

Comparison of the Regulations on Communication Privacy between EU and Japan: Toward Reinforcement of Japan's Communication Privacy

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ABSTRACT:

This article examines the legal scope of communication privacy in the telecommunication services and territorial application in Japan and the EU. Both face similar regulatory challenges regarding how to ensure a level playing field between incumbent services and emerging ones, and how to protect communication privacy in Over-The-Top (OTT) services. A difference between Japan's and the EU's current legislation is that Japan's regulatory framework has the issue of extraterritorial application, whereas the issue in the EU is the scope of regulatory services and territory. The EU has proposed a revision of law to address the issue, whereas Japan has not taken any measures, despite an increase in the number of people using OTT services and accompanying demand for ensuring protection of online privacy. A possible remedy for the Japanese statute is to add services originating from foreign companies to a regulatory category in Japan's already existing Telecommunication Business Act which requires operators to comply with communication privacy. Although domestic law generally has effects only within a nation, there is a clause in the Act on the Protection of Personal Information to apply regulations even to foreign countries' business entities. I argue that such measures should be incorporated into Japan's Telecommunication Business Act.

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Introduction

Secrecy of correspondence is one of the fundamental values in communication services, as the International Telecommunication Union has noted it in its Constitution since its founding.¹ The idea of secrecy of correspondence means that the contents of sealed letters or other forms of communication are never revealed by governments or third parties, and its scope has been expanded to issues of communication privacy.² In the telecommunication industry in Japan, the concept is defined in Japan's Constitution and the Telecommunication Business Act.³ One of the issues in this field is an inequality of regulatory application of communication privacy between Japanese companies and foreign ones.⁴ For instance, Yahoo Japan Corporation, which provides a free mail service, should comply with communication privacy's rules, such as consent by users, which is suggested by the Ministry of Internal Affairs and Communications (MIC), when the company offers online advertisements related to mail content,⁵ whereas Google, providing the Gmail service, does not necessarily have to do so.⁶ In Europe, by contrast, communication privacy is dictated by the Directive on privacy and electronic communications (PEC Directive), and an inequality of privacy regulation in the traditional telecommunication services and Over-The-Top (OTT) services, such as Gmail and Skype, is a present concern.^{7,8} Therefore, a revision of the regulations is now proposed by the European Commission to introduce a more fair and equitable regulation for them.⁹ Both Japan and the EU face a similar problem in regulating enormous companies, whose services originate from outside of their country and regarding the protection of communication privacy. However, despite the similar problem, Japan and the EU have different legal frameworks.

In this article, I will compare current and proposed legal frameworks for communication privacy in Japan and the EU from two perspectives: legal applications to a traditional telecommunication service and an OTT service; and extraterritorial applications. OTT service has a broad definition which can be classified into seven categories by the Organization for Economic Co-operation and Development (OECD): real-time communications; entertainment video services; telework/telepresence; cloud computing; financial services; Internet of Things; and smart homes. This essay concentrates on real-time communication, which includes popular services such as Facebook Messenger.¹⁰ I conclude by stressing the necessity to reinforce Japan's regulations and propose a possible legal amendment.

Regulation in Japan

Regarding privacy-related regulations in Japan, the Act on the Protection of Personal Information (APPI) has scope for privacy's general protection, such as name, address, religion and so on, under Article 2 of the Act on the Protection of Personal Information (Law No. 57) of 2003. In addition, the Telecommunications Business Act specializes in protecting communication contents and traffic data in the telecommunication business in the name of communication privacy within Article 4.¹¹

Confidentiality of communication is applied to communication being handled by a juridical person who operates a telecommunications business. The juridical person falls into mainly two categories. The first category is a telecommunications carrier which has registered a telecommunication business with large facilities under Article 9 or which has filed a notification of a telecommunications business with small facilities under Article 16. This means that it depends on the scale of facilities whether an organization engaging in the telecommunications business should register or file a notification. The telecommunication business is defined as a business providing telecommunications services in order to meet the demands of others under Article 2 (4). The telecommunications service means intermediating the communication of others through the use of telecommunications facilities, or any other acts of providing telecommunications facilities for the use of communication by others under Article 2 (3).ⁱ The second category is an organization which is engaging in a telecommunications business that provides, without installing telecommunications circuit facilities, telecommunications services other than telecommunications services to intermediate communications of users in Article 164. The organization applicable to this category is exempt from other regulations of the act except secrecy of communication, whereas the first category is applicable to all regulations of the act such as consumer protection, safety of telecommunications facilities and reporting obligation of incidents to the authorities.

