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RECENT DEVELOPMENTS IN KOREA'S DIGITAL PLATFORM REGULATIONS

As the EU Digital Markets Act (**DMA**) compliance is set to begin in March 2024, in Korea there is a lively debate on the necessity of an ex-ante regulation for digital platforms and, if so, what would be the optimal policy solution taking into account the intricacies of the country's unique and vibrant digital economy landscape. The situation in Korea is quite different from the EU and other jurisdictions in terms of its market structure as well as its regulatory approach, which provides an informative and insightful alternative path forward. This article covers three main developments of Korea's digital platform regulations: (1) mobile app store legislation; (2) DMA-style ex-ante competition regulation; and (3) self-regulation.

I. APP STORE LEGISLATION IN KOREA

A. What is Korea's App Store Legislation?

In 2020, Google announced that it was on the verge of implementing a policy requiring App developers to use its in-app payment system, so to say prohibiting other payment alternatives. The move was criticized by some developers, and regulators scrutinized Google's and Apple's market share over the smartphone operating systems and the price they charge app developers¹.

In August 2021, Korea became the first country to enact legislation on app stores, which primarily addresses unfair competition issues regarding in-app payment. This legislation obligates app store operators to allow alternative in-app payment options.

The app store legislation refers to the partial amendments to Article 50 of the Telecommunications Business Act (**TBA**) which introduces new obligations that prohibit app market operators from:

- Forcing mobile content providers (including app developers) to use a specific payment method when providing a transaction service for mobile content, by unfairly leveraging their bargaining power
- Unfairly delaying the review of apps
- Unfairly blocking the apps.

The enforcement decree of the aforementioned regulation provides examples of "forcing the use of a specific payment method" as follows:

- Refusing, delaying, or restricting the registration, renewal or review of mobile contents of a creator that uses alternative payment methods; deleting or blocking such mobile contents
- Refusing, delaying, suspending or restricting the use of the app market by a creator that uses alternative payment methods

¹ <https://www.cnbc.com/2021/08/31/south-korea-first-country-to-curb-google-apples-in-app-billing-policies.html>

- Technically restricting the use of alternative payment methods
- Making the access or use of alternative payment methods more difficult and inconvenient
- Restricting a creator's freedom to provide consumers with different offerings depending on payment methods
- Imposing unreasonable or unfair conditions regarding visibility, search, ads, data processing, fees, or any other economic gains to a creator that uses alternative payment methods

Since the implementation of the regulation in March 2022, tensions have been rising between local regulators and app developers on one side and Apple and Google on the other, concerning compliance with this regulation.

B. How Have App Market Operators Modified Their Policies Under Korea's App Store Regulation?

The app store regulation primarily targets Apple and Google. To comply with this regulation, both companies have now allowed alternative in-app payment methods.² Nevertheless, disputes have ensued.

A dispute unfolded between Google and Kakao. Kakao is the leading messaging app in Korea, which also offers a myriad of additional services besides messaging, including restaurant booking, banking, and taxi-hailing.

Following the enactment of Korea's app store legislation, Google has allowed alternative in-app payments through third-parties, but has prohibited outlink payments, which is a payment method used by Kakao. Despite such prohibition, Kakao continued to direct the customers to purchase emoticons and subscribe to the cloud service (KakaoTalk Drawer) on its messaging app using the outlink payment method.

Google rejected Kakao's latest update of its messaging app, as it included the outlink payment method. In response, Kakao provided a separate installation file (APK) for the latest update through a website. After a series of exchanges, the dispute concluded with Kakao taking a step back. Unlike updates through Google Play, downloading and installing APK files was not user-friendly. Furthermore, concerns were also raised regarding phishing scams that use fake update APK files to deceive Kakao users, as malicious codes disguised as Kakao app updates could be distributed through texts or emails.

C. Are Korean Regulators Investigating App Store Operators?

1. KCC investigation

Korean regulators, especially the KCC and the KFTC are conducting numerous investigations of big-tech companies and imposing fines or corrective orders. Revising or introducing digital platform legislation may be necessary, and this should be considered as a legitimate option, but in Korea, it is still feasible to operate within existing rules because appropriate safeguards, like the enforcement action by the KCC and the KFTC, are developed well.

