

A comparative study of legal developments concerning platforms in the EU, Us, and Korea

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Executive Summary

The title of the thesis is a comparative study of legal developments concerning platforms in the EU, US, and Korea focused on abuse of dominant position and creating a level playing field. The thesis addresses regulation of abuse of dominant position by multi-sided platforms and legislative efforts to prevent or restore the unfair competitive environment caused by gatekeeper platforms in the EU, the US, and Korea.

Multi-sided platforms are intermediaries that provide goods or services to several separate customer groups who rely on one another and rely on the platform to enable transactions among them. They significantly reduce costs and, at the same time, increase profits by connecting diverse customer groups based on the Internet and mobile devices. Furthermore, they are rapidly expanding their business areas by leveraging their market-dominant power in one market to enter other markets. During the COVID-19 pandemic and its aftermath, the trend of concentrating market dominance of multi-sided platforms is intensifying.

However, business models of the multi-sided platforms are highly complex, and unusual in our experience. Thus, it is necessary to reflect unfamiliar market features which multi-sided platforms are causing in the process of defining the relevant market, assessing market-dominant power, and determining abuse of market-dominant position. The unique market features associated with multi-sided platforms, such as network effects, scale effects, lack of multi-homing, lock-in effects, and limited access to data, are driving the need for the adoption of new competition tools worldwide. In this respect, competition authorities and regulators can propose alternative ways to address issues related to fairness, such as discrimination between market participants and interoperability, when the conduct in question does not meet the requirements for abuse of dominance. Such alternative measures are suitable to solve the demand-sided competition issues based on consumer information and preferences.

Meanwhile, in light of the changing market environment and the movement towards legislative actions targeting gatekeeper platforms, there are limits to controlling multi-sided platforms only by means of regulating abuse of dominant position. The structural competition problems triggered by gatekeeper platforms can no longer be ignored. In this regard, additional legislative actions aimed at the gatekeeper platforms have been initiated. The Digital Markets Act in the EU to establish a level playing field by promoting innovation, growth and competitiveness in single and global markets entered into force 1 November 2022. In a similar vein, the U.S. House of Representatives voted for antitrust law packages targeting giant platforms, known as GAFAM (Google, Amazon, Facebook (Meta), Apple), on 11 June 2021. In particular, the Ending Platform Monopolies Act contains a strong pre-regulation on the entry of platform operators to a downstream market. Unlike Europe, there have been actually no restrictions on giant platforms for a long time in the United States. Thus, it means a change of position of the United States in terms of competition law enforcement relating to big platform companies. In Korea, the KFTC

proposed “KFTC’s three Online Platform Acts” aimed at platform companies in 2021.

In this regard, the objective of this thesis is to propose implications and recommendations on competition policy to competition authorities and policymakers regarding the abuse of dominant position by multi-sided platforms. And then, it aims to provide guidelines for legislative actions in each jurisdiction to ensure a level playing field. Furthermore, new types of anticompetitive behaviour by multi-sided platforms need to be regulated by competition authorities, even if the size and nature of the conduct at issue do not meet the requirements for abuse of dominant positions. In this regard, applicable regulatory methods that align with the characteristics and size of a platform should be suggested.

For this, the main stream of the methodology chosen in this research is by ‘comparing’. In other words, in-depth case studies between non-platform companies and multi-sided platforms will be conducted to illuminate particular features of multi-sided platforms. To highlight particular features of multi-sided platforms, comparative methods are efficient. Therefore, the findings from the research will be suggested in terms of the comparison of three categories as follows: (i) comparison of abuse of dominant position by non-platform companies and multi-sided platforms, (ii) comparison of abuse of dominant position in the EU, the US, and Korea, and (iii) comparison of additional legislative measures for gatekeeper platforms in the EU, the US, and Korea.

With regard to research methods, case analysis in the EU, the US, and Korea that well reflects the characteristics of multi-sided platforms was selected. And common cases in three jurisdictions such as Google Android Operating System case, were preferentially reviewed to demonstrate differences in competition law enforcement in three jurisdictions. If there was any background to the different approaches by each jurisdiction, it was explained in relation to the goals pursued by the competition laws of each jurisdiction. Interview and surveys were also conducted. The findings of the inquiries and surveys conducted by government authorities and private organisations in the EU, the US, and Korea were used to demonstrate the necessity of additional legislation relating to gatekeeper platforms. In particular, timely research and surveys by the KFTC, the Korean Federation of Small and Medium Businesses, and the Consumer Protection Board were helpful to look for suggestions in this research. For example, surveys such as the ‘Platform Taxi Actual Survey’ by Seoul Metropolitan City in Korea were examined to find some implications and suggestions of the research. For theoretical analysis, in examining the theories relating to multi-sided platforms, the primary research method conducted in this research is examination and analysis of ‘documentary materials’. The decisions of competition authorities, the rulings of courts in the EU, US, and Korea, and the literature in the field were dealt with to provide an in-depth review of current competition law enforcement. The main source of the study, however, is the literature review of articles in the field of law, politics and economics. Most of all, online sources such as conference proceedings and reports are indispensable materials of this research. In light of the rapidly changing environment surrounding the platform industry, online sources such as press releases, and internet blogs were screened, analysed, and included in the discussion.

