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Tracking Ancestry: KFTC Guidelines on Online Platforms

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I. Introduction

On January 23, 2023, the Korea Fair Trade Commission ("KFTC") published the Review Guidelines on Abuse of Market Dominance by Online Platforms ("Guidelines") as part of its efforts for *ex ante* regulation of abusive conduct by online platforms. The Guidelines include sections on the scope of application of the Guidelines, the unique characteristics of online platforms, how KFTC will assess market definition and market dominance, and whether abuse of dominance is established, as well as key types of abuses. While not binding upon the general public nor the courts, the Guidelines serve as internal regulations the KFTC may consider when determining the illegality of a certain conduct falling within their scope.

Since the enactment of the Guidelines at the start of this year there has been a flurry of legislative activity, with multiple members of the National Assembly bringing bills on the regulation of online platforms. Some of these bills focus on abuse of dominance, while others include regulation of unfair trade practices. There are also reports stating that the KFTC will prepare a Digital Market Act ("DMA")-style bill on regulation for online platforms in the coming months. For now, it is unclear how these activities will come together to produce a new law, and what the final result will look like.

As for the Guidelines, the KFTC is keeping in line with legislative trends in other major jurisdiction regarding *ex ante* regulation of online platforms and appears to have considered the structure and concepts employed by kindred legislations and bills, as well as past regulatory precedents abroad and of the KFTC itself. In this paper, we track the lineage of the Guidelines as we attempt to understand the regulatory perspective of the KFTC in preparing this *ex ante* regulation and assess its potential impact on competition policy in Korea regarding online platforms.

II. Regulation of Abuse of Dominance in Korea

In announcing the Guidelines, the KFTC explained that these were not meant to introduce new competition regulations in the online platform space, but rather to add considerations for determining whether an act constitutes an abuse of market dominance under the current FTL, based on accumulated enforcement precedents. The FTL does not include a definition for the term 'abuse' but provides types of conducts as being prohibited as abuse of dominance. These include price abuse, supply abuse, business interference, restriction of market entrance, exclusion of competitors, and substantially harming consumer welfare. The KFTC Guidelines on Abuse of Dominance provide that the KFTC must establish the existence of anti-competitive effects based on price changes, supply volume changes, variety of product or services, effect on innovation, foreclosure effect, changes in competitors' cost, etc. These factors were included in the KFTC Guidelines on Abuse of Dominance after the 2007 Supreme Court decision in the *Posco* case, a refusal to deal case where the court found that anti-competitive effects must be shown based on the above factors, and that when the actual anti-competitive effect has been shown, anticompetitive intent or purpose can be presumed to have existed. Courts have generally taken the effects-based approach on abuse of dominance cases after the *Posco* decision.

Another representative case of abuse of dominance in Korea is the *Qualcomm* case. In this 2009 rebate case, the KFTC found *de facto* exclusive dealing - understood as unfair exclusion of competitors – and discrimination, understood as unfair business interference. In its decision, the KFTC held that exclusive dealing does not necessarily require that

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competitors be entirely foreclosed because of the dealing. The KFTC stated that if an enterprise with a dominant position in a market that has high entry costs and is protected by intellectual property advantages interferes with a competitor's efforts to achieve economies of scale by requiring its customers to refrain from transacting with such competitor in excess of a certain amount, exclusion may be recognized even if 100 percent exclusivity is not imposed. This decision was upheld by the Supreme Court in 2019.

In the second *Qualcomm* case in 2017, where the KFTC imposed the highest fines for an abuse of dominance case in its history, the agency found that Qualcomm's refusal to provide either full or restricted cellular standard essential patent ("SEP") licenses against competing modem chipset manufacturers, as well as coercion for the execution or performance of an unreasonable license agreement by using chipset supply as leverage and linking chipset supply and patent license agreements, etc. constitutes business interference as a form of abuse of dominance and levied KRW131 billion in fines. In April 2023, the Supreme Court found that Qualcomm's conduct interfered with the business activities of modem chipset manufacturers and handset manufacturers and was likely to restrict competition in the market. The Supreme Court took into consideration the circumstances in which Qualcomm established its business, anti-competitive intent shown in Qualcomm's internal documents, and its unordinary business practices in ruling that the conduct at hand excluded competitors in the modem chipset market and maintained and strengthened its dominance.

