

# Regulating Online Platforms: *A balanced approach for South Korea*



# REGULATING ONLINE PLATFORMS: A BALANCED APPROACH FOR SOUTH KOREA

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A Balanced Approach for South Korea

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## Background Note:

Last year witnessed frenzy of activity relating to regulation of digital platforms across jurisdictions. While the EU mooted the Digital Markets Act that would designate certain large online platform as “gatekeeper” (that then have certain pre-defined obligations such allowing interoperability, refraining from self preferencing, etc.), the UK is setting up Digital Markets Unit to oversee a pro-competition regime for platforms within the Competition and Markets Authority and monitor inter alia how platforms use consumer data and abide by transparency principles. South Korea has seen spate of activities, from structural remedies being imposed on merger of digital companies (Delivery Hero and Wawoo brothers), KFTC coming down strongly on instances of self preferencing by digital platforms (such as Naver search engine) and enforcement of ABSP (abusive superior bargaining position) provisions (against Delivery Hero). Japan has also witnessed certain momentous shifts with the establishment of the Transparency Act that aims to bring fairness and transparency into the operations of digital platforms by introducing an amalgam of self-regulation and state regulation.

## Participants:



**Renato NAZZINI** | Professor of Law, King's College of London



**Daniel SOKOL** | University of Southern California, Affiliate Professor of the USC Marshall School of Business



**Tatsuya TSUNODA** | Associate, Nishimura & Asahi, Japan



**Yong LIM** | Co-director, Seoul National University



**Dae-sik HONG** | Professor of Law, Sogang University

## Moderator:



**Leni PAPA** | OECD Competition Division

## Panel Summary

Leni Papa moderated the session and first invited the views of Prof. Renato Nazzini on key trends in US and UK in digital antitrust space. Prof. Nazzini outlined the developments in the EU (viz. designating digital platforms as ‘gatekeepers’ and imposing obligations on such platforms), Germany, UK (setting up of Digital Markets Authority within the CMA). Leni Papa then enquired whether the same type of companies was being targeted across jurisdictions. Prof. Nazzini went on to explain how EU approach differs from that of UK in that, in the UK the definition of firms with significant strategic market status is linked to market power while EU identifies certain platforms as being gatekeepers (i.e. a dynamic approach in the UK versus one size fits all approach in the EU).

Leni Papa then turned to Prof. Sokol and asked about the proposed bills for regulation of online platforms on the table in the US. Prof. Sokol explained about the political economy of the bills, the rise of populism in anti-trust in the US (both from the right and left end of the political spectrum), obsession with size of firms, aggressive pursuit of digital platforms and so on. On being asked which of the proposed bills is likely to see the light of the day, Prof. Sokol explained that least distortive one is likely to fructify.

The next panelist, Tatsuya Tsunoda, then enlightened the panel about the recent development in Japan with respect to the regulation of digital platforms and explained about the nascent Transparency Act, its salient features and how the statute marries elements of self-regulation with state regulation while fostering transparency. He explained how Japan, much like EU is trying to adopt a harmonized approach.



**Leni Papa** OECD Competition Division.

Leni Papa then invited Prof. Yong Lim to give an overview of the developments in South Korea in the realm of regulation of digital platforms. Prof. Lim apprised the

panel of the several legal developments relating to digital platforms that took place in South Korea over last year such as KFTC penalizing search engine Naver for self-preferencing, structural remedies being imposed on Delivery Hero in its bid to acquire Woowa Brothers, settlement of the Apple iPhone case, corrective orders being passed against travel booking websites and so on. Prof. Hong emphasized the need to be careful while regulating platforms so as to not chill innovation and competition.

Finally, the panelists took turns to reflect on if self-regulation is the way to go for regulation of digital platforms and what may be the optimal way forward on this matter for South Korea. The panelists appeared to agree on certain common principles relating to regulation of digital platforms such as the need for a holistic, nuanced, and studied approach; and the need to foster trust and transparency to develop the same.

“...we all agree that there should be a holistic approach... We should also study their overlaps, the different ways that these laws and regulations can conflict with each other and the costs to businesses that these entail...I also note the emphasis on a nuanced approach...legislation that they are going to adopt eventually should be based on studies and reports before we finally agree on the text that we will adopt...eventually, this all boils down to trust and transparency and how these different approaches can develop this, and also predictability of the regulations for the online platforms.”

