

# Towards a Competition Enabling Framework in Asia Pacific: *Opportunities and Challenges*

DEFINING THE MARKET & ASSESING COMPETITION  
DYNAMICS IN THE DIGITAL PLATFORM INDUSTRY



# DEFINING THE MARKET & ASSESING COMPETITION DYNAMICS IN THE DIGITAL PLATFORM INDUSTRY

Defining the market & assessing competition dynamics in the digital platform industry

CPI Live



## Background Note:

- This session seeks to provide an in-depth analysis of market definitions and competitive dynamics in the digital platform industry, with a focus on South Korea.
- Digital platforms have a history of expanding their businesses into multiple markets. This has to do with the fact that once a digital platform secures its customer base or data in one market, it can enter another market easily by utilizing such existing customer bases or data.
- This is a pro-competitive aspect because it accelerates the platform's entry to the market. Some allege there can be anti-competitive sides, too, e.g. by playing a "gate-keeper" role to certain markets.
- However, the methodology to analyze such cross-market effects has yet to be sufficiently developed.
- This Session therefore seeks to explore: Firstly, what kinds of challenges has the advent of digital platforms brought to the traditional competition analysis methodology? Secondly, how can we cope with these challenges?

## Participants:



**Dae-Sik HONG** | Professor, Sogang University



**Bruce GUSTAFSON** | President and CEO, Developers Alliance



**Hak-Soo KO** | Professor, Seoul National University



**Sang-Seung YI** | Professor, Seoul National University

## Moderator:



**Ki Jong LEE** | Professor, Sookmyung Women's University

## Panel Summary

The Panel was chaired by **Professor Ki Jong Lee** of Sookmyung Women's University. The panel included **Professor Dae-Sik Hong** of Sogang Law School and director of the ICT Law and Economy Institute, Sogang University; **Prof. Sang-Seung Yi** of Department of Economics, Seoul National University; **Professor Hak-Soo Ko** of Seoul National University School of Law; and **President and CEO Bruce Gustafson** of the Developers Alliance and founder of the Loquitur Group.

**Professor Ki Jong LEE** opened the panel by introducing the issues outlined above and introducing the speakers.

**Professor Dae-Sik HONG** noted that South Korea's fair trade law has differences as well as similarities with the laws in the U.S. or Europe. As such the solutions cannot be identical, either, but nonetheless noted that regulators in Europe are taking action against large tech companies.

## Key Talking Points | Dae-Sik HONG

- The KFTC also has been enforcing its regulations in a similar manner, albeit differently, noting that there was no *Google Shopping* case in Korea in part because Google is not the number one search engine in South Korea (therefore the KFTC targeted Naver, the country's leading search engine).
- These cases show that South Korea advocates changes in competition law analyses based on certain features of the digital economy, but the KFTC's tendency is to conduct regulatory enforcement in the same old, path-dependent manner instead of developing a new framework or new methods of proof. It is clear that KFTC well understands the characteristics of the digital economy and digital platforms.
- The KFTC acknowledges there are hidden obstacles in defining relevant markets, identifying dominant positions, and evaluating agreements among competitors in digital markets.
- In order to overcome such difficulties, KFTC asserts that they need to apply new methods; defining markets more narrowly; or rather dismissing counter-evidence; or, for example, highly valuing the interaction or correlation between the two sides of a given platform market.
- However, in reality, these methods are not used. As for evaluating agreements among competitors, the results of such restrictions may not be visible and the KFTC focuses on potential effects.

- The authority, being on the forefront of regulatory enforcement, should do more research and develop their analysis tools in order to operate within a persuasive regulatory framework that everyone accepts.



**Dae-Sik HONG** | Professor, Sogang University

**Bruce GUSTAFSON** noted that digital platforms, which have real world analogies, but are different from ecosystems, but that ecosystems is really where the focus should be.

## Key Talking Points | Bruce GUSTAFSON

- Unlike a platform, an ecosystem, rather than just connecting multiple markets, creates a stable market by facilitating one way transactions in a market where incentives and the rents are complex and are not necessarily imbalanced. Certain markets that would not necessarily form spontaneously without some steward who is driving them. Analogs outside of the digital space would include open source projects and Standards organizations.
- Ecosystems therefore have some attributes that are maybe more analogous to a vertically integrated firm in that they have internal markets as well as outward facing markets. For each element, an ecosystem owner has to create a market. The stewardship role is key.
- In a vertically integrated company, there is no obligation for the independent elements inside to be profitable, to behave in sort of any particular manner. When you externalize that in an ecosystem model, it gets a little more challenging to analyze.
- For example, concerning Android, Google is not only a participant in that market, but also as a steward of the overall ecosystem. In this context, a participant in an ecosystem, just like inside an integrated company,

could operate below cost in one market and be over-compensated in some other portion of the ecosystem, such that they come out whole. This dynamic highly complicates the analysis of the overall marketplace.