More recently in 2020, the KFTC sanctioned Naver, an online platform operator, for abusing its dominance by altering its search algorithm so that products sold through its open market would show up at the top of its Naver Shopping search, allowing such products to gain more exposure. This was the first case where the KFTC sanctioned conduct related to search algorithms, or self-preferencing conduct by a platform. The KFTC found that Naver was market dominant in the comparative shopping market, and that through the establishment and application of its search algorithm, Naver leveraged its dominance to further increase its market share in the open market sector. In December 2022, the Seoul High Court decision agreed with the KFTC's ruling in this regard and found Naver's conduct to be abusive. Soon thereafter in February 2023 the KFTC sanctioned Kakao Mobility, a taxi-hailing service platform operator, for adjusting its allocation algorithm to favor taxis who are members of its own taxi franchise, thereby leveraging its dominance in the taxi hailing service market into the taxi franchise market.

In November 2020, the KFTC found Gaztransport & Technigaz SA("GTT")'s coercion against Korean shipbuilding companies that construct LNG vessels, forcing them to also purchase technical support services while providing patent rights, constituted business interference, a type of abuse of market dominance. This was the second tying case to be sanctioned as an abuse of dominance, the first being the *Microsoft* case in 2006. In May 2023, the Supreme Court decision agreed with the KFTC's ruling and found GTT's conduct to be abusive

In September 2021, the KFTC found Google's coercion of handset makers to execute an anti-fragmentation agreement as a condition for licensing of the Play Store and early access to the Android operating system ("OS") as constituting business interference against competing OSs and stated that Google's conduct hinders innovation by preventing handset makers from producing devices with the Android fork OS.

III. *Ex Ant*e Regulation of Online Platforms and Gatekeeping

The European Union (EU) is at the forefront of using *ex ante* regulation for big tech companies to create a level playing field in the digital market. The DMA entered into force on November 1, 2022, regulating large online platforms which qualify as "gatekeepers." The DMA defines a series of prohibited conducts for such gatekeepers, such as favoring their own services or preventing business users of their services from reaching consumers, this can prevent competition, leading to less innovation, lower quality and higher prices. The DMA determines that companies operating one or more of the so-called “core platform services” listed in the DMA qualify as a gatekeeper if they meet the requirements below: (i) when the company achieves a certain annual turnover in the European Economic Area (EEA) and it provides a core platform service in at least three EU Member States; (ii) when the company provides a core platform service to more than 45 million monthly active end users established or located in the EU and to more than 10,000 yearly active business users established in the EU; and (iii) in the case the company met the second criterion during the last three years. “Core platform services” are online intermediation services such as app stores, online search engines, social networking services, certain messaging services, video sharing platform services, virtual assistants, web browsers, cloud computing services, operating systems, online marketplaces, and advertising services.

There are also legislative bills pending in the U.S. which prohibit big tech companies, or platform operators from engaging in certain abusive conduct, such as self-preferencing and discrimination.

The Guidelines follow in the DMA’s footsteps and employ its “gatekeeper” concept as a tool for *ex ante* regulation, but do not adopt the entire package. This is a novel concept under Korean law, never discussed before in the context of the KFTC’s regulation. The FTL prohibits the refusal to provide use or access to essential factors for the production, supply and sales of the product or services of another business operator as a form of business interference for dominant enterprises, but does not go so far as to provide special *ex ante* regulation for essential facility operators. The existing KFTC Guidelines on Abuse of Market Dominance determine an entity to be market dominant if a single entity has 50 percent or more market share, or the top three entities have 75 percent or more. On the other hand, the Guidelines provide that in addition to traditional factors such as revenue, other characteristics of online platforms such as (i) cross network effects, (ii) influence as a gatekeeper, (iii) ability to collect, maintain and use data, (iv) possibility of the emergence of new goods or service, and (v) market share calculation standards other than sales revenue, should also be considered in determining whether an online platform operator is in a dominant position in the market. In other words, the Guidelines provide that in assessing the market dominance of an online platform operator, the KFTC will assess whether an online platform provider acts as a gatekeeper, by considering (i) whether the online platform controls access to a major group of users, while acting as an intermediary, connecting a large number of business users and consumers, (ii) whether the online platform is used, and the order of exposure on the online platform may significantly affect the profit (or utility) of the business user (or consumer), and (iii) the tendency of users to single-homing/multi-homing, etc.

