

KOREA COMPETITION LAW ASSOCIATION – SPECIAL SEMINAR: DIGITAL PLATFORM MARKETS AND COMPETITION POLICY



Background Note:

- Korea provides an interesting example of dynamic growth and fierce competition in digital platform ecosystems which consist of both homegrown platforms, such as NAVER, Kakao and Coupang, and global peers. Interestingly, Korea is also known for a history of strong competition enforcement and policies to regulate digital markets. Like other countries, Korea is facing a crossroad and calibrating its approach to ensure fair competition and continued growth in digital markets.
- This special seminar aimed to provide a deep analysis of competition issues around digital platforms, in particular (i) how a dominant firm’s self-preferential and discriminatory privacy policy can raise competition concerns (ii) the state of play on the implementation of Korea’s in-app payment law and efforts to address loopholes, and (iii) an overview of global ex ante competition regulation for digital economy and lessons for Korea.

Participants:



Dae-Sik HONG | Chair, Korean Competition Law Association



Daniel SOKOL | USC Gould School of Law



Jiyeon PARK | Bae, Kim & Lee LLC



Jae-Han SIM | Yeungnam University School of Law



Ji-won YOON | KFTC Senior Deputy Director, Anti-monopoly Bureau



Seongmin JEON | Gachon University Business School



Soojin NAM | Hankuk University of Foreign Studies



Il KANG | Bae, Kim & Lee LLC

Panel Summary

The seminar started with a keynote address by **Professor Dae-Sik Hong** of Sogang Law School, who is also the Chair of the Korean Competition Law Association. He was followed by presentations from **Professor Daniel Sokol** (USC Gould School of Law), **Jiyeon Park** (Bae, Kim & Lee LLC), and **Professor Jae-Han Sim** (Yeungnam University School of Law). Afterwards, there was a panel discussion including **Jiwon Yoon** (KFTC), **Professor Seongmin Jeon** (Gachon University Business School), **Professor Soojin Nam** (Hankuk University of Foreign Studies), and **Il Kang** (Bae, Kim & Lee LLC).

ecosystem is evolving, what new issues are emerging, and come up with countermeasures.



Dae-Sik Hong Chair, Korean Competition Law Association

Opening Keynote | Dae-Sik Hong

- Although the digital platform market is fiercely competitive, it is also an area that has been the focus of regulation due to the characteristics of platforms, such as network effects, economies of the scope, and data-based economies of scale. Discussions on online platform regulation policies and related legal improvements in Korea should start with understanding the characteristics of online platforms and unique market conditions, competitive situations in Korea, as well as differences in domestic and foreign legal systems.
- Unfairness arising in the online platform industry can be old or new. The dispute over the level of commission amounts is old, but the asymmetric structure of commissions depending on the online platform's two-sided market business model is new. Unfairness arising in the online platform industry may be unique to certain types or sizes of platforms that act as intermediaries. It is necessary to accurately capture the issues that occur in certain types of platforms or in a specific scale of vertical integration and focus on them.
- App market issues are actively discussed together with the introduction of regulations for certain types or scales of platforms in Korea. The app market platform is a core platform that constitutes the foundation of the mobile ecosystem, but is an area where domestic companies in Korea lack sufficient competitiveness. In August 2021, the Telecommunications Business Act (TBA) was revised to impose obligations on app market operators to prohibit app market operators from unfairly forcing developers to use specific payment methods in Korea.
- In today's seminar, it is believed that the discussion will help understand how the app market regulation has progressed in Korea since then, how the mobile

Developments on Regulating App Stores and Digital Platforms Key Talking Points | Daniel Sokol

Professor Daniel SOKOL presented recent empirical studies on the negative competitive effects of the Apple's App Tracking Transparency (ATT) policy and new developments in regulating app stores and digital platforms.

- Korea is one of many countries grappling with the issue of how to regulate and enforce competition law in the tech sector and it has had some headline moments with high-profile antitrust cases. A notable example is the Qualcomm case on standard essential patents. The KFTC's ruling against Qualcomm in 2017 was upheld by the Korean Supreme Court in 2023. Korea is also one of many countries grappling with competition issues concerning digital platforms while carefully observing developments concerning the European Union, U.S. and other jurisdictions.
- One issue that is relatively less explored in Korea is Apple's App Tracking Transparency (ATT). Starting with Apple's iOS 14 update, Apple introduced its so-called ATT Policy that requires third-party apps to specifically ask user's permission to 'track' them across apps and websites owned by companies other than Apple. Papers show that Apple's ATT has the pernicious effects of (i) enhancing the dominance of iOS among mobile operating systems and the dominance of its own apps and services within the iOS

ecosystem; and (ii) significantly reducing consumer choice and devastating the free-app ecosystem.