- For example, app developers do not produce phones. They don't produce operating systems, that's handled by other parties, but nobody buys phones without apps. So there is a web of interactions and inter-reliance that makes the system work. In the EU Android case, the Commission did a poor job of identifying those various markets and the activities in each.
- Further, ecosystems compete as ecosystems. One of the characteristics of the big ecosystem players is they have a competence in bringing market participants together. They have the digital tools, they know how to manage the complexity. The biggest competition with a platform company or a large ecosystem company is another ecosystem company.
- Reaching into an ecosystem and trying to identify market failures or certain behavior is difficult, especially if you only look at one segment of an ecosystem, the market inside an ecosystem. Rather, regulating privacy or copyright or patents or content is a very effective way to shift the incentives within the ecosystem and a more direct way to promote behaviors that are positive for the marketplace.



**Bruce GUSTAFSON** | President and CEO, Developers Alliance

**Haksoo KO** made points relating to the importance of data for competitive dynamics and artificial intelligence, and the functioning of platforms.

### Key Talking Points | Hak-soo KO

- Having access to data or possession of data is significant, but at the same time, it's very difficult to make an

assessment of competitive dynamics. It's a very early stage to come up with a coherent theory about data's impact on competition or competitive dynamics.

- One major role for data concerns artificial intelligence. If a company has much more data than others, they can come up with a better AI model or algorithm. However, there may well be many other factors that are required to have a competitive edge. But this is an area that's very underdeveloped. There is still a long way to go in terms of understanding how data and AI modeling work together.
- Platforms serve many different functions, including potentially a gateway function providing a connection between a platform and their consumers, but also various types of service providers. And here, the service providers include not just private business entities, but also public institutions and even government agencies.
- But other platforms do not serve as a gateway. And even if some platforms serve as gateways. At this point, it's really not clear whether they show a significant anti-competitive impact.



**Hak-Soo KO** | Professor, Seoul National University

**Sang-Seung YI** expressed broad agreement with the other panelists in that there are many challenges in assessing the competitive effects of the digital platform industry.

### Key Talking Points | Sang-Seung YI

- On market definition, it is important to remember that digital services are often provided for free. The platform operator typically monetizes services by selling advertisements. On the consumer side, assuming that you defined two separate markets, one cannot apply the usual SSNIP test, because increasing the price by 5 to 10 percent has no meaning when the starting price is zero.



- The SSNDQ test (the small, but significant non-transitory decrease in quality test) has been proposed as an alternative conceptual framework. This makes intuitive sense, but it is difficult to operationalize because often the data is not available. Further, platform operators (or ecosystems) provide many different services and evolve constantly. As such, it is hard to come up with a single measure of quality.
- Concerning market dominance, because platforms provide multiple services, it is difficult to identify who the competitors are and what their strengths are. These difficulties arose in the recent lawsuit against Facebook, where the trial judge granted Facebook's motion to dismiss the case precisely on these grounds.
- Concerning potential competitive effects, there is broad agreement that potential competition and nascent competition should receive far more weight in competitive assessment of the digital platform industry. But this is easier said than done. The FTC is currently challenging Facebook's acquisition of Instagram in 2012 and WhatsApp in 2014. But the natural question is why it changed its mind.



**Sang-Seung Yi** | Professor, Seoul National University

**Professor LEE** suggested that the panel express their views on market definition in more detail, starting with Prof. Sang-Seung Yi, who noted that there are two main approaches to market definition in digital markets

### Key Talking Points | Professor LEE

- First, there is the approach that consists of determining whether two markets are interrelated. Second, there is an approach based on the difference whether a platform can be characterized as a transaction platform or non-transaction platform.
- Nonetheless, rather than spending too much time and energy on the precise boundary of the relevant

market, we all agree that we should begin with the competitive assessment, that is, we should keep in mind the first principle that we define a market for the purpose of assessing the competitive effects of conduct at issue.

**Prof. Dae-Sik HONG** pointed out the problem of defining a market too narrowly.

### Key Talking Points | Dae-Sik HONG

- In the *Google Android* case in South Korea the focus is on so-called anti-fragmentation agreements, i.e. imposing its anti-fragmentation clauses while allegedly bundling its applications. A key issue was how to define the relevant markets.
- In reality, the relevant competition is ecosystem competition between Apple's ecosystem and Google's own. However, in the KFTC case, Apple wasn't investigated as it adopts a closed setting, with no licensing offer.
- Thus, the KFTC only targeted the ecosystem that offers licensing, i.e. Android. As a result, Google's share ended up looming large. In this case, the market definition was drawn quite narrowly, which in turn influenced the competitive analysis.
- However, another issue arose, which was that, in South Korea, not only smartphones but also other connected devices became an issue. While defining the mobile OS market narrowly, the KFTC bundled these devices together, designating the resulting cluster as "other mobile devices." It then defined an OS market specific to that cluster.
- This constantly fluctuating definition of a market size from narrow to wide by the KFTC seems unprincipled.

