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Ex-Ante Regulation and Competition in Digital Markets – Note by Korea

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This document reproduces a written contribution from Korea submitted for Item 2 of the 136th OECD Competition Committee meeting on 1-3 December 2021.

More documents related to this discussion can be found at
<https://www.oecd.org/daf/competition/ex-ante-regulation-and-competition-in-digital-markets.htm>

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1. Introduction

1. A natural monopoly occurs in the digital market due to its network and first mover effects followed by data concentration. The United States and EU member states are thus becoming more and more concerned that existing ex-post regulation alone cannot adequately prevent major platform businesses from engaging in anti-competitive practices in the digital market. Their concern is that major platforms cannot be well regulated under traditional competition regime and ex-ante regulation is required to restore competitive structure in the market.

2. On the other hand, however, dynamic competition in the digital market driven by innovation is at least as important as competition-in-the-market; competition for market share in an established market. That is, innovative competition-for-the-market is essential in the digital market and to this end. This implies that market participants need to be incentivized to develop new digital services. This is why there needs to be a minimum level of ex-ante regulation.

3. Characteristics of monopoly by digital platforms and competition in each countries' market should be assessed sufficiently before making decision on whether to adopt ex-ante regulation or not in digital markets. Intense ex-ante regulation is more appropriate if the market has solid monopolistic structure and high entry barriers. If competitive market structure is active, on the other hand, a careful approach might be preferable, as imposing ex-ante regulation can discourage the development and investment on innovative digital infrastructures.

4. The KFTC is seeking for balanced regulatory measures to minimize concerns about undermining dynamism and innovation in the digital market while effectively responding to major platforms' abuse of dominant position. At current stage, nevertheless, the KFTC's priority is to enhance the timeliness and effectiveness of ex-post regulation to protect competition in the digital market. The KFTC plans to impose ex-ante regulation as a complementary measure where it is difficult to achieve its policy goals in the digital market with ex-post regulation alone, along with strengthening competition advocacy through cooperation with industry authorities.

2. Ex-ante and Ex-post Regulation in the Digital Market

5. The digital market can be characterized by its tipping effect due to network effect and data concentration. This characteristic makes it easier for dominant platforms to hinder new platforms from entering the market and expand their dominance to relevant markets. Not only does a natural monopoly easily occur, digital services provided by the dominant platforms became essential part of other companies' effort to run their business with competitive edge.

6. Traditionally, various ex-ante regulations including entry regulations existed for industries with strong tendencies of natural monopoly and great influence over dependent businesses; energy supply chain, rail transport, and telecommunication facilities, et cetera. Unlike other general industries, monopolization and abuse of dominant position in these industries bring greater concern and need for scrutiny.

7. There are ongoing, robust discussions and urges that calls upon similar ex-ante regulations on major platforms that control and manage digital infrastructure, which constitutes the basis of the digital economy.

8. With their growing influence, major platforms are now asked be responsible on roles as a major data collector, as a fair manager of the business ecosystem, as well as a protector of consumer interest. The most direct means to obligate platform operators with these responsibilities to will be by ex-ante regulation.

9. On the other hand, however, dynamic competition in the digital market driven by innovation is at least as important as competition-in-the-market; competition for market share in an established market. That is, innovative competition-for-the-market is essential in the digital market and to this end. This implies that market participants need to be incentivized to develop new digital services.

10. We cannot overlook the differences between large platforms and traditional industries of natural monopoly. The traditional natural monopolies tend to have high economies of scale in supply-side and the speed of technological change is relatively slow. Many platform industries, by contrast, tend to rely on the economies of scale in demand-side and the speed of technological change is rapid. The leading participant of web browser market, e.g., has changed from Netscape Navigator to Internet Explorer, and to Google Chrome only less than 30 years. Compared with a century old railway networks still in operation with improvement and modernization, the difference is obvious.

11. Therefore, the status of competition in individual markets needs to be assessed sufficiently before whether to introduce ex-ante regulation in the digital market. In general, introducing ex-ante regulation is more beneficial if the monopolistic market structure is solidified and new businesses does not even dare to enter the market. In a competitive market environment, however, we cannot rule out the possibility that ex-ante regulation could disincentive the development and investment of novel digital services. As platforms in particular reach a monopoly due to the network effects on the demand-side, status of markets in each country could vary significantly.

3. Korea's Policy Trends

12. The KFTC is working on 'the Guidelines for Examination of Unilateral Conduct in Platform Markets' to enhance timeliness and effectiveness of ex-post regulation, aiming to prevent anti-competitive practices of platforms. At current stage, the KFTC's priority is to enhance the timeliness and effectiveness of ex-post regulation to protect competition in the digital market. The KFTC plans to impose ex-ante regulation as a complementary measure where it is difficult to achieve its policy goals in the digital market with ex-post regulation alone, along with strengthening the function of competition advocacy through cooperation with industry authorities.

3.1. Enhancing timeliness and effectiveness of ex-post regulation

13. Traditional competition law enforcement analyzes and regulates anti-competitive effects of an act only after it has occurred and has taken effect; this should be redeemed in terms of timeliness. As platform market changes rapidly and once tipping has taken place by its network effect, it is hard to restore competition in the already monopolized market.

14. In light of these issues, the KFTC aims to prevent anti-competitive practices of platforms through the 'the Guidelines for Examination of Unilateral Conduct in Platform Markets' (hereinafter referred to as the "Platform Guidelines").

