic. The absence of any definition of fairness was in marked contrast to the more detailed provisions on transparency, too. This led us to believe that fairness would mean only procedural fairness, which we believed would mean little in light of the disparity in bargaining power.

2. Outcome and Assessment

Over time, the pessimistic view described above has weakened. Despite the mentioned shortcomings, METI has proactively improved transparency and fairness to a great extent. Most AMA scholars who have monitored the enforcement of the TFDPA now agree that the TFDPA and METI achieved far more than they expected.

A. METI's actions and outcomes

Particularly striking is that, according to METI's survey, 70%–80% of sellers and app developers believe that the designated platforms have improved transparency and become supportive since the TFDPA came into effect. Especially noteworthy is that they feel that they are better supported. Although this alone does not prove that the designated platforms are acting more fairly, it potentially suggests it.

METI has identified and published several concrete examples of enhanced support, such as one platform's changing its criteria to allow some kinds of app that were formerly rejected. Through mutual communication prompted by the TFDPA, the platform recognised that the basis of rejection may have existed nowhere but in Japan, so it changed its policy and started accepting the apps. Improvements also appear to have been made in the procedures and communications related to returning goods, suspending accounts and resolving complaints. Much information on these matters is now available, and accounts are no longer so easily suspended. When accounts are suspended, complaints appear to be handled more quickly and appropriately. Another sign of improved transparency is that, when changes are made to terms and conditions of trade or other matters, companies seem to take steps to inform business users of the changes in advance and to allow sufficient time for the changes to be made.

These developments appear to have improved not only transparency and procedural fairness but also substantive fairness. Account suspensions and changes are among the biggest concerns of business users and are often a direct cause of disadvantage; the TFDPA appears to reduce the disadvantages arising from them.

Other regulatory resources have been allocated with regard to self-preferencing and issues related to data, and there are indications that they are having effect. Furthermore, these matters are also related to maintaining and promoting competition. In other words, they have had a limited but positive effect on maintaining and promoting competition.

B. Factors that drive platforms to cooperate

As will be explained, METI and the TFDPA are not perfect, but they have yielded remarkable outcomes for reasons that may include the following.

First, the incentives for the designated platforms to cooperate may have been greater than expected. Even monopolists must secure a sufficient number of users, and the reputation of

being a good trading partner may help them to do so. In this regard, the TFDPA may have been a useful tool for the designated platforms to assure sellers and app developers that they would be treated fairly. Furthermore, two designated online shopping mall platforms, namely Yahoo! Shopping and Rakuten, may have been under competitive pressure from Amazon and needed to promote themselves by ensuring that they would deal with business users fairly in compliance with the TFDPA.

Second, the reputational effect may also have worked in relation to regulators and legislators in Japan. Yahoo! Shopping (or its parent group, known as Softbank) and Rakuten are based in Japan and have had repeated interactions with its government. For them, maintaining the reputation of good corporate citizens may have put them in a better position vis-à-vis the government for cultivating a favourable business environment. By contrast, Amazon, Google and Apple may have needed less help from Japan's government but recognised that a more stringent and wide-ranging regulation, similar to the EU Digital Markets Act, could soon emerge if the TFDPA was a total failure, as the Digital Markets Act was well-reported and known by policy-makers in Japan, including METI. Indeed, Japan's Cabinet Office had been working on regulation frameworks related to Google's and Apple's mobile ecosystems since early 2022. These circumstances may have prompted the designated platforms to cooperate to prove that such stringent regulation was unnecessary.

Third, METI's annual report may have been more effective than anticipated. Notably, the designated platforms may have cooperated so as to avoid the comments and opinions, which could have been not based on facts, to be included in the METI report due at the end of 2022. Although the TFDPA itself included minimal sanctions, the designated platforms may have regarded (baseless) negative comments and opinions (or recommendations or requests to act in a certain manner) as imposing onerous moral obligation or the risk of a bad reputation, which may have driven them to cooperate with METI, particularly by providing much information even when METI did not use its legal authority.

It is also possible that the AMA was more powerful than we had anticipated, possibly because the foreign-based Amazon, Apple and Google were unaware that Japan's AMA is very softly enforced and does not impose large fines as in the EU, EU member states and South Korea. Alternatively, the fact that the JFTC was active in the digital sector through various means, even if it did not carry out formal enforcement, may have played a role. Among other things, the designated platforms may have strongly impressed by the fact that,

in the Rakuten free-shipping (ASBP) case, the JFTC even applied to the court for an emergency suspension order. The JFTC had also conducted one affirmative proceeding and one investigation against Amazon. A further consideration was the impact of the *Tabelog* civil case, in which, under the AMA, a restaurant demanded an injunction and compensation for damages against Tabelog (a restaurant reservation portal) on the grounds that Tabelog's unilateral, unannounced changes to its ranking algorithm caused damage to restaurants, which constituted an ASBP. The Tokyo District Court allowed the claim for damages.