### Key Talking Points | Bruce GUSTAFSON

**President GUSTAFSON** pointed out that at a fundamental level, companies know what markets they compete in, and they know who their competitors are. And so for a court to second guess what the participants already know is always a surprise when the answers can be determined. But the reality is in an ecosystem, there will be more than two sides to a market. There will be more than one participant. They will overlap. And when it comes time to sort of define how markets are, whether they're competitive or not, I you have to look at the impact one

market to another behavior in one market, how it affects another market within the ecosystem, or you're going to get sort of a faulty answer because of the trade offs between the various components.

**Prof. Hak-Soo Ko** raised certain examples from a regulatory viewpoint:

### Key Talking Points | Hak-soo KO

- Kakao is the dominant messenger app in Korea and certain other countries. Kakao is essential in Korea as a messenger app, but also serves as a financial conduit for financial transaction service. As such, in theory, it could be subject to a whole new set of regulations coming from the financial industry.
- The second example concerns the my-data scheme, which concerns data portability (similar to rules under the EU GDPR). Different financial services companies can be required to transfer customer data from one platform to another. The main difficulty is distinguishing between different types of companies: the traditional market institutions, such as banks and credit card companies, insurance companies constitute one group.
- The other concerns so-called FinTech and BigTech companies. Is it worthwhile distinguishing between these two groups of companies? And even within FinTech and BigTech companies, is it meaningful to distinguish between these two groups? Depending on how you view the whole market dynamics, you can come up with different types of ways of delineating market players, and this is an open question for now.

**Professor Yi** then moved from market definition to competition analysis, focusing on the *Google Android* case. Prof. Yi pointed out the differences between the EU and Korean Google cases.

- The EC challenged three aspects of Google's business model (anti-fragmentation agreements, distribution agreements, and revenue sharing agreements, alleging that Google tried to maintain and solidify its dominance in general search.
- In 2011, Naver and Daum filed a complaint before the KFTC challenging these agreements. But the KFTC dismissed the complaint given that 80 percent of Korean users use Naver rather than Google.

- Nonetheless, in 2021, this fact did not deter the KFTC from challenging the anti-fragmentation agreements. By contrast with the EC, which only looked at smartphones and tablets, the KFTC extended its theory of harm into all smart devices, including smart watches, smart speakers, and smart TVs on a vague basis.
- This will be analyzed when a court reviews the KFTC's ruling.

**Professor Dae-Sik HONG** raised certain points regarding the KFTC's decisionmaking in the Google case:

### Key Talking Points | Dae-Sik HONG

- First, relating to mobile OS licensing, the KFTC came to its decision by applying traditional market foreclosure theories. In the past, the foreclosure theory was typically applied when there was evidence that either a competitor had been ousted from the market or their competitiveness was greatly reduced. However, no such evidence was presented in this case.
- Some parts in KFTC's theory make sense, but it is doubtful if Amazon or Alibaba ever tried to enter South Korea's digital market. After all, South Korea's ecosystems include Android in addition to Apple. Within the Android ecosystem, Korean OEM manufacturers such as Samsung were able to pass compatibility tests by making variants based on what Google had provided. That way, Samsung Electronics was able to make their own devices with their own app stores.
- Also, Samsung develops their own apps. In that aspect, you can say that South Korea sees competition among those compatible Android variants. Nonetheless, KFTC excluded the fact in its ruling. To the contrary, the reason that Google emphasizes compatibility is because from app developers' point of view, a multiple-fork ecosystem is a nightmare.
- In the "other smart device OS" market where KFTC's concerns are even more hypothetical. Even though those other smart devices such as watches, TVs, etc. have not seen their own OS markets sufficiently formed, KFTC's approach is that Google completely blocked emergence of such markets. This runs contrary to experience. When regular consumers transitioned from PCs to mobile devices, Microsoft could no longer assert any power.
- This is a good example of new disruptive innovation. However, the KFTC views such disruptive innovation to be unthinkable in new mobile devices such as

smart watches. It is unclear how this attitude could fit in with any concept of innovation.

**President GUSTAFSON** raised the point that fragmented operating systems drive up costs and complicate the market for developers.

