

# Kluwer Competition Law Blog

## Main Developments in Competition Law and Policy 2021 – Korea

Sangyun Lee (ICR Law Center, Korea University) · Monday, February 14th, 2022

2021 will likely be counted as one of the most monumental years in the history of Korean competition law and policy. Above all, the amendment of Korean competition law, *Monopoly Regulation and Fair Trade Act* (“Korean competition law”), which significantly overhauled it, was entered into force. In addition, several bills to regulate digital platforms were proposed, and the passage of the amendment to the Korean *Telecommunication Business Act* regarding app stores and billing systems garnered a significant amount of attention from around the world. Meanwhile, the Korea Fair Trade Commission (“KFTC”), South Korea’s competition authority, actively joined the global-wide lineup towards creating a more ‘open and contestable’ digital markets (see [here](#)) and rigorously enforced the competition rules to combat abusive practices by digital platforms, such as self-preferencing. Furthermore, the agency at times broadened its remit to tackle the abusive exploitation of the state of economic dependence in the digital and tech sectors. It is no secret that all these developments were inspired by or made in conjunction with other jurisdictions’ enforcement and legislative actions.

### Developments in Digital Competition Policy

Competition laws and policies around the world experienced significant changes last year in the face of challenges from the rapid evolution of the digital economy. For instance, self-preferencing practices, which used to be considered a natural manifestation of the competitive process rather than suspicious conduct (see [here](#)), were targeted by competition authorities around the world (see [here](#)). Also, the role and utility of the abuse of economic dependence tool were revisited in Europe in consideration of the asymmetric relations between participants within digital ecosystems or captive value chains (see [here](#), [here](#), [here](#), and [here](#)). Moreover, *ex ante* regulatory instruments were introduced or proposed in many jurisdictions to rein in large gatekeeper platforms (see [here](#), [here](#), and [here](#)). Korea did not lag behind in this global race for more effective competition law enforcement and stricter digital regulation. In some regards, it seemed to be striving to make itself a front-runner (if not a hipster, see [here](#)).

*Rigorous enforcement actions against abusive practices by digital platforms*

Firstly, the KFTC continued its increased vigilance against abusive practices by a dominant digital platform. The recent case, Naver, was one of the high-profile examples of the authority's efforts to curb the problematic practices by a dominant platform. Following the European Commission's Google Search (Shopping) decision about self-preferencing (Case no. AT.39740, see [here](#)), the Korean competition watchdog sanctioned Naver, a dominant search engine in Korea, for the same conduct in 2021 (Decision no. 2021-027, see [here](#) and [here](#)). In its decision, the KFTC firstly found that Naver held a dominant position in the market for comparison shopping services as well as in the market for online general search services. Then, the commission determined that the company abusively leveraged its position to preference its own online marketplace by manipulating search algorithms through which the company could display the products offered via the Naver's marketplace (*i.e.*, Naver Smart Store) on the top of search results, lowering the rankings of other products sold through competing platforms. This decision marked the first time that the KFTC enforced competition law against self-preferencing and it is reportedly now preparing to apply the novel theory of harm to other platform operators, such as Kakao, which operates a social network platform similar to Facebook in Korea (see [here](#)), and Coupang, which is often referred to as the Amazon of South Korea (see [here](#)).

Also, the KFTC issued a long-awaited decision on Google's restrictive practices regarding the mobile operating system ("OS"), Android (Decision no. 2021-329, see [here](#)). The authority's investigation was triggered by the European Commission's 2016 investigation (see [here](#)), but the main concern in the Korean case was slightly different. Rather than addressing all concerns related to tying practices regarding Google's search service, the KFTC focused on the anti-fragmentation agreements ("AFAs") issue. The KFTC found that Google abused its dominance in the smart device OS market by forcing device makers, such as Samsung Electronics, to exclusively use Android OS on their devices through the AFAs. Under the AFAs, Google obliged device manufacturers not to use other OSs, *e.g.*, Android forks, and even prevented them from inventing alternative OSs. According to the KFTC, device makers had no other choice but to accept the AFAs because Google required them to sign the AFAs as a precondition for a license to include other Google products, like the Play Store, on their devices that are of significant value to users and for early access to Android OS updates. Based on these findings, the KFTC decided that Google abused its dominant position in the mobile OS market, hindering competition and stifling innovation in other smart device OS markets.