**Leni Papa**

## Key Talking Points | Prof. Renato Nazzini

On trends in digital antitrust regulation the EU, UK and Germany - Several ongoing and imminent initiatives, reports and challenges in the EU at the Union level and the national level (such as the Google shopping case and Google Android case), 10th amendment to the German Competition Act (where firms will be designated as having ‘paramount importance’ and certain restrictions

would apply, much like the gatekeeper obligations) and the UK.

### 1. EU Trends:

Digital Markets Act (“DMA:), an ostensibly a non – competition statute has been proposed by the EC. Key features of DMA:

- Aims to harmonize regulation of certain platforms across EU to preclude parallel proceedings by different member states for same underlying cause.
- EC will identify digital companies who are gatekeepers based on: (i) services provided by the platforms; and (ii) the size, market power, ability to act as a gatekeeper for customers and consumers.
- There will be obligation on gatekeepers such not to indulge in self-preferencing (similar to the diktat in Google shopping case).

### 2. UK Trends:

- UK Government has accepted certain recommendations of the final CMA Report relating to digital markets and greenlighted the establishment of the Digital Market Unit within the Competition and Markets Authority.
- Accordingly, certain firms will be designated as having significant strategic market status and have certain added obligations (much like gatekeeper concept of the EU) and will be required to take some pro-competitive actions.
- There will be inter alia obligation to ensure data portability, to check self preferencing and exclusionary conduct.



**Prof. Renato Nazzini** Professor of Law, King’s College of London.

### 3. On differences in approach in UK, EU and Germany:

- Gatekeepers (EU) and firms with significant strategic market status (UK) are distinct concepts.
- UK approach is closer to market power concept and identifies firms on case to case basis.
- EU approach is more structuralist. EU identifies certain services, search engines, social networking for regulation.
- UK is more flexible versus EU’s one size fits all approach.
- UK approach differs from EU approach in that there will be mandatory codes of conduct and no self -regulation (as proposed in the EU).

### 4. On Overlap of regulators for digital platforms:

- DMA is proposed at the EU level & DG Comp may be the regulating authority.
- National competition authorities of Member States also have power to regulate under the EU law.
- Data protection authorities, competition authority, consumer protection authorities, courts have overlapping jurisdiction over digital platforms. This creates significant cost, time, effort outlay for affected participants and may adversely affect competition and innovation.

### 5. On Self-Regulation versus State Regulation:

- EU has a tradition for state regulation and this may impact innovation and competition adversely in the long run.
- UK Code is based on consultations with relevant stakeholders, supported by guidance and is mandatory in nature. Further, there is channel for dialogue between the digital market units and companies about enforcement in detailed action. Hence, the UK Model has elements of both self and state regulation and is a step closer to self-regulation.
- Self-regulation is a more effective tool, that can work across industries and jurisdictions if harmonized properly.

### 6. On the way forward for digital platform regulation in South Korea:

- Large digital platforms, their consumers, stakeholders, regulators and the resulting complex eco system is here to stay.
- A light touch principle that is principle based, objective, based self-regulation coupled with channel for regulatory dialogue would be desirable.

*“...We have to live together with large digital platforms, all stakeholders, consumers, of course, but also businesses who use the platforms. In advertising, publishers and advertisers as sellers, suppliers of services in goods and the general public and the regulators and competition authorities must be comfortable that nothing that is happening in this very complex ecosystem is harming the economy or harming any constituents in a way that offends the public interest...”*

Prof. Renato Nazzini

## Key Talking Points | Prof. Daniel Sokol

### 1. On trends in digital antitrust regulation the US:

- A centrist approach to antitrust has worked in the US historically – with challenges to nuances of doctrines. This is now under attack from populist movement from the right and left wings. Common underlying theme of populist voice, regardless of left or right, is their concern with size (and not market power). Technology firms draw most flak amongst the big firms. There is a trend to pursue big digital platforms more aggressively now.
- Proposed bills relating to regulation of digital platforms currently don't have support House and Senate. Yet, the populist discourse can impact the ability of firms to diversify into new lines of business, acquisitions of smaller companies, that may adversely impact innovation and venture capital industry.
- It is not clear which of the proposed bills will crystallize into law, and it is likely to be one that is least distortive and able to garner bipartisan support.
- On the merger side, there always have been cases (such as Sabre Airline case) relating to merger of platforms inter se. People only see cases that get decided upon and not those that get brought, settled, reviewed.
- Appointment of Lina Khan as FTC chair portends a more regulatory approach to FTC enforcement and greater use of Section 5 powers. Enforcement agencies are likely to become regulators in their own right.



