



Regulations on Cookies under the Amended Telecommunications Business Act

June 16, 2023

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I. Introduction

Telecommunications technologies are all around us. We find them in our emails, SNS's and video-sharing platforms. The more ubiquitous they become, however, the more of a tempting target they pose for thieving schemers. True enough, we are witnessing a growing trend in the rise of leakages of secrets, improper handling of information with respect to the users of telecommunications services (“Users”) and other types of incidents involving telecommunications, which trend seems to be accelerated by more complex and sneakier cyberattacks and/or changes in legal regulations in some foreign countries. Online processing of Users’ information, which has now become an essential part of telecommunications services, is probably the most fundamental factor in those incidents, and, because of the online-dependent nature of telecommunications services, the affected Users are likely to sustain irreparable damages as a result of leakage or unauthorized use of their information.

With the foregoing as a backdrop, in Japan, the amended Telecommunications Business Act (the “**Amended TBA**”) became law on June 16, 2023. This article comments on selected amendments included in the Amended TBA which are likely to have practical relevance to the readers, including (i) the expansion of the scope of Telecommunications Carriers (as defined in the Amended TBA), (ii) the handling of Specified User Information (as defined in the Amended TBA), and (iii) the regulations on outward-bound transmission of Users’ information, often referred to as “cookies restrictions” (the “**Outward Transmission Regulations**”). Importantly, among these three topics, the Outward Transmission Regulations, which apply not only to Telecommunications Carriers but also to businesses not registered with the government as Telecommunications Carriers, may be relevant to quite a few businesses and potentially require that they take necessary steps to meet the applicable requirements.

II. Expansion of Regulated Telecommunications Carriers

Under the Amended TBA, businesses should register with the government to operate a telecommunications business. Once registered, they are now treated as “Telecommunications Carriers” (each, a “**Carrier**”) and are subject to regulations under the Amended TBA. On the other hand, certain types of telecommunication services (including the so-called “**Item 3 Services**”¹) can be operated even by non-Carrier businesses,

¹ Amended TBA, Art. 164(1)(iii).

which will then be subject only to limited sections of the Amended TBA.

Although online search engines and SNS's are generally considered to fall within the category of Item 3 Services, under the Amended TBA, businesses that provide either "Telecommunications Services for Searching Information" or "Telecommunication Services for Intermediation" (each as defined in the Amended TBA) are now required to register as Carriers, subject to a designation by the Minister of Internal Affairs and Communication (the "**Minister**").

According to the Ministry of Internal Affairs and Communications ("**MIC**")²:

- (i) The Telecommunications Services for Searching Information refer to services providing Users with information indicating the intended websites' locations (e.g., domain names) in response to the information entered by the User searching for such websites, as long as such services (a) are used by an extremely large number of Users, and (b) are not uniquely designed for any specialized field (like search engines embedded in a website that are used to search for goods and/or pages within the website). For example, any services that offer a search engine designed to search all websites would fall within this category, depending on the number of Users (or, more specifically, in cases where the monthly average number of its active users in the previous fiscal year was 10,000,000 or more; the Ordinance for Enforcement of the Telecommunications Business Act (the "**Ordinance**"), Art. 59-3(4)); and
- (ii) The Telecommunications Services for Intermediation refer to services designed primarily for intermediate interactions between unspecified Users, as long as the monthly average number of active users of such services in the previous fiscal year was 10,000,000 or more (Ordinance, Art. 59-3(5)). For example, SNS's, message boards or video-sharing platforms that require Users to create their own account to upload information would fall within this category, depending on the number of Users.

It is likely that only a few services offered on a mass scale would fall within the above-mentioned two categories, but in order to provide any such services a business must first register as a Carrier following which it will be subject to the applicable requirements under the Amended TBA.