The KFTC borrowed the concept for “gatekeeper” from the DMA but omitted to bring along the determination standards. This may have been due to the limitations of the “Guidelines” format, which is not legislation. It would have been difficult for the KFTC to properly fit the DMA gatekeeper standards into the existing legislative framework. Some may still consider that there is no statutory basis for the “gatekeeper” concept at all under the Korean FTL, and many are curious to see how the KFTC will marry the existing regulations to the standards stipulated under the Guidelines for actual enforcement of online platforms. As there are no objective standards under the FTL, nor the Guidelines to determine whether a certain business is a “gatekeeper,” it remains to be seen whether (and how) the KFTC, in specific cases, will be able to establish that a business can create a “competitive bottleneck” based on facts and economic evidence.

If the DMA style bill apparently being pursued by the KFTC is successfully enacted, the KFTC itself will designate “gatekeeper” platforms to whom the new legislation will apply. While it is unclear which specific provisions of the DMA will be introduced, the platform operators designated as gatekeepers will be regulated under new standards, and the burden of proof for establishing their anti-competitive status may be shifted to the platform operator, as opposed to the KFTC.

IV. Defining a Multi-sided Market and Cross-network Effects

On June 25, 2018, the U.S. Supreme Court came to a 5-4 decision in *Ohio v. American Express Co.* holding that American Express's anti-steering provisions did not violate Section 1 of the Sherman Act. The majority opinion held that credit card networks have two types of customers, namely merchants and consumers, and that for the purposes of determining the competitive effects of conduct on a two-sided market, the relevant market consists of both sides of the market when the said market shows significant indirect network effects, referring to significant competitive effects or interdependency among multiple customer types. The minority opinion argued that each side of the market needs to constitute separate markets as distinct services are being provided on each. However, the majority opinion decided that the plaintiffs need to demonstrate that the challenged restraint has a substantial anticompetitive effect across the entire platform. "Evidence of a price increase on one side of a two-sided transaction platform cannot by itself demonstrate an anticompetitive exercise of market power."

Even before the abovementioned U.S. Supreme Court decision, there has been jurisprudence in Korea discussing the subject of two-sided markets. The KFTC first employed the concept of a two-sided market in its decisions in 2014 in the *Naver* and *Daum* consent decree case, where a consent decree was reached for the companies engaging in abusive conduct such as providing search results and its own services (shopping, real estate, movies, books, music, etc.) without distinction on its portal site. The KFTC found that the internet portals are a two-sided market whereby the end consumer and contents providers comprise of a market and users and advertisers comprise of another, where there are indirect (or cross) network effects but did not go too far into detail on market definition as it was a consent decree decision.

In 2021, the KFTC issued a conditional approval subject to a structural remedy in Delivery Hero′s acquisition of Woowa Brothers, based on consideration of the unique nature of the two-sided food delivery market. In this decision, the KFTC found that the delivery app market was a two-sided market in that there were consumers using the app to have delivered, and also restaurants using the app to market and sell food. With the number or restaurants joining the app increasing, consumers will have more choice and enjoy higher welfare, resulting in more consumers joining, which will ultimately draw more restaurants to join as well. The KFTC based its market share calculation on the Gross Food Value ("GFV") of all food orders made between consumers and restaurants, in consideration of the "feedback loop" of demand which exists between consumers and restaurants and assessed potential impact of the acquisition on both the competition on each side of the market and the connection between the two sides.

The Guidelines explain that online platforms are multi-sided markets, where cross-network effects may occur. Cross-network effects may have a positive effect of increasing the benefits of platform users. For example, an increase in the number of consumers using the app store increases the benefits for app developers who can sell their apps to more consumers. The increase in these benefits will allow more app developers to use the app store. As the number of app developers using the app store increases, the benefits for app store consumers, who can buy more apps by comparing them, increase. This in turn leads to an increase in the number of consumers using the app store. However, it is also explained that there is a concern that the relevant market may become monopolistic due to a tipping effect in which more users are concentrated on online platforms with more users.