- Simply put, Apple’s ATT policy was a pretext for anticompetitive exclusionary conduct that competition law can be used to effectively eliminate. In fact, recent studies have empirically shown that Apple’s policy change would have significant chilling effects on app developers’ innovation and entrepreneurship, particularly those small and medium enterprises relying on ad-supported business models. Personalization of advertising helps smaller businesses, as it allows them to reach customers in other countries.
- In addition, given the self-preferencing nature of ATT, Apple’s native apps can enjoy unfair advantages over third-party apps because Apple ads will serve personalized ads informed by user data that it tracks. See D. Daniel Sokol & Feng Zhu, *Harming Competition and Consumers Under the Guise of Protecting Privacy: An Analysis of Apple’s iOS 14 Policy Updates*, 103 *Cornell Law Review Online* 94 (2022).
- Platforms are systems that orchestrate the relationship between different sides of a market, including a developer creating an app that is compatible with an operating system. Platforms must set up rules to govern the ecosystem, such as how apps and websites reach users, and have a secure design architecture. When done well, platforms can create competition and innovation.
- However, Apple’s ATT policy has an anti-competitive effect under the guise of privacy protection. In reality, Apple prohibits third parties from offering alternative app stores and store line interfaces and from competing with app store data. This creates a barrier to competitors and consumers as they cannot easily switch to different operating systems. Apple’s strategy of personalization and curating results was used to lock-in consumers even more within Apple’s Walled Garden.
- ATT provides a compelling example to make us change the way we think about competition and privacy interfaces. What is seemingly a privacy policy by Apple is in fact an anti-competitive behavior that can lead to degradation of competition, detriment of small businesses which rely on personalized ad

models, and less optimal consumer choices. Indeed, regulators in a number of European countries, including Germany, France and Italy, currently are probing into this practice in investigations that are public.

- In addition, empirical studies on the impact of the EU’s privacy law – GDPR (General Data Protection Regulation) – on innovation and investment provide thought-provoking results. While there have been a number of such academic papers (all empirically showing that GDPR hurt consumers), he focused on two. A study that analyzes post-GDPR effects after 2018 on EU startup ventures shows that GDPR hurts competition in start up ventures¹. Another study reveals that the GDPR induced the exit of about a third of available apps, and in the quarters following its implementation, entry of new apps fell by half².



Daniel SOKOL USC Gould School of Law

Regulatory Trends for Mobile App Market Operators Key Talking Points | Jiyeon Park

Jiyeon PARK provided a state of play of Korea’s in-app payment law which amends Article 50 of the Telecommunication Business Act (TBA), its implementation, potential loopholes, and recent amendment proposals to introduce more competition in the app distribution market by allowing sideloading.

- Google and Apple have their own app markets and have the right to decide which operators to register in their own app markets as app market operators, and also have a wide range of big data. As largest

¹ Jian Jia, Ginger Zhe Jin, Liad Wagman (2021) *The Short-Run Effects of the General Data Protection Regulation on Technology Venture Investment*. *Marketing Science* 40(4):661-684.

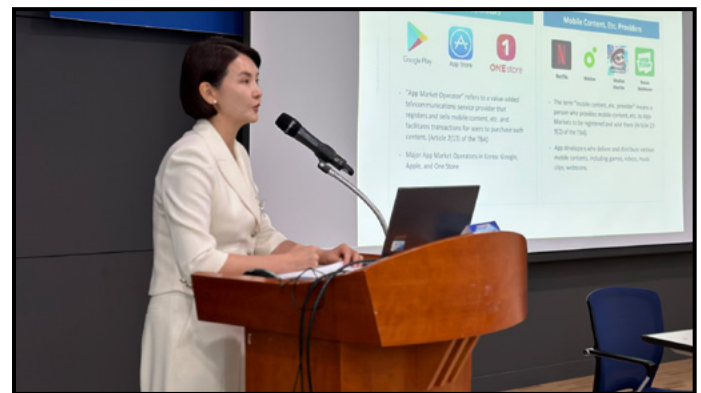
² Rebecca Janßen, Reinhold Kesler, Michael E. Kummer, Joel Waldfogel (2022). *GDPR and the Lost Generation of Innovative Apps*. NBER Working Papers 30028, National Bureau of Economic Research, Inc.

app market operators, Google and Apple have significant power over app developers and can use various means to subordinate the mobile ecosystem to their interests. This could eventually lead to users being negatively impacted, such as a limited number of payment methods and increased content usage fees.