**Prof. Daniel Sokol** University of Southern California, Affiliate Professor of the USC Marshall School of Business.

### 2. On self-regulation:

- Self-regulation does not entail just platform abiding by certain terms, but involves different stakeholders and is a dynamic construct.
- In US, self-regulation has largely been used for non-competition issues. Sometimes, self-regulation relating to privacy creates competition concerns.
- Across jurisdictions, while there are different regulators for different sectors, there often are regulatory overlaps relating to competition issues and certain regulatory gaps. This is work in progress everywhere.
- Regulators should reflect on how to pro-competitive regulation based on certain guiding principles such as proportionality and regulation having nexus with the objective, and checking regulatory overreach.
- Self-regulation can also increase cost of compliance and adversely impact companies with smaller wallets.

### 3. On the way forward for digital platform regulation in South Korea:

- South Korean regulation of digital platforms – where KFTC first introduced draft legislation, then investigation is conducted and then third-party expert reports are commissioned – appears to be going in reverse order. This is likely to hurt competition.
- The order should be understanding the competition concern, getting expert opinion and then crafting legislation.

*“...The government and the KFTC first are introducing draft legislation, then conducting investigations. And only after all of that, only then are they commissioning third-party expert reports. I*

*think that's the reverse of how it should be. First, you do the expert reports. Figure out, is there a problem? Then conduct investigation to see if there is something to the reports. Only after you think that there may be some limit to traditional investigations only then, if you believe in say, market-based principles, only then do you introduce some regulation?... ”*

**Prof. Daniel Sokol**

## Key Talking Points | Tatsuya Tsonuda

### 1. On trends in digital antitrust regulation in Japan:

- Digital Competition Headquarters was established under the Cabinet's organization on September 27, 2019 in order to implement competition policies for promoting competition and innovation in the digital market.
- Transparency Act was made effective on February 1, 2021. It is governed by the Ministry of the Economy, Trade and Industry (METI), not Japan Fair Trade Commission (JFTC).
  - It aims to minimize the regulatory burden on the digital platforms and to respect the set of regulatory frameworks in order to promote competition and innovation.
  - It does not cover all types of the digital platforms and only applies to the specified undertaking that fall under the designated business area and fulfill certain criteria.
  - It requires some periodic disclosures and prior intimations to METI and METI can requisition information from platforms to assess how they are performing as against the transparency and fairness guidelines. METI also publishes its assessments.
  - In case of violation, METI can request JFTC to take necessary action.
  - It may be applied to EU or other jurisdictions and the same should be done carefully and in objective manner.
- Amazon, Yahoo, Japan, Lockton, and Google and Apple have been named as falling under its purview. Other industries may be added to the purview of the Transparency Act. Japan FTC contacted Amazon before launch of new services.

### 2. On similarities between Japanese framework and that of EU & South Korea:

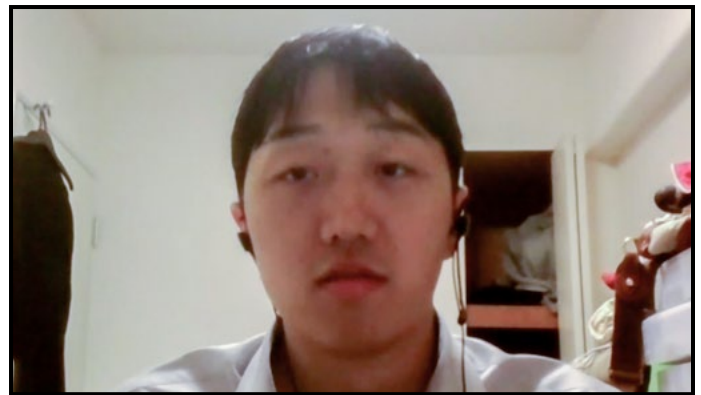
- Japan is also seeking to take a harmonized approach with the use of FTC regulations like the EU and adopting a step-by-step approach.
- Japan's ABSP (abusive superior bargaining position) measures can be triggered without pre-requisite of proving dominant position.

### 3. On self-regulation:

- Japanese Transparency Act respects the self-regulation of the digital platform and at the same time provides incentives for compliance. In case of violations, Japan FTC may step in and conduct investigations.
- METI publication of its evaluation of digital platforms' performance on the metrics of fairness and transparency, is a step to foster confidence of consumers and the market participants involved and enhance compliance.