For a multi-sided market, the Guidelines provide that while either a multi-sided market definition or single side market definition may be considered, a multi-sided market definition may be reviewed first, as the functions and utility gained by each user group may be different. However, in specific cases, cross-network effects between the different user groups, whether the online platform service provider directly mediates transactions between the different user groups, and difference in understanding of the substitutability between the different user groups, may be additionally considered to define a single side market, if deemed appropriate.

For example, in the case where an online platform service provider provides an online social network service and collects and analyzes data of online platform consumers and provides customized online advertising services to online platform business users, the relevant online platform service provider forms two-sided transactional relationships with different groups of users, i.e. consumers and business users. In this case, an increase in the number of business users using the advertising service may result in an increase in data collection and advertising exposure to consumers, which in turn may result in a negative (-) cross-network effect that reduces consumer benefits. In addition, it is difficult to deem that the online platform service provider directly intermediates transactions between consumers and business users. Consumers perceive a specific type of online social network service as a mutually substitutable scope of services, while business users perceive a different scope of mutually substitutable services. In other words, consumers and business users' perception of substitutability and actual aspects of competition may also vary. In such a case, it is possible to consider defining the market by classifying each group of users instead of defining the two sides as a single market.

Going back to the *American Express* case, the Guidelines appear to side with the majority opinion of the U.S. Supreme Court decision. The American Express decision required that courts consider both sides of the platform when a two-sided platform exhibits "pronounced indirect network effects and interconnected pricing and demand." The Guidelines shadow this approach by requiring the KFTC to consider cross-network effects between the different user groups, the role of the online platform service provider and understanding of the substitutability between the different user groups, to decide whether a multi-sided market or a single side market should be defined. As is with market definition in general, the KFTC's task will be a very fact-specific inquiry. Before defining the relevant market, the KFTC needs to determine whether a company operates a two-sided platform and, if so, the magnitude and direction of the indirect network effects.

V. Data and Market Monopolization

The view that collection and accumulation of data by a specific business may increase entry barriers into the relevant market and may act as means through which market dominance of the business in question may be maintained or strengthened, has been employed by various competition authorities including France and Germany. It has also been raised that there are concerns of a business in possession of such aggregated data being able to engage in exclusionary conduct harming competition. Based on such theory of harm, the U.S. Federal Trade Commission ("FTC") also reviewed potential effect of combination of data held by parties of the transaction in Google's acquisition of DoubleClick in 2007. The FTC found that there were no specific anticompetitive effects likely to occur due to the combination of data, as competitors may gain access to similar data from other sources, and that the data held by Google or DoubleClick was not so unique that they amounted to essential facilities for providing an online advertisement service. Furthermore, competitors in the market were vertically integrated and had access to various routes to acquire data which Google did not have, enabling them to compete with Google.

In the same vein, in 2019, the KFTC Guidelines on Review of Business Combinations was amended to include "likelihood of monopoly or foreclosure of data assets" as a consideration factor in determining potential anticompetitive effect of a transaction. The Business Combinations Guidelines states that "In the event parties to a transaction establish, strengthen or maintain market dominance in usage of their data assets, there is a possibility that competition may in fact be restricted in the relevant market" and requires that (i) whether the data assets can be substituted by other means, (ii) whether the parties to the transaction have incentives to restrict access to data assets,

(iii) likelihood of restriction on competition due to restriction of access to data assets and (iv) the likelihood of the parties to the transaction lowering service quality, etc. with regard to the collection, management, analysis, and usage of the data assets, shall be considered in determining potential anticompetitive effects. In the abovementioned 2021 decision on Delivery Hero′s acquisition of Woowa Brothers, the KFTC considered the likelihood of restriction on market entry due to data concentration as a factor in determining potential anticompetitive effect of the transaction.

The Guidelines take a similar view and emphasize the importance of data for online platforms, and explains that the ability to collect, retain, and use data can have a significant impact on the competitiveness of an online platform operator. For example, a key element of a search engine is the algorithm that reflects users’ search intent and presents optimal results. Search algorithms can be improved in a way that derives better search results while learning the user's search data and reflecting feedback. Therefore, the larger the number of users and the more the accumulated data in a search engine, the higher the possibility of improving its search algorithm. If search algorithms are improved, the competitiveness of the search engine will increase, creating a virtuous cycle through which the number of users increases. The Guidelines further explain that in this process, while the improvement of algorithms using data has a positive effect in increasing user benefits, there is a concern that the monopolistic structure of the market may solidify as more users are concentrated in those search engines with an expansive pool of existing users.