- On September 14, 2021, the amended TBA (stipulating, e.g., prohibition against compelling the use of a particular payment method) came into force. The amended TBA aimed to effectively regulate app market operators by specifically defining the act of compelling the using a specific in-app payment system as a prohibited act. Prohibited acts in the amended TBA also include unreasonably delaying an app review and unfairly deleting an app.
- On April 5, 2022, the Korea Communications Commission (KCC) announced its authoritative interpretation that an app market operator’s restriction of the use of outlinks may be deemed as an act of compelling the use of a particular payment method under Article 50(1)9 of the TBA:
 - (1) Where an app market operator restricts the update of, or deletes any app enabling users to be externally linked (outlinked) to another webpage and thereby to make a payment thereon.
 - (2) Where an app market operator suspends an app developer using other payment methods, including outlinks, from using the app market.
 - (3) Where an app market operator restricts an app developer using other payment methods, including outlinks, from using such other payment methods by blocking API authorization process.
 - (4) Where an app market operator restricts an app developer from setting more favorable terms of use within a reasonable range for other payment methods, including providing lower fees.
 - (5) Where an app market operator treats an app developer to be treated unfairly in market exposure or search results.
- In May 2022, the KCC raided Google, Apple, and One Store to investigate whether they had violated the amended TBA. The KCC’s investigation is still in progress.
- Despite this law, app developers in Korea are only using Google and Apple’s in-app payment methods. This is due to Google and Apple’s following policies: Google still requires app developers to introduce Google’s payment method in parallel. If

other payment methods are used, they are charged a fee that is reduced by 4% only (which can actually increase the financial burden for app developers), and outlinks are still prohibited. If the app developer wants to use other payment methods, Apple will exclude the payment methods of its own that were previously used by the app developers. In order to use other payment methods, Apple imposes a fee that is only reduced by 4%, outlinks are prohibited, and if the end-user purchases mobile content through other payment methods, Apple has been forced to issue a warning message at the time of use.

- The problem is that the app market operators, which also own the mobile operating system, effectively control app distribution. Some legislators are of the view that a fundamental solution to this problem is to introduce competition in the app distribution market by diversifying the distribution channels, thereby removing the dominant position currently held by the app market operators. Three bills are currently pending before the National Assembly, all of which call for mandatory sideloading for app market operators, which also have mobile operating systems.



Jiyeon PARK Bae, Kim & Lee LLC

Regulatory Trends for Digital Platforms Key Talking Points | Jae-Han Sim

Jae-Han SIM provided a snapshot of ex ante regulation for digital platforms in EU, Germany, the U.S., and Korea and proposed new approaches to conduct market analysis.

- The European Digital Markets Act (DMA) is essentially an ex-ante regulation targeted at the so-called ‘gatekeepers.’ In the case of Germany, the 9th amendment to the German competition act (GWB)

introduced the standards for the evaluation of market power of multi-sided markets, and the 10th amendment to the GWB included the standards for evaluating data. As for the new Brandeis movement of the U.S., it emphasizes that there is a need for strong regulations due to the large influence of digital platform operators. Four bills out of five proposed bills were discarded, and only one bill concerning raising the fees for the merger filings passed. This reflects the urgency of the current situation of needing to compete against Chinese platform operators.

- In Korea, discussions are underway in two major categories regulating this issue: the Proposal of the Fair Online Platform Intermediary Transactions Act and the Proposal for the Online Platform User Protection Act. In addition, there are the Guidelines for the Review of Abuse of Market Dominance by Online Platform Operators that have recently been implemented. The two proposals for digital regulations have many overlapping provisions, and the proposal for the Online Platform User Protection Act contains comments from the information communication agency. In particular, the ex-ante regulation is more heavily reflected. There are dozens of proposals in front of the National Assembly of Korea, and the number of new proposals is likely to be on the rise. As for the guidelines, there are more discussions centering around self-preferencing.
- From the competitive law perspective, the discussion needs to focus on the structure of the market and the reasonable solution to move forward with the future through conducting an analysis of the dynamic changes in the market and considering the overall ecosystem.



Jae-Han SIM Yeungnam University School of Law

Panel Discussion



Key Talking Points | Ji-won Yoon

Ji-won YOON explained the recent Korea Fair Trade Commission (KFTC) moves and policy directives concerning the regulation of digital platforms in the Korean landscape.