² Apple's guidance for app developers in Korea: [Distributing apps using a third-party payment provider in South Korea](#); Google's announcement: [Enabling alternative billing systems for users in South Korea](#).

The Korea Communications Commission (**KCC**), responsible for enforcing Korea's app store regulation, is currently investigating the dispute between Google and Kakao. In April 2022, the KCC issued the so-called the 'interpretative guidance of Article 50 of the TBA, stating that Google's refusal to allow the outlink payment method may potentially violate the app store regulation. However, the KCC emphasizes that a thorough investigation is necessary to determine whether Google has indeed violated the law, and the investigation is still ongoing.

In October 2023, the KCC warned of possible fines totalling up to \$50.5 million to Google and Apple, alleging that Google and Apple's enforcement of certain payment methods, and Apple's "discriminatory charging of fees to domestic app developers" is likely to undermine the TBA's purpose of promoting fair competition.³

Meanwhile, the KCC is currently probing Apple, Google, and a local app store for alleged violations of the law, including the matter of outlinks. Complaints from some app developers and local politicians are pressuring the KCC to ramp up its enforcement actions.

2. KFTC investigation and decision

In September 2022, the Korea Fair Trade Commission (**KFTC**) conducted a dawn raid against Apple Korea. This raid came after a complaint by Korean mobile game developers, who alleged that Apple's rate of commission is excessive. This investigation is separate from the above KCC investigation.

Apple charged app developers 33% of the prices paid by users, which the app developers argued was excessive. On November 22, 2022, Apple announced a voluntary reduction, lowering the effective commission from the original 33% to 30%, starting from January 2023. Despite Apple's such voluntary measure, the KFTC indicated that it would continue the investigation.

Last year, the KFTC also launched an investigation into Google's in-app payment, alleging that Google imposed anti-steering provisions on app developers. Following the enactment of the app store regulation last year, Google allowed app developers to offer a 'third-party payment method' alongside Google Play's in-app payment service. However, at the same time, Google prohibited app developers from providing users with an outlink to a web payment system. The KFTC appears to be taking issue with this policy.

D. How is Korea Dealing with Alleged Loopholes in the App Store Legislation?

In September 2022, members of the opposition party in Korea proposed a bill to take further steps to introduce mandatory 'side-loading.' This bill is a partial amendment to Article 50 of the Telecommunications Business Act, and the proposed text of the amendment is as follows:

".. An app market operator that builds and provides a basic operating system for mobile communication devices (which means a base system that enables software to run on mobile communication devices) is prohibited from unduly restricting users from installing or using third-party app markets or mobile contents through app markets other than those managed by the aforesaid app market operator or through external routes (methods of receiving publicly available information through wired or wireless telecommunication, as later prescribed in the Enforcement Decree, such as application software installed on mobile communication devices)."

³ <https://www.reuters.com/technology/skorea-considers-505-mln-fine-against-google-apple-over-app-market-practices-2023-10-06/>

In March 2023, members of the ruling party proposed a similar bill, which further incorporates measures to mitigate concerns on privacy and security of alternative billing systems from third parties. These measures include empowering the Ministry of Science and ICT (MSIT) to (i) assess the security of app stores, payment methods, and mobile contents, and (ii) make public disclosure of such security assessment results.

II. DIGITAL PLATFORM REGULATIONS IN KOREA

Beyond app markets, there is ongoing broader discussion regarding whether it is necessary to introduce a separate ex-ante competition legislation for digital platforms similar to the EU DMA.

A. Recent Dynamics of Digital Platform Regulations in Korea

Initially in 2020, with the expansion of digital platforms in Korea, the KFTC announced the enactment of the Online Platform Act and the KFTC introduced the bill to the National Assembly. In fact, the bill was repealed due to the expiration of the session at the time. In 2022, the government announced that establishing self-regulation for the platform is a presidential task of the year. The basis for self-regulation of digital platforms was built through the enactment of Article 22(11) TBA, enabling the establishment of a 'self-regulatory organization'.