III. Handling of Specified User Information

Under the Amended TBA, a Carrier that provides Telecommunications Services (as defined in the Amended TBA) must properly handle Specified User Information ("**SUI**") if it is designated as a Carrier obligated to do so ("**Designated Carriers**") by the Minister, as long as the monthly average number of active users of such services in the previous fiscal year was 10,000,000 or more in cases where such services are provided

² *Manual for Starting Telecommunications Services (Updated Edition)*, page 4 and *Guidebook: Manual for Starting Telecommunications Services (Updated Edition)* (both issued by MIC, Jan. 30, 2023).

free of charge, or 5,000,000 or more in the case of charged services.^{3,4}

SUI includes information to which secrecy of correspondence is applicable, or information that enables identification of a specific User (including a person who signed for or has created his/her own account to use any telecommunications service), being part of a database or other similar searching devices. The most typical example of SUI is personal information, but it also includes account IDs, passwords and the date, time or location of a specific telecommunications event. It may be worth remembering that, even if any such information is removed from a certain set of information, the remaining part could still be considered to constitute SUI as long as it can be used to identify any User. Moreover, information that, in and of itself, does not enable identification of Users, such as IDs or IP addresses stored in cookies, might still be considered to constitute SUI if such information allows identification of any User when used in combination with other available information.⁵

Designated Carriers are required to:

- (i) develop and submit to the government their internal regulations with respect to handling of information (“**Information Handling Regulations,**” or “**IHR**”);
- (ii) develop and make publicly available their information handling policy (“**IHP**”);
- (iii) review the status of information handling; and
- (iv) assign and notify the government of the person responsible for the management of SUI (“**SUI Manager**”).

The most noteworthy of the four sets of these requirements appears to be that identified in (ii), the development and publication of the IHP. Accordingly, the IHP (a) must specify the details of SUI to be collected, as well as the purpose and method of the use of SUI, and (b) must be published online within 3 months after designation of the Carrier as a Designated Carrier by the Minister.⁶ If there is any privacy policy already issued that adequately covers the matters required to be stated in the IHP (including cases where such matters are added to the original privacy policy), such privacy policy can be treated as IHP. However, even in such a case, matters concerning SUI must be indicated in the manner making them readily distinguishable, for example, by utilizing illustration or images, or by displaying a list of relevant items in an “accordion” style, which allows each such item to be expanded to display more detailed information by clicking on it, rather than displaying all statements as they are, so as to display on the screen only the essential part in relation to the Users.⁷ In addition, businesses intending to collect both personal information and SUI (which does not contain personal information) would be well advised to consider

³ Amended TBA, Art. 27-5 to 27-11

⁴ *Commentary on the Guidelines Regarding Protection of Personal Information in Telecommunications Business* (Personal Information Protection Commission, MIC; May 18, 2023; the “**Commentary**”), Section 6-1-3-1. Services that are free of charge but offer any optional payment plan to receive additional services are considered to be services free of charge.

⁵ *Commentary*, Section 6-1-2.

⁶ Amended TBA, Art. 27-6(1); Ordinance, Art. 22-2-23.

⁷ *Commentary*, Section 6-2-2.

separately stating matters concerning each type of such information in the IHP.

In contrast, the Information Handling Regulations must include matters concerning (a) security management, (b) monitoring of subcontractors, (c) development and publication of the IHP, (d) review of information handling status, and (e) monitoring of operators, and must be submitted to the government within 3 months from the day on which the Carrier is designated as Designated Carrier by the Minister.⁸ Businesses having any existing internal regulations that include matters (a) to (e) above are allowed to submit such internal regulations as their IHR by omitting or blacking out the irrelevant part.⁹

With regard to (iii), the review of the status of information handling must at the very least cover compliance with both the IHR and the IHP and the existence of any leakage of SUI during the most recent fiscal year.¹⁰ The IHR and/or the IHP should be modified as required in accordance with the results of the conducted review, and if the IHR has been modified, the implemented modification must be notified to the Minister, while any modification to the IHP is required to be made public without delay.

Lastly, Designated Carriers must assign the SUI Manager, whose duty is to manage operations relating to the matters covered under (a) to (e) above, within 3 months after designation of the Carrier as Designated Carrier by the Minister, and must notify the government of the assigned SUI Manager without delay. The SUI Manager should be a person who “holds a management position that participates in the process of making important decisions with respect to management” (in other words, a person who is responsible for and authorized to supervise the handling of SUI at the management level in a thorough, cross-sectional manner¹¹) and has practical experience in handling information associated with the Users¹² (Amended TBA, Art. 27-10). It is generally understood that a person holding a position with responsibility for information security (e.g., as the CIO (Chief Information Officer) or CISO (Chief Information Security Officer)) can also be appointed as the SUI Manager, provided that such person meets all requirements for the SUI Manager and the duties required to be performed by the SUI Manager are fully assigned to such person.