Fourth, it may be that global players, such as Google and Amazon, were changing how they operated to comply with laws and regulations outside Japan and felt that they could easily do likewise in Japan. Alternatively, they may have been changing how they did business on a global scale anyway (including in Japan), so that their changed practices only coincidentally followed the coming into effect of the TFDPA.

The human factor may also have been in play. At METI, a few young, qualified lawyers were employed temporarily who otherwise would have been working for established law firms. The leader of the TFDPA team was an open-minded, approachable METI official. The team was well connected with economists and AMA scholars and actively expanded its human network further to connect business people, law practitioners and other law scholars with diverse backgrounds. The METI officials may have used their knowledge and expertise with regard to the AMA and legal precedents in Japan and abroad as well as knowledge of the platforms' business models and the logic behind those models to establish METI as a good facilitator of the agile governance-style norm creation process. These dynamics were particularly evident at the monitoring meeting established by METI. The meeting comprised 10 experts, of whom five were AMA and competition policy experts who constantly served as expert advisors to various policy-makers, including the Cabinet Office, the JFTC and METI. The background of other five members varied, but they were as vocal and influential as the five competition policy experts. These members collectively sent a list of about 100 questions to each designated platform. The designated platforms may have recognised the long-term negative impact on them had they been seen negatively by these members, so the monitoring meeting appeared to have not only provided expertise but also strengthened METI's informal power to convince the digital platforms to cooperate.

3. Remaining Issues and New Challenges

Although the TFDPA outperformed, it was not a panacea. The first round of implementation and review process revealed both the TFDPA's effectiveness as well as ineffectiveness in specific matters. Following the Ministerial Review in December 2022, the designated platforms are obliged to further improve transparency and fairness, which may be the real test to the TFDPA. Furthermore, the government expanded the scope of the TFDPA to cover the three largest media-integrated digital ad platforms (i.e., Google, Yahoo! Japan, and Meta) and an ad intermediary digital platform (i.e., Google). The extent of cooperation of the only dominant ad intermediary platform, Google, is particularly unclear. In the following, we describe three challenges METI may face in the coming years.

The improvements made so far under the TFDPA tend to relate to the relationship between the designated platform and sellers or app developers. If Japan seeks to maintain competition and further contestability in the platform markets, it needs to do more than simply securing fairness between the designated platforms and their users, which are in a vertical relationship. For a contestable market, the dominant platform's various strategies to discourage new entrants and hinder rivals must be eliminated. The TFDPA has not addressed such issues even if it shares the same goal with the AMA, namely promoting fair and free competition. The TFDPA does not refer to contestability and contains few provisions that maintain it. Moreover, fairness under the TFDPA does not include a provision on levelling the playing field such that rivals of the designated platform can freely participate in competition without being unfairly excluded.

It may be that the TFDPA is taking a step-by-step approach, and contestability is to be addressed at the second or third stage. While the concept of fairness is not defined, levelling the playing field may become one of the main goals in the near future through agile governance dialogues. However, we are concerned that the interest of new or potential entrants and competitors are underrepresented in such dialogues despite it being essential to further contestability and level the playing field. We fear that, by nature, the dialogue tends to focus on the interests of those who are already in the markets.

The TFDPA may not be very effective in promoting fairness between the designated platform and sellers and app developers, too. As noted earlier, the TFDPA and METI managed to make the trading conditions fairer to some extent but not entirely. For example, neither Google nor Apple has made substantial changes to their in-app payment system and policies. No designated platform has introduced a compensation system for when the platform

wrongly suspends accounts and mistakenly causes damages to sellers or app developers. Voluntary cooperation has its limits, and fairness with regard to several core issues may be achieved only through stringent regulatory measures or restored competition.

With regards to data and algorithm, a member of the monitoring team has already pointed out that the designated platform's explanation and information alone are not sufficient, no matter how detailed they are. For these matters, it appears to us that the designated platforms must establish the internal monitoring system under which the independent and competent auditors verify the accumulation and use of data as well as algorithm. Data and algorithm experts hired by the METI would then need to assess the accuracy of the report submitted by such independent auditors. It is unclear whether such a practice could naturally emerge and be implemented through an agile process without greater authority backed by severe penalties.

These issues, namely contestability, greater fairness, and transparency in relation to data and algorithm, all relate to the dominant digital ad intermediary, Google. As long as the METI can overcome the challenges listed above, the TFDPA may be useless. The challenges could be multiplied if Google's incentive to cooperate is insufficient given its dominant position, inherent opacity, and even deceptive practices that have been allegedly employed in relation to ad stack.

Conclusion

For the first time, Japan has implemented digital platform regulations based on the idea of agile governance/regulation under the TFDPA. Although it has achieved a certain degree of success, it remains unclear whether it can continue to bring positive outcomes in different settings. Both second stage in online shopping malls and app stores and digital advertising appear to be presenting serious challenges. We will be able to determine the success of the model only after the next METI review or even longer period of time.