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BUSINESS/LAW WEBINAR

DEVELOPMENTS IN KOREAN PLATFORM COMPETITION AND REGULATION



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Perspectives on online platform laws

1 *EX ante* regulation v. *ex post* enforcement

- Multiple Paths for **Preemptive Antitrust**
- Sectoral regulation model v. (extended) Traditional competition law model

EU DMA

GWB19a

- What legal obligations designation would entail?
 - ✓ Periodic comprehensive compliance report
 - ✓ Automatic prohibition of the illustrated behaviors under the law

1. Dominant position vs. Gatekeeper

- ◆ Dominant position in a relevant market
vs. Gatekeeper for an economy with cross-market impact
- ◆ What is behind the concerns about Big Tech? Justifications
necessary to justify sacrifice of efficiency
 - Probably something more than just market concentration
 - Reclaiming Digital sovereignty
 - New Brandeis School : economic, political and social reasons

Legislative Approach: Comprehensive vs. Specific Prohibition

- Current provisions applicable to online platforms under the MRFTA: multiple layers
 - ✓ Abuse of market dominance and/or unfair trade practices
 - ✓ KFTC's Review Guidelines: Abuse of Dominance, Unfair Trade Practices and Special Guidelines for Online Platforms
- Current legislative approach
 - **MRFTA**
 - Abuse of market dominance: 5 specific conduct categories
 - Unfair trade practices: 9 specific conduct categories + 1 catch-all provision
 - **Enforcement Decree (abuse of dominance)**
 - 3 conduct categories (predatory pricing, output limitation, and exclusionary conduct): specific prohibition only
 - 2 conduct categories (undue interference with others' business activities and undue interference with new entrants): specific prohibition + general provision supplemented by KFTC's Review Guidelines
 - **KFTC's Review Guidelines for the 2 conduct categories (abuse of dominance)**
 - Lists up 4 specific conduct categories for each of the 2 conducts
 - 4th conduct category seems like a catch-all provision but is limited to specific conduct categories 6 and 4
 - **KFTC's Online Platform Guidelines**
 - 6 service sectors and 4 specific conduct categories
 - 4 conduct categories (restriction on multi-homing, forcing MFN, self-preferencing, and tying) fall under one of the existing 5 conduct categories
- Proposed amendment by the KFTC
 - ✓ A special rule for abuse of dominance: Abuse of dominance and unfair trade practices may still be applicable
 - ✓ Target areas and prohibited conducts remain the same as in the current online platform guidelines
 - ✓ Is a new legislative structure needed to prohibit conduct specifically for online platforms?

- Q#1: Policy priorities in Korea

- Pervasiveness of platforms → many important policy areas
- “Hot” issue: “gapjil”-related grievances
 - Civic group survey on online platform: Most complaints relate to online platforms’ treatment of business users (e.g., delivery platform) → focused on unfair trade practices (“gapjil”)
 - Large % of self-employed in Korea (restaurant business)
 - Concerns commission rates, MFN clause
 - Existing laws (unfair trade practices) have been used to address these issues but frictions continue
 - KFTC currently involved in collective negotiation process
- Important for long-term economic development and competition:
 - Protecting reasonable access to key platform services and technologies
 - Scrutiny necessary on exclusive dealing agreements, blocking reasonable request for access
 - Interoperability measures

- Q#2: Any conduct not covered by KFTC's proposal?
 - These categories may be broadly interpreted to include wide range of conduct
 - Unclear if list is exhaustive or there could be more (KFTC press release says "etc.")
 - In line with response to Q#5 (importance of protecting access) further discussion needed on:
 - Refusal to deal
 - Exclusive agreements

Perspectives on online platform laws

2 Intersection of Antitrust and Privacy Regulations

- KFTC's proposed online platform bill v. EU DMA/DMCC/GWB19a
- Limits of Antitrust ?
- *Ex post enforcement* on privacy practices (exploitative/exclusionary)

Ex-ante regulation and burden of proof

- *Ex-ante* designation does not always shift the burden of proof
 - *Ex-ante* designation of gatekeepers under the EU Digital Markets Act (DMA)
 - **Presumption of gatekeepers:** Quantitative threshold (CPS provider, annual turnover, active users) and qualitative threshold (EC's market investigation)
 - **Rebuttal:** Qualitative (despite meeting all quantitative thresholds, a platform should not be designated as a gatekeeper due to exceptional circumstances) but the EC may still designate a platform after a qualitative market investigation
 - *Ex-ante* designation of Strategic Market Status (SMS) under the UK Digital Markets, Competition and Consumers Act (DMCC)
 - Qualitative (digital activity linked to the UK, substantial and entrenched market power, and a position of strategic significance) and quantitative (minimum turnover threshold)
 - **Rebuttal:** qualitative
 - *Ex-post* presumption of super dominance under the KFTC's proposed amendment of the MRFTA
 - Similar to the current presumption of dominance, but with different quantitative threshold
 - Quantitative (minimum turnover threshold, number of users) and qualitative (define the relevant market and assess the market share)
 - **Rebuttal:** Qualitative
- Burden of proof for anti-competitive effects
 - **EU DMA's *ex-ante* designation of prohibited conducts:** Shifts the burden by requiring compliance reporting from designated gatekeepers
 - **UK DMCC:** DMU will develop codes of conduct, a firm specific prohibition (no burden shifting) but platform operators may argue for the countervailing benefits exemption
 - **4 conduct categories under the KFTC's proposed amendment of the MRFTA:** Burden of proof should be on the KFTC and platform operators will be given the opportunity to rebut

2. *Ex-ante* regulation by a Competition Authority

- ◆ Competition regulation vs. Industry regulation
 - Competition authorities vs. Sector-specific regulators
- ◆ Identity of KFTC is not a pure competition authority
 - KFTC has a wide range of mandates & tools, already including *ex-ante* regulations - different from other authorities in the world
 - *Ex-ante* regulation of digital platforms will require more expertise than existing characteristics as an *ex-ante* regulator