### 4. On the way forward for digital platform regulation in South Korea:

- Transparency and fairness in the process of enactment and the enforcement of the new regulatory framework is important.
- South Korean government should consider publishing its assessment reports annually.



**Tatsuya Tsonuda** Associate, Nishimura & Asahi, Japan.

*“...the Transparency Act requires these digital platforms to submit an annual report, and the Ministry of the Economic Trade and Industry will evaluate the annual report. And by concerning with the performance of the digital platforms is sufficient to comply with the Transparency Act*

*and they will publish the results of the assessment. And that could be relating to that trust from the social people to the digital platform. If the digital platform does not fully comply with the Transparency Act, we can see the results of the assessment provided by the governmental authorities... ”*

**Tatsuya Tsonuda**

## Key Talking Points | Prof. Yong Lim

### 1. On trends in digital antitrust regulation in South Korea:

- There are several statutes that may apply to a conduct in the South Korea viz. Anti-Monopoly Regulation and Fair-Trade Act, contract law, consumer protection laws, telecom and network laws, etc.
- Abuse of dominance case in October 2020, South Korea's leading search engine Naver was fined on grounds of self preferencing by the Korea Fair Trade Commission (KFTC).
- KFTC imposed structural remedy in case relating to two leading delivery food delivery apps viz. Delivery Hero and Woowa Brothers, that required Delivery Hero, which was the acquiring party, to sell off its existing local business before going ahead with the acquisition of the target.
- As part of ABSP (abusive superior bargaining position) enforcement, there was action against Delivery Hero Korea in June 2020, which targeted the most favored nation (MFN) clause used by Delivery Hero, which restricted restaurants from selling at a lower price through other competing apps.
- Apple iPhone case that involved imposition of unfair terms and conditions by Apples on carriers was finally settled in February 2021 with a consent decree that would run for three years.
- In March 2021, KFTC announced that remedial measure on five accommodation platforms – Interpark, Booking.com, Agoda, Expedia, and Hotels.com – that were accused of using MFN clauses to detriment of competition.
- Google, Facebook, Beaver, and Cocoon, Netflix, all major platforms in Korea have also been subject to corrective orders related to their standard form contract clauses that form part of their terms and conditions in 2019 and 2020.

- There are several pending cases relating to platforms such as ongoing investigations into online advertising, app store policies, chat platforms (Cacao) and several other digital platforms.

### 2. On self-regulation:

- Self-regulation should be based on holistic, studied and nuanced approach.
- One needs to be wary of targeting only certain companies.
- Target regulation of big tech would could have ripple effect on innovation and competition.
- There is a need for jurisdictions to learn from each other's models.
- Combining regulation with self-regulation would be desirable.
- Any changes in algorithms that can have impact on important parameters should be pre notified to the regulator. One has to be careful in effecting measures in this regard, as it can be a tedious exercise (as learnt from EUs P2B Regulation and API under Microsoft Consent Decree). One also needs to be mindful of how these regulatory requirements would impact smaller firms.
- Important to foster trust when regulating platforms.



**Prof. Yong Lim** Co-director, Seoul National University.

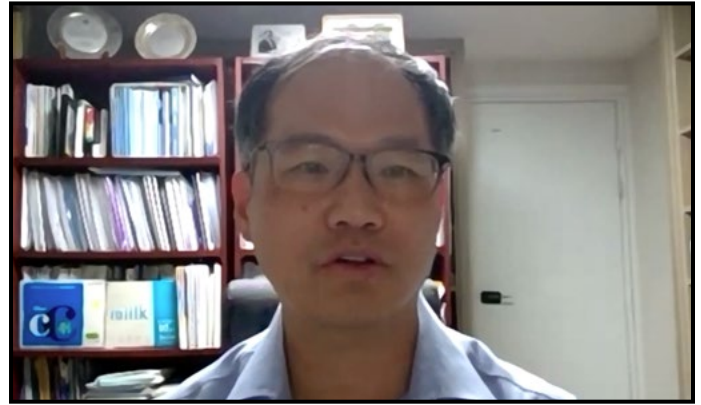
*“ ...a lot of experimentation is needed, ... But I think it's better at this time, at least to approach it as a more complementary way where you have both self-regulation and regulation coming together to achieve an optimal outcome... ”*