Meanwhile, in 2020 the European Commission introduced a legislative proposal aimed at protecting consumer welfare and to restore fairness and contestability in the EU's digital market.

The DMA is a form of an 'ex-ante platform regulation' which contradicts with the ex-post nature of competition law enforcement. The DMA focuses on structural issues of digital markets such as an unequal level playing field between a platform and users, a platform's leveraging of market power across adjacent markets (services), and certain anti-competitive conduct by dominant digital platforms.

The DMA specifically designates global big-tech platforms such as Google, Apple, and Amazon as 'gatekeepers' and proactively regulates their core services. Once designated as gatekeepers, their core services are subject to certain obligations under the DMA to prevent self-preferencing and bundling. Repeated non-compliance could fines of up to 20% of global sales. In addition, as it operates as a *per se* rule, there is little room for companies to bring efficiency arguments or other objective justifications.

In 2023, as the DMA was entering the implementation stage, the KFTC revived its efforts to introduce *ex-ante* regulation concerning digital platforms through the Online Platform Act. Specifically, the KFTC established the Online Platform Regulatory Improvement Task Force (Platform TF), while adopting the Guidelines for Review of Abuse of Market Dominance by Online Platform Operators (the "Online Platform Review Guidelines" which took effect on January 12, 2023).

But it faced criticism that the regulation is 'excessive' as a regulatory measure and reverse discrimination against Korean digital platforms. The National Economic Advisory Council, an advisory body directly under the president, communicated these concerns to the presidential office through its 'Annual Report' in October 2023.⁴

According to the report, the Online Platform Act, which is currently under legislative discussion, should be reconsidered since global tech giants may not be effectively regulated if they do not have a physical

⁴ <https://www.edaily.co.kr/news/read?newsId=01105366635778168&mediaCodeNo=257>

presence in the country, potentially leading to discriminatory effects that primarily impact domestic platforms.

Now, the KFTC has to decide whether Korea's ex-ante regulation of digital platforms would be modeled after the EU's DMA or Germany's 10th amendments to its competition law *Gesellschaft für Wirtschaftsbestimmung* (GWB 10). This choice was previously deliberated by the Platform TF, and it was reported that the TF was leaning toward the GWB 10-style regulation.

In October 2023, an official from the KFTC said, "We are planning to announce a specific disciplinary direction to prevent monopolistic abuse of digital platforms within the year, but we have not yet specifically finalized the details of enactment for the Online Platform Act or the extent of the regulation."⁵

B. Preliminary Discussion on German-style Regulations

GWB is an equivalent of Korea's Monopoly Regulation and Fair Trade Act (**MRFTA**). It is characterized by the 9th (2017) and 10th (2021) amendments to the existing law to accommodate the changes brought about by digitalization. Notable amendments include the following:

- Bundeskartellamt may issue a decision declaring that an undertaking that is active to a significant extent on markets is of paramount significance for competition across markets (GWB 19(a)) that are "dominant in competition and of significance beyond market boundaries". And Bundeskartellamt may prohibit against a company in a dominant position, if the company commits certain types of behavior listed under GWB 19(a)(2). Bundeskartellamt cannot prohibit the behavior if the company provides objective reasons for the behavior, in which case the burden of proof is on the company to provide objective reasons.
- The competition authority (Bundeskartellamt) may impose interim measures *ex officio* if an infringement is more likely than not to exist and the interim measure is necessary to protect competition or due to an imminent threat of serious harm to another undertaking (GWB 32f).

Will Korea follow the German way? There are discussions regarding the impact of German-style digital platform regulation in Korea. If applied in Korea, regulating monopolistic abuse in the platform market will likely involve amending the MRFTA and providing an interpretation of the amendments through review guidelines.

First, allowing the competition authority to intervene early in the digital market through the issuance of interim cease-and-desist orders may lead to market rigidity by stifling companies' business activities. This is contrary to the original regulatory purpose of 'promoting competition.'

Second, it is unreasonable and unconstitutional in terms of procedural justification to place an excessive burden of proof on the respondent company, requiring them to demonstrate that they are not in a dominant market position or that there are objective reasons why their conduct is not a violation.