#### *Enforcement against abuse of superior bargaining position (a.k.a., abuse of economic dependence)*

The KFTC's enforcement actions were not confined to abuse of dominance cases. They curbed abusive practices by non-dominant platforms as well under the prohibition against the abuse of superior bargaining position, also known as abuse of economic dependence (see [here](#)). Although the competition enforcer's reliance on the relative concept was not novel in East Asia (as to Japan's experience, see [here](#) and [here](#), and Taiwan's experience, see [here](#)), the KFTC enforcement was conspicuously vigorous.

The KFTC's Delivery Hero case was a good example. In this case, the authority found that there was a competitive bottleneck in the market for on-demand food delivery services, causing restaurants to become economically dependent on delivery platforms, whether dominant or not. Based on this ground, it found that Delivery Hero, the second-largest but not-dominant food delivery platform (which had a 20-30 percent market share) held a superior bargaining position

(*i.e.*, economic dependence) over participating restaurants and then abused that position by imposing price parity clauses and restricting the restaurants' economic freedom to set their own prices (Decision no. 2020-251, see [here](#), and [here](#)).

Similarly, the KFTC recently fined Coupang, the second largest (and non-dominant) e-commerce platform operator in Korea, for abusing its superior bargaining position. The KFTC held that Coupang forced suppliers to raise their sales prices offered on other platforms when the prices fall due to temporary sales promotions. Coupang allegedly engaged in this practice to secure its "lowest price policy" under which it matched product prices on its marketplace with the lowest ones offered elsewhere online. The KFTC held that this practice infringed on suppliers' freedom to make choices in their own business, hampered price competition, and harmed consumer welfare (Decision no. 2021-237, see [here](#)).

Furthermore, several global tech companies, although they were not necessarily digital platforms, were on the radar of the competition watchdog in 2021. For example, the KFTC closed its investigation into Apple's abusive practices related to iPhone distribution channels with a commitment decision (Decision no. 2021-074, see [here](#)). Similar to the French Autorité's Apple case (Decision 20-D-04, see [here](#) and [here](#)), the KFTC raised concerns around Apple's superior bargaining position in its distribution system. The KFTC accused Apple of coercive practices, that is, foisting advertising and repair costs on local mobile carriers by using that superior bargaining position, as noted in the 2016 French government's litigation against Apple (see [here](#)). However, the Korean case was closed without reaching an infringement decision. The KFTC closed the case and accepted Apple's commitments to offer around 100 billion won (circa 73.4 million Euros) worth of support programs for small businesses and consumers, remove the contested contract terms, transparently share advertising costs with retailers.

Lately, the KFTC took action against another global tech firm in Dolby (Decision no. 2021-223, see [here](#)). Dolby, as a standard essential patent ("SEP") holder for AC-3 technology, was determined to have a superior bargaining position over Gaon Media, a local set-top box manufacturer, and found to have violated competition law by restricting access to the patented technology and breaching its commitments to license the SEP on fair, reasonable and non-discriminatory terms ("FRAND"). The value of this case as a precedent is limited because it was mainly concerned with a contractual dispute that arose during Dolby's royalty audit, rather than the SEP license as such. Nevertheless, this case may be of interest to competition scholars who are fond of the flexibility of the 'economic dependence' approach.

### *Regulatory approaches to digital platforms*

#### *Platform Regulation*

In keeping with the global trends of increasingly stringent digital regulation, the KFTC and the Korean Communications Commission ("KCC"), the Korean telecommunications regulator, put forward the *Act on Fair Intermediate Transactions on Online Platforms* (the KFTC's bill, see [here](#)) and the *Act on Online Platform User Protection* (the KCC's bill, see [here](#)), respectively, to regulate unfair transactions between platforms and business users. Both bills shared significant commonalities, particularly in terms of the legal obligations for platform operators, such as the applicable scope of the rules; the requirement that platforms give users prior notice when

terminating contracts or restricting services; transparency obligations, including providing the ranking and visibility of users on the platform; the requirement that they have a complaint-handling system; and prohibiting the abuse of their superior bargaining position. While the two agencies agreed upon the necessity of new regulations rein in large intermediary platforms, they, unfortunately, failed to agree on which would be the main regulatory authority. Furthermore, at the time of writing, all debates over new legislation have been suspended due to the upcoming 2022 presidential election, further delaying resolution for this issue.