- The KFTC is actively responding to the unfair trade practices concerning restrictions on competition on platforms such as mobile OS and app markets in accordance with the current Monopoly and Regulation of Fair Trade Act (MRFTA). In April, the KFTC fined Google for blocking game companies from launching games on a competing app store (One Store), thereby harming competition in the app market ecosystem. The Google app market case provided an opportunity to restore competition in app distribution.
- In addition, the KFTC fined Google for blocking Android OEMs from developing and manufacturing devices with Android-modified OS. The Google Android case increased the possibility of competing OS and competing app markets entering the Android OS market where Google has dominance.
- The KFTC is also closely monitoring for various unfair practices by Apple by setting an unfavorable fee levying standard for domestic app developers based on the unclear provisions. The KFTC is conducting market analysis on app distribution markets in Korea and abroad. The KFTC is continuously working and paying attention to establishing the direction of the competition policy and enforcing the law in the app market ecosystem.

- The KFTC will continue to make efforts to promote competition to encourage dynamic innovation growth and to increase benefits of platforms. It will also closely examine the impact on user welfare and innovation, noting that a dominant firm’s data protection policies can lead to self-preferencing behavior in a way that provides discriminatory options to users.



Ji-won YOON KFTC Senior Deputy Director, Anti-monopoly Bureau

Key Talking Points | Seongmin Jeon

Seongmin JEON raised points about the current trends in the South Korean digital platform market.

- The online platform is an area where relevant technology developments are rapidly occurring, and the regulation is unable to follow the speed of technological development. Since the online platform is very broad, it is unreasonable to bind all of it into an online platform and regulate it under a single law.
- Korea is one of few countries in the world that have successful native platforms. In reality, companies such as NAVER and Kakao work with numerous startups and acquire various companies. Sometimes, people working in NAVER and Kakao move jobs to these startups and create their own startups continuing innovation.
- Innovation created by startups is also important. If the startups want to create platform businesses and innovate, they may be subject to regulations from the starting point due to the relevant regulations.
- It is recommended to consider where to place regulations and strategies on the platform in order to create new businesses and promote innovation in the future.



Seongmin JEON Gachon University Business School

Key Talking Points | Soojin Namn

Soojin NAM overviewed digital platform regulations and the factors that should be considered for future regulations to come with a focus on compliance.

- Many competition authorities have made regulations and installed corrective measures to prevent discrimination, and it seems difficult to determine whether the business is performing properly pursuant to such laws. This was so in the case of Google shopping in Europe, where the business was carried out using algorithms or machine learning and the analysis was complicated.
- It is difficult to evaluate whether the implementation will work properly as it is also difficult to predict the behavior characteristics of users. While the monitoring and evaluation are difficult, the digital platform operators argue that they have performed the roles in the most favorable way to users as it may have a significant impact on user visits and profits.
- In the case of digital platforms, it is necessary to consider the implementation plan of regulation step by step, and to evaluate the impact of the implementation plan on the market through road testing.
- The neutrality and reliability of the regulatory authorities and cooperation with the regulated companies are important. The cost of regulation and the implementation measures that can encourage competition in the markets should also be considered as much as possible.



Soojin NAM Hankuk University of Foreign Studies

Key Talking Points | II Kang

IL KANG provided examples of recent mobile app market regulations in the US, UK, Germany, Taiwan, and other countries

- The U.S. is taking a careful approach to platform regulation in part because there’s a growing concern about Chinese platform companies. On the other hand, the NTIA has published a report on the competition in the mobile app ecosystem, pointing out concerns that consumers may have limited options in the app market. In other words, while taking a prudent stance on the general regulation of platform operators, possible options to tackle specific competition issues such those in the mobile app market are still being actively discussed.
- The UK’s ex ante regulation is largely driven by the newly established Digital Market Unit (DMU) within the Competition and Markets Authority (CMA), and the Digital Market, Competition and Consumer Bill has been introduced to the Parliament and the legislative process is ongoing. One of the main criticisms is that too much discretionary power is given to the DMU and we will see how this criticism is addressed during the legislative process. In 2022, the CMA issued a final report on market study on the mobile ecosystem, which contains concerns about the growing market position of Google and Apple in the app market ecosystem, and it further includes a separate chapter on privacy and competition concerns analyzing Apple’s ATT and Google’s Sandbox.
- Germany appears that it is taking a more cautious stance on the regulation of the platform. However, the

competition authority has launched its investigation and reviewed the ATT policy of Apple.

- In Taiwan, the TFTC (Taiwan Fair Trade Commission) is taking a wait-and-see approach to the DMA, especially to see the effectiveness of the DMA and its impact on the local economy. In Japan, it is impressive that the three major agencies cooperate to set up a governance framework for platform regulation. The co-regulation model, which brings together both the government and the industry, can serve as a reference for effective and balanced rulemaking.



Il KANG Bae, Kim & Lee LLC