

The Future of Mobile Ecosystems: Enabling a Choice for Market Players & Customers in Korea.

KOREA CHAPTER



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The Future of Mobile Ecosystems:
Enabling a Choice for Market Players & Consumers in Korea

CPI Live

Participants:

- Hwang LEE** | KOREA UNIVERSITY SCHOOL OF LAW (SEOUL)
- Jinyul JU** | PUSAN NATIONAL UNIVERSITY (BUSAN)
- Yong LIM** | SEOUL NATIONAL UNIVERSITY AI POLICY INITIATIVE (SEOUL)
- Haksoo KO** | SEOUL NATIONAL UNIVERSITY (SEOUL)
- Kyung SIN PARK** | OPEN NET KOREA (SEOUL)

Growth has occurred since then in all fields,
both hardware and software.

Background Note:

- Abuse of superior bargaining position (ASBP) concerns situations where a party makes use of its superior bargaining position relative to another party with whom it maintains a continuous business relationship to take any act such as to unjustly, in light of normal business practices, cause the other party to provide money, service or other economic benefits¹.

Participants:



Yong Lim | Co-Director, Seoul National University AI Policy Initiative



Kyung Sin Park | Founder & Executive Director, Open Net Korea



Jinyul Ju | Professor, Pusan National University, Korea



Haksoo Ko | Director of Antitrust & Innovation Policy, Information Technology and Innovation Foundation (ITIF) Professor of law, Free University Brussels (VUB)

Moderator:



Hwang Lee | Professor, Korea University School of Law

¹ Available at https://www.ftc.gov/system/files/documents/public_comments/2018/08/ftc-2018-0054-d-0007-151038.pdf

Panel Summary

Korea, with its three decades of competition experience and vibrant and robust technology industry, is ahead of many of its western counterparts in digital regulation. The Panel discussed certain important issues in respect of app markets in particular and mobile ecosystem in general, use of ‘Abuse of superior bargaining position’ provisions (“ASBP”) and certain key concerns regarding different approaches to policy making viz. focus on consumers versus focus on businesses, closed system versus open system, stringent regulation versus collaborative regulation.

The Panel was moderated by **Hwang Lee** (Korea University School of Law) who noted the widespread use of ASBP in the Korean context and its increasing international appeal. Korea has been a frequent user ASBP as highlighted by **Yong Lim** (Seoul National University AI Policy Initiative), who went onto discuss the features, merits and demerits of the use of ASBP. Hwang Lee underscored the need to balance data protection concerns with innovation in the mobile ecosystem and acknowledged the blurring distinction between mobile ecosystem and digital platforms and the need to harmonize their regulation.

Prof. Jinyul Ju (Pusan National University) laid out the contours of the Korean app market that is very robust and characterized by technological innovations and thriving competition. He hinted how Google may now, given the economic incentives, veer towards a closed system, which architecturally is more impervious to regulatory scrutiny as suggested by Prof. Haksoo Ko (Seoul National University).

On the issue of intermediary liability, **Prof. Kyung Sin Park** (Open Net Korea) suggested that how the issues around intermediary liability get resolved will have a greater bearing on the consumers in comparison to the outcomes of the dominance issues. This is so because consumers will be more interested in content related issues of a platform and the outcome of the intermediary liability debate will determine how much countervailing power consumers yield vis a vis the tech platforms.

Key Talking Points | Yong Lim

1. Abuse of Superior Bargaining Position (“ASBP”):

Korean ASBP provisions (inspired by Section 5 of the US FTC Act) are strictly enforced and may entail administrative fines and / or criminal sanctions. Notably, in 2019, 17% of all decisions by the Korean competition authority

concerned ASBP and 25% of the Monopoly Regulation and Fair Trade Act related complaints related to ASBP violations.

2. Salient Features of the Korean ASBP provisions:

Superiority Requirement: There is a requirement of superiority in a specific transactional relationship and not market-wide dominance. This is often assessed in terms of dependency by one party on the other; and **Unfairness Standard:** Unfairness Standard, which is broader than the traditional effects based anti-competitiveness standard.