### *Regulation on In-App Purchases (So-called “Anti-Google Act”)*

Notwithstanding the delay over this legislation regulating platforms, however, the National Assembly, South Korea’s national legislative body, swiftly passed a bill last year that was locally dubbed the ‘Anti-Google Act’ (see [here](#)). Its purpose was to make it illegal for app store operators, e.g., Google and Apple, to force developers to use their proprietary in-app purchase systems. This legislation was introduced by amending the Korean *Telecommunication Business Act* by adding Article 50(1)(9) that proscribes app store operators from “unfairly using their bargaining position” to force the providers of apps distributed through their app stores to use specific payment systems for transactions made in their apps. In contrast to the ambitious legislative intention, however, the effect of the new law remains questionable. Although the law entered into force on September 14, 2021 (see [here](#)), Google and Apple have made no effective changes in their practices yet (see [here](#) and [here](#)). As a result, many businesses continue to complain about the two giants’ nearly 30% commission rates (see [here](#)) and several commentators argue that stricter *ex ante* regulation is required (see [here](#)).

Recently, the KCC announced that it will revise the Enforcement Decree for the Telecommunication Business Act and the Notice to clarify the scope and meaning of Article 50(1)(9) discussed above by adding the following examples of the *unfair use* of the asymmetric bargaining position: (i) “Actions which reject, delay, restrict or delete or block the registration, renewal, review of mobile content which uses different payment methods”; (ii) “Actions which suspend or restrict the use of the app market by mobile content providers which use different payment methods”; (iii) “Actions which use technical means to restrict use of different payment methods”; (iv) “Actions which require significantly difficult procedure to use a different method of payment; Actions which apply irrational or discriminatory conditions or restrictions for monetary profit.” The KCC also stated that “the relative standing of parties, forced nature, or unfairness of a transaction” will be considered when determining whether the law had been violated (see [here](#)).

### **Overhaul of Korean Competition Law**

Beyond digital regulation-related issues, several remarkable developments were made in Korean competition law, the *Monopoly Regulation and Fair Trade Act*. Notably, at the very end of the last year, on December 30, 2021, a revised version of Korean competition law finally entered into force. These amendments were noteworthy because they included several substantial revisions, such as the clarification of the concept of information exchanges, the introduction of the injunctive relief system for unfair trading practices and the transaction value threshold in the merger control, as well as some technical modifications in the wording and numbering of articles.

### *Information Exchange*

First, Article 40(1)(9) and Article 40(5)(2) were newly introduced by the amendments. They explicitly stipulated that information exchange can now qualify as anti-competitive collusion (see [here](#) and [here](#)).

In fact, even before the amendment, it had not been impossible to tackle anti-competitive concerted practices without explicit agreements. Because the word “agreement” which was required as a precondition to establishing illegal collusion under the Korean competition law was broadly interpreted to include tacit collusions. Nevertheless, there was controversy over how far this interpretation could be extended and how much the evidentiary standards for proving the existence of an agreement could be relaxed in the antitrust administrative procedures, given the possibility of the KFTC’s follow-on criminal referral to the Attorney General (Article 129, Korean competition law, see [here](#)). Indeed, considering the possibility of the criminal penalties for collusive behaviors, the Supreme Court had incrementally elevated the standard of proof in the administrative competition law proceedings and the latest high-profile example was the 2015 *Ramen Collusion* case (Judgment no. 2013Du25924, see [here](#)). In this case, the Court rejected the hearsay evidence put forward by the KFTC (it was the very first time for the Court to reject the hearsay evidence in administrative proceedings) and ruled that the mere fact that companies alleged to have engaged in price-fixing collusion shared some sensitive information does not amount to an anti-competitive “agreement” in the sense of Korean competition law. This judgment gave rise to heated debates about whether it should.

Against this background, the KFTC and the National Assembly decided to embed clear provisions in the law, Article 40(1)(9) and Article 40(5)(2), to presume the existence of ‘agreement’ where there is evidence that companies shared competitively sensitive information. As to the types of sensitive information and the competitive assessment of information exchange, the KFTC issued guidelines on December 28, 2021 (see [here](#)), which entered into force on December 31, 2021.

### *Injunctive Relief for Unfair Trading Practices*

In addition to the information exchange provision, the amendments also introduced injunctive relief for unfair trading practices (“UTPs”). UTPs have long been prohibited as illegal business practices in Korean competition law (see Article 45(1), Korean competition law, see [here](#)), like in the Japanese Ant-Monopoly Act (see [here](#)). Despite the long history of their prohibition, however, there has always been a fierce controversy over the nature of the harm that the UTPs cause in the sense of competition policy. It was because the purview of the UTPs prohibition has included almost all types of vertical restraints, abuse of superior bargaining power, some forms of unfair competition regardless of a power imbalance, and even some unfair commercial practices, which are addressed by contract or consumer protection rules in general. While some academics and practitioners have sided with the necessity of the broad definition of the UTPs and the public intervention by the KFTC for an effective and efficient speedy resolution of disputes, many, if not a majority of, have criticized and argued that the UTPs should basically be handled by private litigation before civil courts rather than addressed within the framework of competition law enforcement. They have noted that, otherwise, the UTPs prohibition could undermine the

coherence of competition law enforcement that seeks to address structural market failure, not a situational contract failure.