Third, there is an excess of discretion granted to competition authorities in determining market-dominant companies and offenses, posing a risk of introducing uncertainty in law enforcement. The

5 <https://www.edaily.co.kr/news/read?newsId=01118486635778168&mediaCodeNo=257>

concepts introduced in the revised GWB are problematic as their meanings are not clear in the text (e.g., “disruption of competition,” “paramount significance for competition across markets,” and “access to competition-related data”). Such ambiguity leads to the formation of law through the interpretation of competition authorities, which hinders the predictability for companies.

C. Concerns Regarding the Rapid Introduction of Digital Platform Regulations in Korea

The enactment of regulations should reflect the characteristics of the platform industry in each jurisdiction. However, it is difficult to find empirical evidence regarding whether the introduction of DMA-style regulations is suitable for Korea, where platform companies fiercely compete for innovation and growth.

Furthermore, even in the EU, it is commented that DMA could induce negative impacts on innovation, causing “chilling effects,” as it blocks acquisitions or makes them more difficult.

Making acquisitions harder may result in more startup failures, reduced investment, and increased costs. Forcing companies to litigate deal challenges will also increase legal uncertainties and hinder much-needed growth and innovation.

There is no global consensus that *ex-ante* regulation is the right solution to address perceived competition problems in digital markets.

D. Recent Trends in Digital Platform Self-Regulation

The MSIT and the KCC announced that on November 14, 2023, the State Council approved a partial amendment to the TBA. The amendment aims to establish and spread a legal basis for platform self-regulation to respond quickly and actively to the needs of platform users.

The amendments allow digital platforms to conduct activities such as creating a balanced trading environment, promoting innovation, protecting users, and promoting cooperation through private platform self-regulatory organizations or self-regulation of digital platforms themselves. The amendments also focus on the government's support for such self-regulatory activities.

The government has been discussing how to handle the matters of digital platforms at the Pan-government Platform Policy Council, which involves all relevant ministries, including the Ministry of Economy and Finance (**MOEF**) and the KFTC, in addition to the MSIT and the KCC. However, despite the amendments to the TBA, there still seems to be ongoing discussions on the enactment of the Online Platform Act by the KFTC.

III. CONCLUDING REMARKS

To establish a solid regulatory basis for digital platforms, the following principles are necessary.⁶

First, a balanced approach is needed when considering the relationship between ‘regulation’ and ‘innovation and growth,’ rather than adopting a confrontational stance. From the perspective of digital platforms and industries, the transition to the digital economy can be viewed as an opportunity for innovation and growth. Meanwhile, from the perspective of competition authorities, it can be viewed as a transformative period

⁶ The paragraphs that follow mainly refer to page 12 of *Reviewing legislation to effectively regulate online platforms*, National Assembly Research Service of Korea, Young-gug You, May 2, 2023.

in the legal and policy environment for establishing a new regulatory framework. Therefore, a balanced approach to both sides is essential, as well as continuous discussion and persuasion to reconcile both sides. In this context, a fundamental question for all market participants should guide discussions on a new regulatory framework: What principles should form the basis for responding to the digitalization of digital platforms?

Second, as a preliminary step to the establishment of such a new regulatory framework, it is necessary to thoroughly review whether the existing normative framework can sufficiently operate in the digital economy. It is an essential process for determining the direction and extent of amendments, and it is expected that a more coherent normative system will be established through revision and amendment based on the results of the review.

In resolving structural competition issues that may arise in markets with big tech companies, it is essential to (i) identify which areas the MRFTA is still applicable, (ii) precisely determine where new regulations are required, and (iii) examine how a new normative system can be established while maintaining balance with existing laws.

Furthermore, it seems necessary to continue to monitor future enforcement cases of the DMA and the revised GWB and to discuss (i) whether introducing similar legislation in Korea would not cause similar problems and tradeoffs in the Korean platform market, and (ii) whether revising the KFTC's guidelines on abuse of dominance, rather than the MRFTA itself, would be a more effective approach to protect competition in the evolving digital market without jeopardizing legal stability.

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For any inquiry or questions regarding the content of this newsletter, please contact us.

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