Examples of service in the first category are providers of a traditional fixed or mobile call service, and some OTT services such as free mail service.¹² In the case of Yahoo Japan Corporation, the company is in this category as a provider of a free mail service. The reason why the category is not applied to Google's Gmail service is that the act regulates an entity which has an operational base in Japan, which Yahoo Japan does, but Google does not.¹³ The OTT service is generally considered as a telecommunications carrier as they are expected to meet the demands of others. As such, in fact, LINE, which has a similar function to Facebook Messenger, is categorized as a telecommunications carrier which is required to comply with the regulation in Japan, whereas Facebook Messenger, with its base outside of Japan, is beyond the scope of regulation in Japan.¹⁴ An example of the second category is an online notice board which intermediates contact just between a provider and users, not between users.¹⁵ This means that the scope of privacy of communication applies not only to the traditional telecommunications operators but also OTT services and broader services, as long as their operational base is established in Japan. The inequality of the regulation between companies in Japan and foreign countries has been previously pointed out, because the services provided by the companies whose operations' base is in foreign countries are not applicable to the regulation of communication privacy.¹⁶

ⁱ The telecommunication means transmitting, relaying or receiving codes, sounds or images by cable or any other electromagnetic form under the article 2 (2).

Regulation in the EU

In the EU, confidentiality of communications is defined in the Charter of Fundamental Rights of the European Union in Article 7 which states that privacy of communication should be respected. Additionally, Article 5 in the PEC Directive also defines confidentiality of communication. The Directive sets the scope of application to publicly available electronic communication services (ECS). This service is defined as one “normally provided for remuneration which consists wholly or mainly in the conveyance of signals on electronic communications networks, including telecommunications services and transmission services in networks used for broadcasting,” with an exception for services controlling editorial contents and information society services which do not involve “wholly or mainly” a transmission of signal.

This means that traditional telecommunications services such as fixed and mobile calls and mobile communication operators are included in the definition of ECS, which is considered to “wholly or mainly” involve conveyance of signals, while the boundary is blurred whether OTT services are included in the definition of it.¹⁷ Actually, the Body of European Regulation for Electronic Communications notes that it depends on the country whether OTT services, especially the Gmail service, are considered to be ECS or not (BEREC, “Report on OTT Services,” p. 21). For instance, the German Court classified the service as a telecommunications service under German law, which has almost the same texts comparable to the ECS, and the regulatory framework in Finland can also include the service into the ECS, whereas in The Netherlands the service is not considered as ECS (BEREC, “Report on OTT Services,” p. 20; Grünwald and Christoph Nüßing¹⁸). This indicates that in the EU there is an inequality in the regulation of communication privacy between incumbent services and newly emerging ones.

There are currently proposals to revise the scope of legal application by extending the definition of the ECS. The term is redefined by merging three types of service’s categories: internet access service; interpersonal communications service, which is itself divided into two sub-categories in terms of whether it is number-based or number-independent; and services consisting wholly or mainly of conveyance of signals.¹⁹ Regulation 2015/2020 of the European Parliament and of the Council defines internet access service as “a publicly available electronic communications service that provides access to the internet, and thereby connectivity to virtually all end points of the internet, irrespective of the network technology and terminal equipment used.” Interpersonal communications service means an interpersonal and interactive exchange of information, covering services such as traditional voice calls between individuals, but also online services as emails, messaging services, or group chats.²⁰ The third category involves services such as transmission services used for machine to machine communications and for broadcasting.²¹ It implies that a part of OTT services can be specially included in the proposed definition of interpersonal communications service which is required to comply with communication privacy.

Furthermore, the proposed regulation suggests that a legal application of territorial scope covers end-users and terminal devices in the EU. The document

reflects the revised personal data law, the GDPR, the legal exercise of which applies not only to the location of processing data but also to the location of users, based on targeting criterion that government can rule activities as far as the businesses target domestic people (see Regulation (EU) 2016/679, Case C-131/12, and the article by Christopher Kuner²²). This extraterritorial application has been allowed since the *Google Spain* case, showing that activities of processing EU's personal data even outside the EU falls under the European regulation.²³ The proposed act also requires a representative of a service in the EU in Article 3.2 and 3.3. Authorities can demand data related to processing electronic communications in Article 3.4. If any infringement of the rule is found, a fine can result, in an amount up to 10 million Euro or up to 2 % of a global annual revenue.

Although the regulation of communication privacy has not worked sufficiently in terms of legal scope of service and territory so far, the proposed regulation will solve the issue. The new idea is also generally supported by major telecommunications' organizations. It is in keeping with opinions expressed by the BEREC and the European Telecommunications Network Operators' Association (ETNO). The European Data Protection Supervisor (EDPS) and the Article 29 Data Protection Working Party have positively evaluated the proposal as well,^{24,25,26} because the proposed regulation will bring a level playing field between traditional electronic communication services and OTT services provided in the EU, irrespective of the location of the processing of data.

Necessity of Revision of Japan's Legislation

The comparison of the problem regarding the regulation on OTT services in terms of the communication privacy between Japan and the EU shows that Japan's regulation framework has a problem of extraterritorial application, whereas the issue in the EU was the scope of regulation of services and territory. Yet, currently the EU is on the way to expand the applicable services and clarify the territorial application.

