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NEWSLETTER

Platform Regulation Team

CONTACT



Partner
Hwan Kyoung KO
T: +82.2.2191.3057
E: hwankyounk.ko@leeko.com



Partner
Jeong-Ho SUN
T: +82.2.772.4676
E: jeongho.sun@leeko.com



Partner
Ji Yeon KIM
T: +82.2.772.4306
E: jiyeon.kim@leeko.com



Partner
In Seon LEE
T: +82.2.6386.6359
E: inseon.lee@leeko.com

KOREA FAIR TRADE COMMISSION'S NEW ROADMAP FOR ONLINE PLATFORM REGULATION

On September 11, 2024, the Korea Fair Trade Commission (the **KFTC**) announced a new roadmap for the legislation of the online platform regulation. In general, the new roadmap proposed the legislative plan to amend the Monopoly Regulation and Fair Trade Act (the **MRFTA**) to introduce new thresholds for the presumption of online platform operators' market dominance, and to specify prohibited conducts of online platform operators. Rather than directly bringing in a dramatic change in the online platform regulation landscape by adopting a sector specific law, the KFTC chose to adjust current regulation first to handle various issues in the online platform sector. Ki-Jeong Han, the chairperson of the KFTC, implied that the new roadmap is the alternative to the past legislation plan for the EU Digital Markets Act (the **DMA**) style ex-ante regulation. As a clear sign that the KFTC is continuing to scrutinize on anticompetitive conducts in online platform sector, the new roadmap invites keen attention from the online platform operators doing business in Korea.

KFTC's Proposals in New Roadmap

In the new roadmap, the KFTC proposed the amendment of the MRFTA, the prime antitrust/competition law in Korea, to regulate anticompetitive conducts of market dominant online platform operators. Major amendments proposed by the KFTC are as follows:

Item	Details
Adoption of Separate Thresholds for Ex-post Presumption of Online Platform Operator's Market Dominance	<ul style="list-style-type: none"> ■ No DMA style ex-ante designation of market dominant online platform operators (gatekeepers) ■ Online platform operator is presumed to be market dominant when following thresholds are met: <ol style="list-style-type: none"> 1) a single online platform operator with <i>10 million or more number of users</i> has <i>market share of 60% or more</i> in the relevant market; or 2) three or less online platform operators with respective number of users of <i>20 million or more</i> have <i>aggregated market share of 85% or more</i> in the relevant market; 3) provided that, any online platform operator with annual platform related (direct and indirect) turnover less than <i>KRW 4 trillion (approx. USD 3 billion, EUR 2.7 billion)</i> shall be excluded from the presumption.

<p>Specification of Types of Online Platform Operator's Abuse of Market Dominance</p>	<ul style="list-style-type: none"> ■ Specify, in relevant law and regulation, market dominant online platform operator's following conducts as types of the "abuse of market dominance: <ol style="list-style-type: none"> 1) Self-preferencing 2) Tying 3) Restriction of multi-homing 4) Demanding Most-Favored Nation(MFN) treatment ■ Purposed to more actively regulating market dominant online platform operator's conduct to exclude competing platform operator or to prevent new market entry
<p>Increase in Maximum Administrative Fine</p>	<ul style="list-style-type: none"> ■ Increase maximum administrative fine on online platform operator's abuse of market dominance from <u>6% to 8% of relevant turnover</u>

The KFTC also specified (i) online transaction intermediation platforms, (ii) online search engines, (iii) online video platforms, (iv) social network service platforms, (v) operating systems, (vi) online ads as major sectors that will be the primary targets of the regulation.

While there still are bills pending in the National Assembly that stipulate the EU DMA style ex-ante online platform regulation, the KFTC, in responding to the imminent need for the online platform regulation and the backlash from the market, took a step back from the adoption of ex-ante regulation of online platforms, and the legislation of an independent and specialized antitrust/competition law for the online platform sector.

Unsuccessful Efforts in Adoption of DMA Style Ex-ante Online Platform Regulation

Since 2020, the KFTC has been on the drive to adopt sector specific antitrust/competition law regulation for online platforms. Initially, the KFTC proposed to introduce the "Fair Intermediation Transactions on Online Platform Act" (the **FOPA**), which primarily targeted to regulate unfair trades related to online transaction intermediation services. The bill was proposed in the 21st National Assembly however, was abolished following the expiration of the 21st National Assembly's term.

In responding to the growing needs for the section specific regulation in the online platform industry, the KFTC, besides the FOPA, adopted various sector specific regulations and guidelines in divert areas of antitrust/competition law (the KFTC also adopted sector specific regulations for consumer protection in online platform sector). Followings are major developments made by the KFTC in regards to the online platform or digital sector.

