The Brussels Effect: Digital Market Regulation in East Asia (Korea)

Bae, Kim & Lee, LLC | July 16, 2024 | Richard Shin, Ph.D.

I. Various platform bills were introduced, but faced fierce opposition

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01 Purpose of the bills

- 19 bills pending in the National Policy Committee of the 21st National Assembly (January 10, 2024)
- Purpose: ① Enhancing contestability of the market, ② Regulating abuse of superior bargaining position, and ③ Protecting platform users
- Same in the 22nd National Assembly

02 Context of the bills

- Enhancing contestability: ① Pre-designation system, ② Prohibited practice (e.g. Self-preference, tying, restricting multi-homing, MFN), ③ Presuming anti-competitive effect
- Superior bargaining position: ① Written agreement for intermediary transaction, ② Unfair practices, ③ Dispute resolution system
- Platform users: re-notice for service change

03 Fierce oppositions

- Harm to innovation: GDPR & DMA effect study
- Lack of market study: Compared to other competition authorities
- Harm to Korean Champions
- Relationship with the United States

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II. New Proposals are on the table

1. The opposition party proposed new platform bills on July 5.

- On July 5, an assemblyman Nam-geun Kim proposed two platform bills: (i) one for contestability and (ii) the other for regulating superior bargaining position
  - ✓ The bill for contestability contains (i) a pre-designation system, and (ii) types of abusive conduct: self-preference, tying, MFN, restricting multi-homing and restricting access to data
- The assemblyman claims to have gathered overall opinions of the opposition party, the ruling party, and stakeholders (e.g. People's Solidarity for Participatory Democracy)

2. The KFTC will propose a new law on platform markets

- The KFTC has gathered stakeholders' opinions through seminars and panel discussions
  - ✓ The KFTC is also referencing other countries' DMA regulations
- The KFTC has not finished drafting the bill, but plans to release a version in the near future

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III. The KFTC is planning to propose a new law to regulate platforms

1. Likely features of the KFTC proposal of new regulation on platforms

- Previously, a new law on monopolized platforms was announced on December 19, 2023, but was not passed due to fierce opposition from various stakeholders
- Features of the next KFTC proposal: Pre-designation system & prohibited practices
  - ✓ The KFTC Director in charge of drafting the new law recently remarked:
    - "The new law is necessary for consumer and business user protection"
    - "The new law will focus on 'Don'ts', not 'Dos'"
  - ✓ The KFTC has not released the draft, but it will include the following " Don'ts":
    - ① Self-preferencing, ② Tying, ③ Restricting multi-homing
    - ④ Restricting access to and transfer of data, ⑤ Requiring MNF
- The likely effect is to shift the burden of proof to gatekeepers for the regulated behaviors
- After a long delay, the KFTC is finally conducting a market study on platform markets: hopefully, this will shed new light on the Korean platform markets

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III. The KFTC is planning to propose a new law to regulate platforms

2. The expected KFTC proposal will have many obstacles

- The opposition party and the ruling party have different views on the new regulation
  - ✓ President Yoon suggested self-regulation during his presidency election
  - ✓ Currently proposed legislations by the opposition parties are more restrictive
- The KFTC proposal may not have support from the existing legislature or the administration
- The proposal would not clear the National Assembly without bipartisan support
- The proposal will face significant opposition by major firms that are likely to be designated as the gatekeepers
  - ✓ The global tech companies: Apple IOS, Google, Meta, etc.
  - ✓ Korean platforms: Naver, Kakao, Coupang, etc.

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IV. Observations and Recommendations

1. It is wise to delay enacting DMA-type legislation in Korea

- Learn from European experience
  - Why would you jump on the DMA regulation bandwagon?
  - Observe and learn to adopt only the needed and effective reforms
- Regulatory costs can be substantial for ex ante regulation relative to ex post regulation
  - ✓ Ex ante regulation should be adopted only in cases of natural monopoly or identifiable and egregious market failures
  - ✓ The nature of ex ante regulation like the DMA is profoundly different from ex post competition enforcement: Two separate agencies are needed, which will require a considerable increase in manpower and budget
  - ✓ The compliance costs for companies designated as gatekeepers will be significant
    - A CSIS study estimates such costs for DMAs and DSAs to be between USD 22 billion and USD 50 billion (8% to 17% of European revenues)
    - After the breakup of AT&T's US telephone monopoly in the 1980's, I saw a report that AT&T reduced their work force by one-third

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IV. Observations and Recommendations

2. It is wise to delay enacting DMA-type legislation in Korea

- DMA imposes obligations to gatekeepers, but lacks appropriate compensation
  - ✓ In the digital platform market, securing more subscribers increases network effects
  - ✓ All gatekeepers initially invested heavily to secure and retain subscribers
  - ✓ Providing access to members and the network without proper compensation is unfair
- DMA wants to promote competition by reducing consumers' switching costs and allowing multihoming and data mobility.
  - ✓ When requiring data portability, at least two issues must be addressed:
    - ➢ Data ownership
    - ➢ Cost of transferring
  - ✓ Not all prohibited behaviors are always anticompetitive

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IV. Observations and Recommendations

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3. It is wise to delay enacting DMA-type legislation in Korea

- DMA-type laws may create abuse by gatekeepers
  - ✓ Some companies claim that some gatekeepers use the European Privacy Protection Act as an excuse to restrict or limit the flow of information to competitors
    - ➢ For example, Sokol and Zhu reviewed empirical evidence to see how competition and consumers are harmed in the name of privacy protection and concluded that “competition and privacy can be at odds”
- Even without the new law, the KFTC can monitor and enforce violations of competition law in the digital market under the existing competition laws

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Thank you.

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