### Key Talking Points | Bruce GUSTAFSON

- Operating systems compete with each other. Developers will develop for the platform that is the most profitable for them. Fragmentation is a factor in that decision. There is a strong market reason why an operating system would seek to limit fragmentation because of its value in another portion of the ecosystem.
- On data, data portability, data ownership, we view rights and data as more of a bundle of sticks. There are joint rights by many of the people that are involved in the value chain; the person who collects the data, people who process data, the people who produce the data. A much more sophisticated discussion will need to take place there before we define a legal framework that is operable.
- Finally, there is a cost to an ecosystem to support a brand, and in the consumer's mind when they are interacting with an ecosystem and all of the participants in it, it is that brand that is foremost in their mind.
- So what is sometimes termed as a gatekeeper role, I think is also important to protect the general brand value of all of the participants that are in the ecosystem. It can be seen as negative, and certainly is painted that way by policymakers, but it's necessary for the ecosystem to function, so that has to be reflected in law.

**Professor KO** concluded by noting that some of the large platforms tend to become bigger, but that's not a universal phenomenon in every market segment. In some markets, some of the platforms are becoming dominant players, but in some other market segments, there's very fierce, very dynamic competition. In Korea, for instance, there's significant competition in, for example, in e-commerce, messaging, and food delivery. They are not dominated by a single player, but several large players compete against each other very fiercely.



**Ki Jong LEE** | Professor, Sookmyung Women's University

## SPEAKERS



### Dae-Sik HONG

Prof. Dae-Sik Hong is a professor of Economic Law at Sogang University Law School, as well as 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).

His research interest includes antitrust laws, consumer laws, law of regulation, particularly involving media and telecommunications sectors, personal information protection law, and law and economics. He is frequently consulted as an expert adviser to governmental bodies such as the Korea Fair Trade Commission ('KFTC'), the Korea Communications Commission ('KCC'), the Ministry of Science and ICT ('MSIT'), the Personal Information Protection Commission ('PIPC'), the Ministry of Trade, and many more.



### Bruce GUSTAFSON

Bruce is the President and CEO of the Developers Alliance, the leading advocate for the global developer workforce and the companies that depend on them. Bruce is also the founder of the Loquitur Group, a DC consulting firm, and the former VP and head of the DC Policy office of Ericsson, a global information and communications technology company, focusing on IPR, privacy, IoT, spectrum, cybersecurity and the impact of technology and the digital economy. He has previously held senior leadership positions in marketing and communications at both Ericsson and Nortel, as well as senior roles in strategy and product management across wireless, optical and enterprise communication product portfolios.



### Hak-soo KO

Haksoo Ko is a Professor of Law at Seoul National University School of Law in Seoul, Korea. He primarily teaches areas in Law and Economics as well as in Data Privacy and Artificial Intelligence Law. He regularly sits on various advisory committees for the Korean government and other public institutions.

Prior to joining academia, he practiced law with law firms in New York and in Seoul. He currently serves as President of Asian Law and Economics Association; President of Korean Association for AI and Law; Co-director of SNU AI Policy Initiative; and Associate Director of SNU AI Institute. He had visitor appointments at UC Berkeley, University of Hamburg, Vrije Universiteit Brussel, University of Freiburg, and National University of Singapore. He holds a B.A. in Economics from Seoul National University and received both J.D. and Ph.D. (Economics) degrees from Columbia University in New York, USA.



### Sang-Seung YI

Sang-Seung Yi is a Professor at the Department of Economics, Seoul National University. Professor Yi received his Ph. D. from Harvard University in 1992. He taught at Dartmouth College from 1992 to 1998 before returning to Korea. Professor Yi is the first recipient of the Kim Taesung Memorial Prize in 1998, awarded annually by the Korean Econometric Society to a Korean economist under 40 for academic excellence. Professor Yi's academic research is in the area of applied microeconomic theory and industrial organization. He has published highly-cited papers in peer-reviewed journals such as Rand Journal of Economics. Professor Yi's current research focuses on the economic analysis of competition law. He has authored numerous papers (including a publication in Competition Policy International in its early days) and consulted on key antitrust cases in Korea since early 2000's when the KFTC began enforcing competition law in earnest, including abuse of dominance (such as tying, refusal to deal and loyalty rebates), mergers, and damages estimation from collusion. In recognition of his contribution to the development of antitrust policy in Korea, the Korean government awarded him the Hongjo Order of Merit in 2017. Professor Yi co-founded and has served as Co-President of the Asia Pacific Competition Community since 2020.



### Ki Jong LEE

Professor Ki Jong Lee currently focuses on competition enforcement in platform industries, publishing several articles and a monograph on the subject. Another major area of interest is international competition law, and he has served as Secretary General of Asia Competition Association since 2010. He teaches competition law, consumer law and commercial law at Sookmyung Women's University, Korea.