**Prof. Yong Lim**

## Key Talking Points | Prof. Dae-sik Hong

### 1. On trends in digital antitrust regulation in South Korea:

- South Korean legal system is adequate to address concerns relating to unfair competition as well as unfair trade actions, thus obviating the need for additional legislation is not required for regulating digital platforms.
- KFTC proposed the Online Platform Transaction Fairness Act in September, 2021 inspired by the developments in the EU and Japan and is stricter than its foreign counterparts and would impose higher obligations on digital platforms (such as requiring platforms to share contract with users that will need disclosures relating to self-preferencing, higher penalties for violations, etc.).
- KFTC would be required to make public information relating to terms of the aforesaid contracts, that could lead to higher judicial scrutiny.
- South Korea has trade specialty laws in subcontract act, franchise business transactions act, large distribution business act, and the agency act and KFTC is inclining towards considering digital platforms as the next specialty area.
- There is little empirical evidence to show that digital platforms are pre-disposed to abuse their superior bargaining power.
- Further, under South Korean law, online platform business is categorized as value added telecommunication service, which is governed by the Telecommunications Business Act that provides for prohibited practices and Korean Communications Commission is the nodal authority for this statute.
- Two regulators are thus competing over same subject matter in South Korea that could lead to turf wars as well as legal confusion.
- Stricter regulation can be onerous for smaller players.
- South Korean government should be careful in importing measures from foreign jurisdictions and applying them to domestic context. Any regulation should be studied and patiently considered.



**Prof. Dae-sik Hong** Professor of Law, Sogang University.

*“...this kind of strict regulation is only beneficial for established online platforms. And that could be harder for new online platform or start-ups. So, I guess the common intention, this kind of introduction of new regulation would harm competition for the market from various kind of online platforms...”*

**Prof. Hong**



## SPEAKERS



### Leni PAPA

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Leni Papa works with the Competition Division of the Organisation for Economic Co-operation and Development (OECD). Leni was a consultant for the Asian Development Bank, the Centre for Competition Policy of the University of East Anglia (UK), and the OECD on topics of regulatory and competition policy. She was also an Assistant Director and Spokesperson of the Philippine Competition Commission, a legal counsel of Samsung Electronics, and a Senior Associate in Angara Abello Concepcion Regala & Cruz (ACCRALAW), advising on Public-Private Partnerships, public procurement, M&As, and investments. She received her Master of Laws degree on EU and International Business, Competition, and Regulatory Laws from Freie Universität Berlin, Germany and is a Fulbright US-ASEAN Visiting Scholar for 2021.



### Renato NAZZINI

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Renato Nazzini is a partner of LMS Legal LLP, London. Renato focuses on antitrust, regulated sectors, State aid and European Union law, in particular cartels, abuses of a dominant position, vertical agreements, mergers, litigation, arbitration and ADR. Renato is regularly appointed as arbitrator and advises and represents clients in complex commercial disputes both in arbitration and court proceedings. His experience covers various sectors including transport, pharmaceuticals, financial services, manufacturing, IT and new economy markets, heavy industries, consumer goods and retailing. Renato is Professor at King's College London and a Non-Governmental Advisor to the International Competition Network.



### Daniel SOKOL

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D. Daniel Sokol is the University of Florida Research Foundation Professor of Law and Term Professor of Law at the University of Florida Levin College of Law. Sokol writes across several different topics in antitrust. The Global Competition Review named Sokol its Antitrust Academic of the Year in 2014 at its awards ceremony. Sokol is among the top 10 most cited antitrust law professors in the past five years. Sokol is also a non-governmental advisor to the International Competition Network and academic advisor to the US Chamber of Commerce for Antitrust.



### Tatsuya TSUNODA

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Tatsuya Tsunoda has extensive experience in advising on various matters of competition law/anti-trust law for both domestic and international cases, including private monopolization, unilateral conduct and unfair trade practices, such as vertical restraints and abuse of superior bargaining position. Mr. Tsunoda also advises on data protection, telecom, consumer protection regulations and other regulatory issues, and he is particularly active in advising on digital platform operators-related regulations. He also actively advises on international law and trade matters.



### Yong LIM

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Yong 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.



### Dae-sik HONG

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Prof. Dae-Sik Hong is currently a professor of Economic Law at Sogang University Law School. He is also the founding director of ICT Law & Economy Institute affiliated to Sogang University. Prior to joining the academia, he served as judge at various courts for a decade (1993-2003) and as a practicing partner at Yulchon law firm for about 5 years (2003-2007). He received LL.B., LL.M. and Ph.D. degrees from Seoul National University and was a visiting scholar at the University College London in the UK and the University of California, Berkeley in the US.