3. Advantages of ASBP:

These features allow KFTC to pursue conducts that might have escaped the net conventional competition law. In context of digital markets, ASBP allows for targeted interim intervention, that may not have been supported by the existing liability theories. ASBP are globally emerging as an important regulatory tool in context of digital markets. Use of ASBP can possibly obviate the adoption of ex ante rules and allow for deliberate and measured approach.



Yong Lim Co-Director, Seoul National University AI Policy Initiative

4. Criticism of ASBP:

Legal subjectivity: injects uncertainty and arbitrariness into the legal system via amorphous concepts of fairness and allows an easy roundabout for regulators who are less confident about properly defining relevant markets and proving anti-competitive effects.

Subsumes party autonomy and freedom to contract: the ASBP approach clashes with private law and the freedom of bargaining, which should be left to the parties and market mechanisms.

5. Caution while Using ASBP:

ASBP impacts monopoly power: ASBP can function as a tool to regulate exploitative conduct vis-a-vis counterparties, which in some cases can indirectly restrain the exercise of monopoly power – whether that be in terms of pricing or other form of rents.

ASBP can clash with competition law: ASBP regulation, based on notions of fairness, may end up condemning pro-competitive conduct or conduct that is ambiguous and would have survived condemnation under conventional competition law. Caution needs to be exercised when balancing pro consumer and anti-counterparty conduct.

6. On Regulatory Intervention in Digital Markets:

Open and closed markets are not opposite poles but a question of degree. Given that overregulation of a fast changing market may kill innovation or harm competition, it's worth looking into utilizing consent decrees and trying to be more forward-looking in terms of regulating or intervening into the market.

“...it's very important that companies be allowed to compete. That means to counter, match and react to changing consumer preferences and competitive threats...” - Yong Lim

Key Talking Points | Prof. Jinyul Ju

1. Overview of the Korean App Market:

Robust competition amongst app stores and apps: Google Play has the largest market share, followed by Onestore (an app store market created through the coalition of Korean major mobile communication providers). There are Korean blockchain backed apps as well that are likely to witness explosive growth in coming years. Google and Apple are planning transition to the next level of developing blockchain-based apps and the two giants will probably have to join the competition.

Issue of In app payment fees: Many app developers reported Google (with in-app payment fee of 30%) to the Korean Fair Trade Commission for violating Korean competition laws, citing abuse of market dominance, and unfair trade practice. Notably, they did not report: (a) Apple as Apple had already announced reduction of in-app payment fee from 30% to 15%; or (b) Onestore that was charging in-app payment fee at 30% till 2018 and then slashed it to 20% (that spurred growth

of Onestore). The foregoing facts allude to the fact that in-app payment fee practice is a pricing issue and not a competition concern.



Jinyul Ju Professor, Pusan National University, Korea

2. On Open and Closed Systems:

Google began with an open system as building a closed system would have been hard to build and a hard sell. A closed system enhances profitability. Hence, Google is now incentivised to move to a closed system.

“..Many in Korea assert that the Korean Fair Trade Act, Korea's own competition law, must be applied to in-app payment fee practice. However, as you can see in the case of Onestore, this is purely a matter of company pricing policy issues. I find it a stretch to apply antitrust issues here..”

Prof. Jinyul Ju

Key Talking Points | Prof. Haksoo Ko

1. On Personal Data and Competition Concerns:

My Data Scheme & Basic Law of Data: Korea has introduced My Data Scheme (likely to take effect from February 2021) that gives a lot of control to the data subjects. There is also proposal regarding the Basic Law on Data.

Use of Pseudonymised Data: Korea amended data protection law in August 2020 and introduced the concept of pseudonymized data, paving way for more extensive use of pseudonymised data alone or in conjunction with other data sets.

Policy choices for data laws: There are two ways to look at any data protection law, i.e. to give control and primacy to the data subject or the businesses. Going forward, it is likely that personal data store type services may emerge and will form key part of the mobile ecosystem and this incentivises the platforms to compete for market share in the app store market.