In the event of leakage of SUI that (a) involves information of 1,000 or more Users, or (b) leads to transfer of the leaked information to a foreign country’s government in accordance with such country’s regulatory system that is likely to affect proper handling of SUI (e.g., a regulatory system that authorizes the government to collect certain information from telecommunications service providers), the details of such leakage, including its date, time, location, outline and cause, must be promptly reported to the Minister in

⁸ Ordinance, Art. 22-2-22; *Guidelines Regarding Protection of Personal Information in Telecommunications Business* (Personal Information Protection Commission, MIC; May 18, 2023), Section 45.

⁹ Commentary, Sections 6-1-4 and 6-1-5.

¹⁰ Commentary, Section 6-3-2.

¹¹ Commentary, Section 6-4-2.

¹² Ordinance, Art. 22-2-25.

writing.¹³

Although only a few businesses providing mass-scale telecommunications services are expected to be designated as Designated Carriers, it may be worth remembering that, once so designated, taking a quick action especially in connection with requirements (i), (ii) and (iv) above would be well advised because, as described above, some of the required steps must be taken within 3 months from the date of designation.

IV. Outward Transmission Regulations

Under the Amended TBA, Carriers or businesses that offer Item 3 Services and provide any “Telecommunications Services that might considerably affect the interest of users” must notify or otherwise make certain matters readily accessible to Users when they transmit certain information stored in the Users’ devices, such as computers or smartphones, to other telecommunications equipment (e.g., web servers) owned by persons or entities other than the User involved during the course of the provision of such services (Amended TBA, Art. 27-12).

1. Scope of Application

The above-mentioned “Telecommunications Services that might considerably affect the interest of users” include^{14,15}:

- (i) Intermediation of messages between Users;
- (ii) SNS’s, message boards, video-sharing services and online shopping malls (meaning an online platforms that allow users to shop online at multiple shops or to purchase goods online from multiple sellers);
- (iii) Online search engines; and
- (iv) Online services that distribute the news, weather information, video clips, maps or other information.

Naturally, activities outside the scope of the telecommunications business under the Amended TBA, such as the use of a website by a company for the purpose of promoting or advertising its goods and/or services or raising its profile, online distribution of goods, distribution of email-based magazines or mere lease of telecommunications equipment (e.g., mobile routers) without any additional services, are not subject to the Outward Transmission Regulations.

Referring to the Outward Transmission Regulations as “cookies regulations” under the Amended TBA may be misleading as they do not only regulate cookies. Indeed, the scope of information subject to the Outward Transmission Regulations includes a broader range of information stored in Users’ terminal devices, such as identification codes (e.g., IDs embedded in cookies or associated with advertisement), the trail of Users’

¹³ Amended TBA, Art. 28(1)(ii)(b); Ordinance, Arts. 57 and 58.

¹⁴ Ordinance, 22-2-27.

¹⁵ *FAQ: Outward-Bound Transmission Regulations* (the “FAQ”), Q1-8.

online activities (e.g., the URL of the webpages visited by the User), Users' names, and contact details of persons or entities other than the Users.¹⁶

On the other hand, certain categories of information, such as IDs embedded in the so-called "first-party cookies" or information required to be transmitted to make the telecommunications service in question available (e.g., OS-related information required to properly output characters, video clips or music onto the User's device, information relating to the screen settings, preferred language or the web browser used, or information required for the purpose of security or load balancing across servers), are excluded from the scope of information regulated by the Outward Transmission Regulations.¹⁷

Furthermore, unlike the regulations described in Part II and III of this article, which only regulate businesses providing mass-scale telecommunications services, the Outward Transmission Regulations do not take into account the number of active users of the offered service when determining whether such service falls within the category of "Telecommunication Services that might considerably affect the interest of users," and therefore are likely to affect a much broader range of businesses.

2. Required Measures

Under the Outward Transmission Regulations, businesses offering "Telecommunications Services that might considerably affect the interest of users" must notify their Users of, or otherwise make readily accessible to them (a) the description of the information to be transmitted, (b) the identity of the entity/entities to which such information is to be transmitted, and (c) the intended use of such information (collectively, the "**Details**") (Ordinance, Art. 22-9-29).