Developments	Details
<p>Adoption of "Transaction Value" Merger Notification Thresholds</p>	<ul style="list-style-type: none"> ■ Introduced transaction value merger notification thresholds to keep anticompetitive "killer acquisitions" under watch
<p>Amendment of Merger Review Guidelines</p>	<ul style="list-style-type: none"> ■ Introduced guidelines regarding: <ol style="list-style-type: none"> 1) definition of relevant market for industries in which entities provide free services or involve multi-sided markets; 2) competitive assessment to cover special characteristics of the digital sector (e.g. network effects, increased barriers to entry, factors to be considered in reviewing anticompetitive effects of merger concerning free services) 3) analysis of pro-competitive effects of mergers in digital sector

**Introduction of
“Guidelines
for Review of
Online
Platform
Operators’
Abuse of
Market
Dominance”**

- Introduced new guidelines specific to the online platform sector for the review of abuse of market dominance by online platform operators.
- Stipulated to consider special characteristics of online platforms, including (i) multi-sided markets and cross network effects, (ii) economy of scale as barrier to entry, (iii) importance of data, (iv) freely provided services in reviewing online platform operators’ potential abuse of market dominance
- Specified factors to consider in defining relevant markets in online platform sector.
- Specified factors to consider in determining the possession of market dominance in online platform sector (e.g., cross-network effect, market influence as “gatekeeper”, ability to collect and use big data etc.)
- Specified following conducts as types of online platform operators’ abuse of market dominance:
 - 1) Self-preferencing
 - 2) Tying
 - 3) Restriction of multi-homing
 - 4) Demanding Most-Favored Nation(MFN) treatment

Upon the EU’s implementation of the DMA, the KFTC initiated the discussion on the need for the DMA style ex-ante online platform regulation in Korea. The KFTC, highlighting the necessity of swift and effective response against online platform operators’ abuse of market dominance, proposed the enactment of “Platform Competition Promotion Act” (the **PCPA**) which includes the rules for the ex-ante designation of market dominant online platform operators or “gatekeepers”.

While the KFTC was already able to regulate online platform operators’ abuse of market dominance with regulations in the MRFTA, the KFTC aimed to expedite and streamline the investigation process in online platform sector by avoiding tedious process of defining a relevant market through economic analysis.

However, the KFTC’s attempt to adopt ex-ante regulation through the PCPA faced fierce resistance in the market. Korean online platform markets’ competition landscape is quite unique in the age of global “big tech” companies in that domestic platforms are flourishing in markets despite of the global big tech companies’ market penetration. The unique competition landscape resulted in the concern that the ex-ante designation of “gatekeepers” result in the regulation only on domestic platform operators and not the global big tech companies, which was the focus of the EU’s DMA and online platform regulations in other jurisdictions, resulting in uneven playing field in favor of global big tech companies. Furthermore, as Korea is one of the pioneering country in digital era nurturing a myriad number of start-up companies, there also were concerns that a precipitate adoption of sector specific ex-ante regulation would hinder the innovation in the market.

The new roadmap is the KFTC’s response in confronting the fierce resistance in the market and requests for active enforcement of antitrust/competition law in online platform sector. The KFTC renounced the adoption of ex-ante regulation and decided to amend the MRFTA to tackle online platform operators’ abuse of dominance while minimizing the negative effects of the sector specific regulation.

Limits of Proposed Legislation Plan in KFTC’s New Roadmap

Save for introducing separate thresholds for the presumption of market dominance and increasing the maximum amount of administrative fine, the proposed legislation plan on online platform regulation in the KFTC’s new roadmap, in general, is a clarification

of the rules in KFTC's Guidelines for Review of Online Platform Operators' Abuse of Market Dominance. Further considering that only very limited number of online platform operators would be captured as market dominant players under the new thresholds of market dominance presumption, and that the KFTC was already able to investigate online platform specific abuses of market dominance (e.g., self-preferencing) with existing laws and regulations, the proposed legislation plan in the KFTC's new roadmap is less likely to result in substantial change in the online platform regulation landscape.

In addition, the legislation plan did not provide predictability (especially to global online platform operators) on the scope of online platform operators which would likely to be captured under the regulation.

The KFTC's proposed thresholds for market dominance presumption of online platform operator stipulates that any online platform operator with annual platform related (direct and indirect) turnover (including those of affiliates) less than KRW 4 trillion (approx. USD 3 billion, EUR 2.7 billion) shall be excluded from the presumption. However, the thresholds do not provide clear explanation on the scope of "platform related turnover" and "indirect turnover". If the turnover refers to domestic turnover, most of the global big tech companies engage in Korean business could be excluded from the market dominance presumption. To avoid such situation, the KFTC is likely to widen the scope of "platform related turnover" and "indirect turnover", and in this case it would be extremely difficult for global online platform operators to predict whether the regulation is applicable to their business without a clear definition.

Furthermore, as the "less than KRW 4 trillion" threshold may allow most of online platform operator to avoid the presumption of market dominance (as for domestic platform operators, only 3-4 online platform conglomerate would be captured), the regulation under the new roadmap may also not be as effective as it intended to be.

Implications

Despite of the limits and problems, the KFTC's new roadmap clearly demonstrates the KFTC's will to strengthen the enforcement of antitrust/competition law in the online platform sector. Furthermore, considering that the KFTC has been conducting relentless investigations on global online platform operators, the KFTC is also likely to utilize the new regulations to expand the scope and targets of the abuse of market dominance investigation on global online platform operators doing business in Korea.

In addition, in a long-term, the new roadmap may pave the road for the National Assembly to enact a sector specific ex-ante regulation in the online platform sector.

In this regard, the KFTC's new roadmap invites the keen attention of online platform operators (especially global big tech companies) to keep in track of the future legislative developments in online platform regulations.

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