Unlike the KFTC’s Business Combination Guidelines, the Guidelines lacks specific standards based on which potential competitive harm of data may be recognized. It does not mandate that the KFTC shall consider the nature of the data at issue. For example, whether the data in question is ubiquitous (widely available), non-rivalrous (the data can be provided multiple times on many occasions and to different counterparties), and/or its use by one party does not diminish its value to others, will need to be considered in the KFTC’s determination process. The KFTC will also need to consider the regulatory balance with offline businesses or non-platforms when applying this part of the Guidelines, all of which use data for their business in this modern era. Under the existing regulatory framework, the possession of data cannot be a determining factor in a competition analysis, confer market power, or imply competitive harm.

VI. Dynamic Markets and Innovation

The U.S. Horizontal Merger Guidelines define the product market and the geographic market when determining the relevant market and do not separately define the innovation market as an independent market or sub-market of an existing market. The Horizontal Merger Guidelines only state that when assessing potential competitive effects, the competition authority shall review “innovation” and product diversity. The guidelines also explain methods to include non-price competition, including innovation, in the analysis of business combination. With respect to innovation, the guidelines consider the possibility of reduction or acceleration in innovation during the analysis of a merger’s unilateral effect. The 1995 U.S. Antitrust Guidelines for the Licensing of Intellectual Property (U.S. IP Guidelines) considers (i) decrease of competition of R&D activities due to horizontal combination, (ii) creation of conditions that facilitate market division or price agreement, and (iii) vertical foreclosure effect. The U.S. IP Guidelines refer to “goods markets,” “technology markets,” and “innovation markets.” The “innovation market” means a market that consists of R&D to develop new or improved goods or processes, and the close substitute for the relevant R&D.

The U.S. competition authorities had protected competition related to promoting innovation even before the promulgation of 1995 U.S. IP Guidelines. The *U.S. v. Aluminum Co. of America* decided in 1964 is a representative case, in which ALCOA, a dominant company in the aluminum wire production market, tried to acquire Rome, an aluminum wire and copper wire producer. The U.S. government filed a lawsuit against ALCOA’s acquisition of Rome pursuant to Article 7 of the Clayton Act, requesting for sale. The U.S. Supreme Court divided the relevant market into ① the aluminum wire production market and ② the copper wire production market. These markets were defined using traditional market definition principles and were limited to only those products that were close substitutes or reasonably interchangeable. The court concluded that the proposed transaction would lead to innovation effects in each relevant market and impact the merging parties' continuing efforts to develop substitute technologies.

The U.S. IP Guidelines define the goods market, the technology market, and the innovation market with a focus on transactions for technology licensing, and there are cases where these definitions have been applied to merger analysis. However, each of these "markets" is narrowly defined to include only those products or technologies that are close substitutes or reasonably interchangeable. The only difference between them is whether there are actually products on the market or whether there are late-stage, near-term, products in development. The market itself, however, is defined using traditional market definition principles by looking only to close substitutes for a particular product. There is no precedent for a broad or generally defined technology or innovation market consisting of all tools in a particular industry. For example, in the *United States v. Gen. Motors*, Civ. No. 93-530 (D. Del. Nov. 16, 1993) (which was before the U.S. IP Guidelines), although an innovation market was technically defined separately from the traditional goods market, it was limited to the narrow product area of civil and military automatic transmitters – i.e. a product segment that included only actual or potential substitute products and technologies.