15. The Platform Guidelines are applied across major platform markets, including but not limited to online intermediary services, search engines, and OS. According to the guidelines, cross-network effects, economies of scale, importance of data, and characteristics of free service business model must be considered in defining markets, assessing market dominance, and determining the unjustness of a conduct. The guidelines also provide the judgment criteria on four types of abusive practices; restriction of multi-homing, MFN clauses, tie-in sales, and self-preferencing.

16. The guidelines will serve as a warning to platform operators not to engage in anti-competitive practices. If such conducts are to take place, it is expected that the illegality of the conduct can be judged quick, clear and accurately so investigations and remedies are more effective and in a more timely manner.

3.2. Enhancing transparency in trade with ex-ante regulation

17. Enhancing transparency in trade process is an effective means of preventing anti-competitive practices. As trade process becomes more transparent, platform operators cannot abuse their power as a referee and take responsibility as a fair manager of the ecosystem. With more transparency, their role as a referee can be evaluated better in the market.

18. One of the core means of business in platform services—search, advertising, intermediary platforms alike—is the power to determine exposure ranking. Platform operators can use this power to favor their own products and services to attract consumers, or guarantee preferential exposure to business partners in order to make exclusive dealing agreement. This way, they can leverage their existing market power to adjacent markets or increase entry barrier in the dominant market.

19. Rather than introducing ex-ante regulations which directly prohibit certain conducts, the KFTC plans to take a more indirect approach in ex-ante regulation; obliging platform operators to enhance transparency in trade process that can prevent further attempts to take part in anti-competitive practices. As part of our efforts, the KFTC is driving to enact the ‘Act on Fairness in Online Platform Intermediary Transactions (OPA)’.

20. According to OPA, platform operators must state the order of exposure, format, and criteria of products and services in the contract to improve transparency of their trade. This measure will not only allow their business partners to understand important terms of the trade they engage in, but also prevent platform operators from abusing their influence; playing dual role as a referee and a player, such as self-preferencing.

3.3. Strengthening consumer protection with ex-ante regulation

21. Although e-commerce platforms are highly involved in trade and play significant role in everyday consumer life, their responsibility was limited to an intermediary under Korea’s current legal system. This is why ex-post regulation needs to be strengthened by legally stating platforms’ responsibilities.

22. Ex-post regulation alone, however, has its limits as it relieves consumer harm only after determining whether the seller or the platform should be held accountable. If platforms are obligated to provide sufficient information to consumers through ex-ante regulation, on the contrary, consumers are able to make more rational, informed choices than before, which can fundamentally prevent consumer harm.

23. The KFTC is proposing the amendment of the ‘Act on Consumer Protection in the E-Commerce Transactions.’ to better protect consumers using e-commerce. The bill includes

ex-post regulation which clearly imposes responsibility on platforms, as well as ex-ante regulation. According to ex-ante regulation in this bill, e-commerce platforms must state major factors that determines search and exposure ranking (e.g. views, sales volume, price, organic vs paid search) and disclose information on collection and process of the user reviews. These ex-ante regulations are intended to prevent platforms from misleading consumers to make misconceived decisions and cause consumer harm.

3.4. Enhancing data portability and interoperability through collaboration with industry authorities

24. As many other industries are, platform businesses are related to industry authorities and competition authorities alike. A close collaboration between these authorities is important in reaching appropriate regulation regime.

25. Data is an important factor of production that can be used in all areas of business, including production, logistics, and marketing. The ability to collect, own, and utilize data determines business competitiveness; since providing customized services by utilizing user data improves service quality, and this accelerates user data accumulation, creating a virtuous cycle. While data is concentrated in certain businesses, lack of data portability and interoperability can increase entry barriers and restrict competition.

26. By contrast, greater data portability and interoperability facilitates the emergence of new innovations and services. For instance, Personal Credit Information Management Service (also known as My Data Service) adopted by the Financial Services Commission enhanced data portability; by allowing financial institutions to provide consumers' personal information to a government approved third party under the person's own request. Since then, new services related to financial information are on the rise.

27. To set the regulatory system that promotes competition in the platform sector, collaboration with industry authorities concerned, such as Ministry of Science and ICT, is an important task. This is because industry authorities leads the formulation of technical standards and protocols for enhancing the portability and interoperability of data.

28. In September, the 'Act on the Promotion and Use of Data Industry' (hereinafter the "Data Act") was passed by the National Assembly. The bill proposes that the government must establish a basic plan every three years to promote the production, trade, and utilization of data and found the data industry with consultations of central administrative agencies concerned. It also proposes that the government must take necessary measures to accelerate exchange and enhance convergence in and out of the industry to facilitate production of new data by data combination.

29. The KFTC plans to take part in the National Data Policy Committee, established as the bill takes effect. The Commission will collaborate with industry authorities to facilitate competition in the platform sector by enhancing data portability and interoperability. Moreover, the Commission will strengthen its competition advocacy function by seeking measures to improve ex-ante regulation that can promote competition in relevant industries.

4. Conclusion

30. The KFTC is prioritizing measures to restructure ex-post regulation fit for the unique characteristics of digital market. As ex-post regulations are not sufficient to achieve transparency of trade and consumer protection goals, these goals will be pursued by ex-ante regulations. The data portability and interoperability will be approached by

collaboration with the industry authorities. The Commission is willing to take a flexible approach between ex-post and ex-ante regulation in dealing with the situation.