The notification of the Details must be made in a timely manner (e.g., in the manner often referred to as "just-in-time notice" in the field of online privacy management), for example, by displaying a pop-up or other similar form of notice. When otherwise making the Details readily available in connection with website-based services, the Details must be displayed on the webpage from which the User's information is transmitted or other webpages that are easily reachable from such webpage. In the case of application-based services, the Details must be displayed on the first screen shown to the Users when they use the offered application or other screens that are readily reachable from such screen. It is also required that the message be provided in plain, commonly understandable text without using technical terms or foreign languages, and that an appropriate font size be selected so that the Users are not forced to expand or reduce the size of the displayed window.¹⁸

In this regard, the Details can be considered to have been made readily available if a cookies policy containing the Details is developed and made available on the webpage that can be easily reached, for

¹⁶ FAQ, Q1-14 and 4-1.

¹⁷ Ordinance, Art. 22-2-30

¹⁸ Ordinance, Art. 22-2-28

example, by a single click, from the webpage transmitting the Users' information. In such a case, it is recommended by MIC that businesses clearly state in the title or headlines of their cookies policy that it includes the Details, and make it possible for the Users to view the Details all at once (i.e., without requiring them to check several different parts of the cookies policy).¹⁹

3. Exclusions

The Outward Transmission Regulations are not concerned with outward-bound transmission processes with respect to which each individual User's consent has been obtained or opt-out options are being properly offered (Amended TBA, Art. 27-12).

According to MIC,²⁰ each User's consent must be obtained in a concrete and voluntary manner, and businesses must avoid using any improper way to obtain Users' "voluntary" consent, for example, by adopting the so-called "default-on" style, in which checkboxes are already checked. MIC also recommends that the Users be informed without fail of the Details in the manner described in section 2. *Required Measures* above before they make their decision.²¹

With regard to the opt-out options, the following matters should be made readily accessible to Users,²² preferably in the same manner as described in section 2. *Required Measures* above²³:

- (i) Available opt-out options;
- (ii) Whether the offered opt-out options disable transmission or use of the intended information;
- (iii) How each User's opt-out preference can be reflected (e.g., by clicking or tapping on a button, filling out a prescribed form included in a website, using a dashboard or following a link²⁴);
- (iv) Whether and how the availability of the offered service could potentially be restricted when an opt-out is selected; and
- (v) Details of the user-related information to be transmitted
- (vi) Name of the recipient of such information; and
- (vii) Intended use of such information.

V. Closing Note

Unlike the regulations under the Act on the Protection of Personal Information as amended in 2022 ("APPI"), which were also sometimes referred to as "cookie restrictions" but did not particularly require the development of any cookie policies or introduction of pop-up messages asking for Users' consent to the use of cookies,²⁵ the regulations under the Amended TBA require certain businesses to implement such

¹⁹ Commentary, Sections 7-2-1 and 7-2-3(1)

²⁰ Commentary, Section 7-4-2-2.

²¹ Commentary, Section 7-4-2-1.

²² Ordinance, Art. 22-2-31.

²³ FAQ, Q5-2.

²⁴ FAQ, Q5-3.

²⁵ More details available on: https://www.clo.jp/english/wp-content/uploads/2022/11/Lexology_Article_CLO_Sep2022_E.pdf.

particular steps. Businesses which decided not to make any particular adjustment in the wake of the amended APPI in 2022 may want to reconsider whether any steps to comply with the Amended TBA should be taken, because, at this time, there is a real chance of being subject to the regulations on cookies described in this article.

The potential impact of the new regulations under the Amended TBA goes far beyond the regulations on cookies. Indeed, the expanded scope of Carriers and the requirements with respect to proper handling of SUI apply only to a limited number of companies, but a deeper understanding of such requirements should help most businesses, especially when they expand their business fields or operations in the future.

Lastly, the reader may wish to keep abreast of the latest developments and insights pertaining the Amended TBA, which are expected to be published in the coming few years and are likely to include detailed explanation of the difference and overlap between SUI and other similar concepts specified in the APPI (i.e., Personal Information and Personally Referable Information).²⁶

²⁶ *Results of Opinion Poll Regarding Draft Report Issued by Working Group on Proper Handling of Specified User Information* (MIC, September 12, 2022), Insights Regarding Opinion 2-10.