Many experts point out the necessity of redefinition of territorial application to ensure a level playing field and a consumer protection irrespective of the location of the base of the company (see Kurosakatatsuya; Itakura;²⁷ Ishikawa;²⁸ Takahashi²⁹). A research conducted by the MIC shows that mail takes up 45.3 % of time for use of communication tools, followed by SNS at 30.5 %, mobile calls at 15.5 %, online calls at 4.7 % and fixed calls at 2.6 % in 2016.³⁰ It means that a percentage of emerging communication services such as free mail service, SNS and online call with uncertain application of communication privacy amounts to 91.3 %, whereas the traditional communication such as mobile calls and fixed calls make up 8.7 %, which is fully regulated. Especially among SNS, 67.0 % of people in Japan use LINE, followed by 32.3 % for Facebook, 27.5 % for Twitter, 26.3 % for Google+, 6.8 % for mixi, 5.6 % for Mobage and 3.5 % for GREE.ⁱⁱ The data shows that more than one-third of people in Japan use an SNS whose operational base

ⁱⁱ LINE, mixi, Mobage and GREE are registered as a telecommunication service operators in Japan.

is in countries outside of Japan, and which thus are not covered by national regulations. Additionally, the percentage of people who feel anxious about disclosure of personal data, communication contents and traffic data amounts to 87.8 % in 2016.³¹ This research indicates that new communication services, including those not wholly regulated, are widely utilized in Japan, and that there is a demand to enhance the protection of personal data.

Proposal for Japan's Telecommunication Policy

A question here is how Japan can revise its legislation to strengthen protection of communication privacy, especially for services provided by companies in foreign countries, and to ensure equally fair business conditions for both Japanese companies and foreign ones. It would be ideal that OTT services provided by foreign countries' companies, and with the same functions as Japanese companies, are added to the first category which is applicable to all regulations set by the Telecommunication Business Act. However, as Fuke points out, it would not be practical to apply these regulations to foreign countries' entities which have originated from different regulatory frameworks, and the number of services are countless as there are totally more than 1.5 billion websites in the world.ⁱⁱⁱ In fact, the EU system is also criticized because representative requirement in the previous Directive of the GDPR has not been in reality enforced and it is irrational to expect it to cover all of countless services (see Directive 95/46/EC; Christopher Kuner). Thus, a possible measure in Japan is that services originating from foreign companies are added to, at least, the second category in the Telecommunication Business Act, to which only communication privacy is applied.

Although generally national legislations are considered to take effect domestically, there are some examples of extraterritorial application. The APPI was revised alongside a rise in awareness of the necessity to protect personal data in Japan harvested by services provided by foreign organizations.³² In the past, the act was applied only to companies whose base was located in Japan. However, after a revision of the law in 2015, it has an extraterritorial reach as far as the service itself is offered to aim at Japan's market irrespective of the location of operational bases. It is considered to be based on the targeting criterion as it is reflected in the GDPR as well.^{33,34,28} If it is found that a foreign entity violates the APPI, the Personal Information Protection Committee can order the company to comply with the legislation, and cooperate with foreign authorities. In contrast to the case of the EU, there are no obligation such as setting a base in Japan and legal measures to accomplish the order, which makes the Japanese law appear weak in terms of enforcement. However, this is a necessary result of balancing the benefit of protection of personal data and a respect for the sovereignty of other nations.^{iv} Although this is not a perfect answer to the issue of equal footing,

ⁱⁱⁱ Fuke Hindori, p. 71; "Total number of websites," Internet live stats, accessed March 24, 2021, <http://www.internetlivestats.com/total-number-of-websites/>.

^{iv} House of Councilors in the National Diet of Japan, Secondary Source 33.

it is a realistic measure, and a first step to reinforce protection of personal data while taking into consideration consistency between a general privacy regulation and communication privacy regulation.

Conclusions

This article examined the applicable legal scope of service and territory in communication privacy of telecommunication service in Japan and the EU. Both the Japanese and EU frameworks face similar regulatory challenges, including how to ensure a level playing field between incumbent services and emerging ones, and how to protect communication privacy even in OTT services. A difference in current legislations is that Japan's regulatory framework struggles with the issue of extraterritorial application, whereas the issue in the EU is the regulatory scope of services and territory. The EU has proposed a revision of the law to address this concern, whereas Japan has not taken any measures to address the issue, despite an increase in the number of people utilizing OTT services and a demand for ensuring protection of online privacy. A possible measure is to legally cover services originating from foreign companies within at least the second service's category in the Telecommunication Business Act, which requires to comply with communication privacy. This is a feasible way to address the issue, because it is not practical to impose every regulation to services originating from foreign countries. Although a domestic law is generally enforceable only within a nation, there is an example in the APPI to apply rules even to foreign countries' entities, which should be taken into the Telecommunication Business Act.

Further studies are needed because regulating communication privacy matters influences not only the applicable scope of service and territorial matters, but also obligations such as how to process personal data, limitation of transmission to the third party, storage, consent enforcement and so on. The appropriate steps to ensure an equal footing between Japan's entities and foreign ones also remains a subject of concern. As Tagawa points out, telecommunication services are provided internationally, so an international regulation for ensuring a level playing field will be also worth examining.³⁵ Although there are many other aspects to consider regarding communication privacy regulation and territorial application, the measures I outlined here would certainly improve the current situation regarding communication privacy and regulation.

Disclaimer

The analyses, opinions and findings in this article represent the views of the author and should not be interpreted as an official position of the author's institutions or affiliations, including the Government of Japan.

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