2. On Closed and Open Systems:

A player that controls an app store ecosystem, can possibly collect all different sorts of types of granular information about users, as well as about service providers. The processes and analytics of a closed system are almost impervious to outsiders, which is not the case with an open system, thus lending an open system to greater scrutiny.



Haksoo Ko Professor of Law & Director, Center for Law and Economic Studies, Seoul National University

3. On Platform's Role as an Intermediary:

A platform could possibly pursue two different paths:

- (i) To serve the service provider / platform itself (this could be challenged on grounds of self preferencing and other data protection grounds); or
- (ii) To serve as an intermediary alone that collects data as and when required for operational purposes (this could be challenging if service provider choose to encrypt all information from end to end).

4. On Role of Competition Law on Data or Algorithm:

Several regulatory authorities are competing to regulate the challenges posed by the increased use of algorithms / AI, which this may lead to fragmented or sub optimal regulation. The jury is still out on this point.

“ ..there will be so much competition on a different dimension among the regulators to take part in this new horizon, in this new paradigm, and become a dominant regulator, or at least become an active regulator on a certain aspect related an algorithm.. ” **Prof. Haksoo Ko**

Key Talking Points | Prof. Kyung Sin Park

1. On Difficulty of Applying Antitrust Law to Digital Economy:

- (i) New markets in digital economy don't lend themselves easily to relevant market paradigms
- (ii) Competition constraints are exercised from across borders in digital economy
- (iii) Korean regulatory overlap in digital space: In Korea, the telecommunication regulator and the antitrust regulator are constantly vying for jurisdiction over legal challenges arising from digital economy. This is sometimes resulting in suboptimal outcomes.



Kyung Sin Park Founder & Executive Director, Open Net Korea

2. Korean Competition Trends:

While Korea keenly watches the developments in the US and the EU, Korea is also ahead of the curve in its regulations (such as having administrative content regulation and mandatory notice and take down way before the western counterparts) on account of having a thriving digital economy and an active competition authority with longstanding experience.

3. On Intermediary Liability:

Notice and take down provisions, in a way, dilute the

blanket safe harbour for intermediary liability. From consumer point of view, the issue of intermediate liability safe harbour is more important than competition related regulation on platforms as it relates to their countervailing power with respect to the platforms. If consumers are dealing with just one or two platforms, they are likely to focus on the harmful practices of such platforms (such as illegal activities / harmful content, etc.) instead of harping on dominance issues.

“ .. consumers have less to complain with the dominance of one or two platforms, than they complain with the specific harmful content, or a specific illegal activity taking place on platforms...”

Prof. Kyung Sin Park

SPEAKERS



Hwang LEE

Hwang LEE is a professor at the Korea University School of Law since 2008, the current Dean of the School of Interdisciplinary Studies, and the current President of the Korea Competition Law Association. His academic interest covers competition laws, intellectual property rights, telecommunication laws, consumer protection, and economic regulations.



Yong Lim

Yong Lim is an Associate Professor at Seoul National University, School of Law. He is also the Co-Director of the SNU AI Policy Initiative at SNU's Center for Law and Economics. His areas of specialty include antitrust & competition, consumer protection, and information technology law. Yong graduated from Seoul National University, College of Law, and obtained his S.J.D. at Harvard Law School (*The Rules of the Game in a New World: Antitrust and the New Frontier of Digitized Personal Information*). Prior to joining academia, Yong practiced law at Kim & Chang in Seoul, Korea.



Kyung Sin Park

Kyung-Sin Park is a professor of law at the Korea University School of Law and is also one of the founders of Open Net Korea.



Jinyul Ju

Jinyul JU is a professor of law at Pusan National University School of Law in South Korea. He has provided legal advice to governmental as well as private entities, and written more than 100 articles and book chapters on various topics.



Haksoo Ko

Haksoo Ko is a Professor of Law and a Director for the Center for Law and Economic Studies at Seoul National University.