Against this backdrop, Article 108 was added to the Korean competition law (see [here](#)). This provision allows an individual who claims to be a victim or to likely be a victim of UTPs to pursue injunctive relief before civil courts, leaving aside the possibility of the KFTC to take public enforcement action. Under the newly introduced article, plaintiffs are merely required to show “damage or the possibility thereof” to have standing. Unlike in the US (15 U.S. Code § 26, see [here](#)) and Japan (Article 24, AMA, see [here](#)), the plaintiff does not have to show that such damage is ‘irreparable’ or ‘extreme’. Although it remains to be seen how the new system works in practice, it is expected to allow for quicker remediation within the civil law framework.

## Other Developments

In addition, the amended Korean competition law has also brought about several significant changes to improve the effectiveness of the private and public enforcement of the law. For example, with an aim of promoting private damage claims against cartels and UTPs, Article 111 has been introduced (see [here](#)), which allows individual plaintiffs to seek the court’s order for the defendant to submit documents necessary for proving damages. Meanwhile, in terms of public enforcement, the maximum level of administrative fines for violations of the Korean competition law has doubled. Also, by adding Article 11(2) (see [here](#)), the transaction value threshold has been adopted. The threshold models Section 35(1a) of the German competition law (see [here](#) and [here](#)) and, like that of the German law, its purpose is to allow for the prohibition of some transactions that may restrain potential competition by established firms swallowing up startups through so-called killer acquisitions.

## Recapping 2021 and looking ahead 2022

In 2021, South Korean competition law and policy became more closely aligned with global trends in competition law. There were significant antitrust enforcement actions taken against global tech giants, and serious efforts were also made to regulate the digital economy by sector-specific regulations. These trends are likely to continue in 2022. Indeed, the KFTC’s decision on Broadcom’s practices, which were already tackled in Europe (see [here](#)) and the US (see [here](#)), is expected to be rendered this year (see [here](#)) and there will be more cases related to Google to come. It is reported that the KFTC is now investigating Google’s practices, such as forcing app developers to distribute their apps exclusively through the Play Store, the Play Store’s in-app purchase policies, and practices related to digital advertising (see [here](#)). Moreover, on January 6, 2022, one day after the German authority published its decision designating Google as gatekeeper (see [here](#)), the KFTC put forward its draft enforcement guidelines on unilateral practices by gatekeeping platforms (see [here](#)). Given that the KFTC recently revamped its technology task force to increase its digital expertise and strengthen international cooperation (see [here](#)), these guidelines can be seen as a way for it to increase its enforcement actions against digital platforms in 2022 (see [here](#) and [here](#)). Needless to say, the bills regulating digital platforms, if enacted, will likely make other highly potent regulatory actions possible. Finally, it is noteworthy that the KFTC recently sent Statements of Objections to carmakers, *i.e.*, Daimler, BMW, and the Volkswagen



Group, regarding agreements related to car emission technologies following a related decision by the European Commission (Case no. AT.40178, see [here](#)). This case will test whether Korean competition law can be enforced based on environmental sustainability-related theories of harm (see [here](#)).

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I thank Betül Canbek for her comments. All errors are my own.

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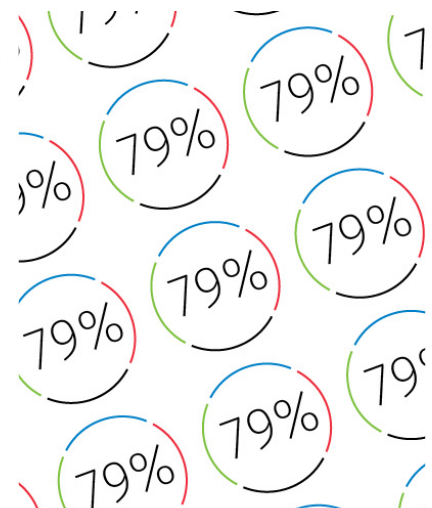
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