This thesis gives a brief overview of multi-sided platforms. The definition, requirements, types, and specific features of multi-sided platforms are dealt with. Next, market definition, assessment of market power, and abuse of dominant position are addressed. And then some research findings that were based on the two categories of comparison are explained. The first is a comparison between non-platforms and multi-sided platforms and the second is a comparison multi-sided platform cases in the EU, US and Korea. Finally, current legislative actions in the three jurisdictions for better regulation of multi-sided platform companies were discussed. In this regard, the new regulatory trends for creating a level playing field beyond regulation of abuse of dominant position are proposed. This thesis concludes with some implications and recommendations to achieve a better regulation framework for multi-sided platforms. In this regard, I suggest a three-phase regulative model for platforms in this research.

Traditional competition law tools do not adequately capture and reflect the complexity of multi-sided platforms in regulating abuse of a dominant position by multi-sided platforms. Thus, it is important to consider the unique characteristics of multi-sided platforms. The market definition for multi-sided platforms can be conducted by means of conventional methods for relevant market definition. Bundling customer groups does not guarantee a proper reflection of the characteristics of multi-sided platforms; it rather adds uncertainty concerning competition law enforcement.

Multi-sided platforms have an influence not only on the original area in which the platforms operate, but in other areas where the platforms are trying to extend their business by means of their market power. Under these conditions, innovation and rapidity are extremely important considerations in assessing market power. In addition, the references of users and reputation or trust of a community can be considered assessment factors of market power. As such there are a variety of challenges in reflecting multi-sidedness such as potential biases and uncertainty in measuring the market power of multi-sided platforms. That is why there should not only be quantitative approaches, but also qualitative approaches in practice as proposed by the European Commission in the Google Comparison Shopping case. Therefore, it would be improper to provide detailed recommendations for the assessment of market power of multi-sided platforms.

In regard to the illegality of the conduct of multi-sided platforms, it is required to choose the best model to assess the illegality of the conduct at issue because the conduct triggers pro-competitive effects or anti-competitive effects, or both. In this regard, competition authorities and courts in each regime need to develop best models to judge the illegality relating to abuse of a dominant position by multi-sided platforms reflecting particular features of multi-sided platforms.

Next, there are differences in competition law enforcement regarding abuse of a dominant position by multi-sided platforms between the EU, the US and Korea. All the differences in the decisions of the competition authorities in each jurisdiction are derived from the goals these competition authorities and courts are pursuing. Thus, it is very hard to identify a similar stance of competition authorities and courts in the three jurisdictions without there being a consensus on competition policy for abuse of a dominant position by multi-sided platforms. However, it

would be appropriate and reasonable to propose common guidelines for the creation of a level playing field for competitors when gatekeeper platforms are standardising people's lifestyle. Gatekeeper platforms have the same business model across borders, competition authorities around the world should introduce various international cooperation measures to overcome information asymmetry in the digital market. In addition, multi-sided platforms are rapidly expanding their business areas by taking advantage of market-dominant power in one market for gaining market power in other markets. Thus, it may also be possible to suggest common guidelines for each competition authority or conduct a joint fact-finding investigation to cope with global platform companies.

Current competition laws have limitations in regulating gatekeeper platforms. It is very difficult to prove each requirement of abuse of a market-dominant position in each phase of abuse of dominance cases. Thus, it is necessary that abuse of a superior position in the market should be regulated even if it is not a market-dominant operator. With regard to gatekeeper platforms, ex-ante regulation should be considered as the DMA suggests. Competition authorities can even be free of their obligation to prove the requirements of abuse of dominant position or reverse the burden of the proof to multi-sided platforms. Thus, competition authorities in each jurisdiction need to introduce additional legislative measures targeting at the platforms acting as gatekeepers to overcome the limitation of regulation of the abuse of a dominant position and ensure a level playing field. Gatekeeper platforms have been distorting competition by manipulating exposure rankings and playing the role of a referee and a player at the same time. This refers more particularly to the problem of data collection by gatekeeper platforms in the light of the fact that the possession of consumer data determines winners and losers in the multi-sided platform market. Thus, strict law enforcement is needed under the circumstances of an uneven playing field where the innovation engine is weakened.

Finally, I suggest a new three-phase model which competition authorities can apply in regulating multi-sided platforms. In other words, the regulatory methods that competition authorities can choose should be different depending on the size and nature of the platform at issue. First, with respect to gatekeeper platforms, pre-regulatory legislative measures can be applied. For abuse of a dominant position by a gatekeeper platform, the regulations of abuse of a dominant position can be applied. In the case of unfair trade practices which do not lead to abuse of a dominant position, regulation of unfair trade practices can be applied to a case involving gatekeeper platforms. Second, for a multi-sided platform which is not a gatekeeper but in a dominant position, it is possible to apply the regulation of abuse of a market-dominant position. If the conduct at issue does not meet all the requirements of abuse of a dominant position, the regulation of unfair trade practices can be applicable. Third, for a general platform which is not in a market-dominant position, it may be possible to apply the regulations of unfair trade practices. In my view, the regulatory methods that competition authorities can choose should be different depending on the size and nature of the platform at issue.