Since the Korean Supreme Court *Posco* decision in 2007, the KFTC has considered effects on innovation when assessing anti-competitive effect. For example, in the case involving violation of restriction on merger by Western Digital Corporation (Case No. 2011 Kigyeol 3313 dated February 3, 2012) (*Western Digital* Case), the KFTC decided on the issues of hindrance of innovation and product diversity. In this case, the "innovation market" was not defined as the relevant market. Instead, only the "goods market" was defined as the relevant market and then, the hindrance of innovation and product diversity were considered as potential effects in determining substantial anti-competitiveness. Further, the KFTC did not focus on hindrance of innovation in determining the unilateral effect, but on (i) changes and differences in market shares; (ii) demand substitutability and possibility of purchase switch; (iii) differences in production capacity and easiness of sales increase; (iv) existence of enterpriser who purchase large amount of products; (v) possibility of refraining from decreasing and increasing supply amount; and lastly (vi) any interruption to innovation and product diversity. In the 2017 *Qualcomm* decision, the KFTC found that Qualcomm's imposition of unfair licensing conditions on OEMs such as unilateral licensing fees, free-of-charge cross-grants, etc., lead to exclusionary effect in not only mobile communication standard essential patent licensing market, but also in the modem chipset market and the innovation market.

The current version of the KFTC Guidelines on Abuse of Market Dominance provides that effect on innovation be considered in assessing anti-competitive effect. Further, the KFTC Guidelines on Unfair Exercise of Intellectual Property Rights (Korean IP Guidelines) adopts the approach stated by the U.S. IP Guidelines and states that in addition to the goods market and the technology market, the innovation market which relates to new or improved products to R&D for specific technology or process, should be considered.

Meanwhile, the Guidelines state that due to the trend of convergence of products and services, the pace of rapid market change, etc. for platform operators, the boundaries between markets in which they participate may become unclear. The Guidelines go on to explain that a market may be defined to include not only areas which are in competition, but areas which may be in competition in the future, and therefore, the dynamic characteristics of the market, such as the speed of technological development, R&D situation for new products or services, and possibility of release into the market, should be considered in defining a relevant market. For example, the Guidelines state that in the case of OS for smart devices, market definition may be reviewed by dividing the market into OS for "mobile" devices such as smartphones and tablet PCs and OS for "non-mobile" devices such as robots and drones. The mobile OS market has already been formed for a long time, and the market can be defined in the existing static manner in consideration of the fact that quality-oriented competition (competition in a market) is underway to modify and supplement existing products by adding some functions to them rather than competition to develop new products. On the other hand, non-mobile OS is still in various stages of R&D and commercialization attempts, so the market definition may be reviewed in consideration of dynamic characteristics. As it is unclear on what types of devices and in what innovative services the OS market will be formed in the future, services providers with innovative capabilities compete to lead the formation of new markets (competition for a market) rather than competing in the existing product market. As such, in the case of business areas where innovative competition mainly takes place, the existing static market definition method may be inappropriate, and thus, dynamic market conditions may be considered such as including the developing market when defining the relevant market.

On assessing anti-competitive effects, the Guidelines provide that, in principle, the illegality of an online platform operator's conduct must be determined by weighing the "anti-competitive effects" and "increased efficiency" in the relevant market. In determining anti-competitive effects", factors other than price and output volume could be considered, such as reduction of consumer welfare and hindrance of innovation. For example, if a market-dominant business entity licensing mobile OS restricts the counterparty's development and release of a new OS, the relevant effect of hindering innovation may be considered in assessing the illegality. In particular, the effect of hindering innovation can be deemed to have occurred if the act of the business operator hinders the inducement of research and development to develop a new OS, or if the emergence of new products and services is obstructed, such as the failure to release various smart devices equipped with a new OS.

The Guidelines appear to suggest that approaches to market definition different to the one under the current regime (such as the SSNIP test) may be employed for online platform operators when it says that "dynamic market conditions may be considered such as including the developing market when defining the relevant market," which is not completely in line with the approach taken by the U.S. IP Guidelines or with the Korean IP Guidelines. Although it is unclear what such market definition will look like in an actual case, it seems that the Guidelines are saying that the innovation market should be considered in market definition, in supplementation of traditional market definition methods. For example, if the KFTC were to determine that a business which is not dominant in a market space determined under the current SSNIP test, should be deemed dominant because the market should be defined in consideration of the R&D market, it is expected that the KFTC will be met with much pushback in that there are not any grounds under the FTL regulations to employ such a new market definition method for online platform operators and that such approach is more radical than that of competition authorities in abuse cases around the world. On the other hand, the issue may not spark so much debate if the KFTC only intends to employ this approach in converse cases, where conduct of currently dominant businesses are not regulated as abuse of market dominance, because they are not expected to be able to exercise much market power in the future in consideration of the innovation taking place in the market. Either way, it will be interesting to see how the KFTC overcomes such challenges in real life cases.

VII. New Regulation of Self-preferencing

The EU's DMA bans gatekeepers from treating their own products and services more favorably that those of rivals when ranking, crawling and indexing. Gatekeepers should apply transparent, fair and non-discriminatory conditions when ranking products and services. The DMA Art. 6(5) states "The gatekeeper shall not treat more favorably, in ranking and related indexing and crawling, services and products offered by the gatekeeper itself than similar services or products of a third party. The gatekeeper shall apply transparent, fair and non-discriminatory conditions to such ranking." On the U.S. side, the bill for the American Choice and Innovation Online Act (ACIO) also sets forth that it is illegal for covered platform operators to (i) advantage its products, services, or lines of business over those of other business users, (ii) exclude or disadvantage products, etc. provided by other business users relative to their own products, etc., and (iii) discriminate among similarly situated business users.

In the recent *Naver Shopping* decision of 2021 (affirmed by the Soul High Court in December 2022), the KFTC found that Naver Shopping unfairly restricted competition in open markets by taking advantage of its dominant position in the comparative shopping service market to provide more advantageous exposure to its own smart store products. The KFTC found that such conduct comprised unfair discrimination of transactional counterparties and unfair solicitation of customers through fraudulent means in violation of the FTL.

While the categorical prohibition on self-preferencing clearly came from kindred legislations such as the DMA or ACIO, the KFTC Guidelines can be distinguished from both in that there is a leveraging of market dominance requirement. The Guidelines more generally provide that an online platform service provider using its position as a platform, to increase accessibility of its other goods or services, and lower accessibility of competing goods or services, may be deemed anti-competitive in the instance that the platform is leveraging is influence in the online platform market to become dominant in relating markets. Such conduct may also be efficiency enhancing in the event that user welfare is increased by connection between the online platform service and the relating goods or services.

The Guidelines provides the *Naver Shopping* case as an example, stating that Company A is a dominant business entity in the comparative shopping service market, and simultaneously, operates an open market platform. Competing open market platforms are in a state where it is difficult to secure alternative transaction channels that can facilitate the sale of goods to consumers without using comparative shopping services of Company A. In this context, in order to expand its market share in the open market platforms, Company A artificially adjusted the search algorithm applied to the comparative shopping services, thereby continuously increasing the exposure of the online sellers that use its open market platform at the top of the search results and reducing the exposure of the online sellers that use its competitors' open market platforms. As a result, consumers who use Company A's comparative shopping service purchased more goods from the online sellers that used Company A's open market platform and Company A's open market platform enjoyed a virtuous cycle due to the cross-network effect and continued user growth. Conversely, the competing open market platforms which had reduced exposure experienced decrease in online sellers using such platforms and were mired in the vicious cycle of user decline due to cross-network effects. Hence, Company A's transfer of its dominance to the open market platform market by leveraging its dominance in the comparative shopping service market and restricting competition may constitute unfair discriminatory practices among interference with business activities of other business entities in violation of the FTL.

Again, this incongruity stems from the fact that the KFTC only borrowed half of the gatekeeper concept from the DMA. While the DMA defines its regulatory scope around the gatekeeper concept, the KFTC was not able to do this and ended up including it only as a factor to be considered in determining dominance. Hence, in order to stay within the regulatory regime of the abuse of market dominance under the existing FTL regulations, it was necessary to stay in line with the *Naver Shopping* decision and require that the platform is leveraging is influence in the online platform market to become dominant in relating markets. As such, it is difficult to imagine that the KFTC may establish a separate regulatory framework outside the existing one on abuse of market dominance, for self preferencing. It is highly likely that the existing one will take precedence, unless the KFTC is able to provide further guidance on how the new standards will apply in alignment with existing regulations.

VIII. Extraterritoriality

In terms of scope of application, the Guidelines state that they will also apply to cases where a foreign service provider's activities conducted overseas affect the domestic market. This may be regardless of whether the foreign service provider has a place of business in Korea or whether the counterparty is a domestic service provider or consumer. This is in line with the FTL's existing provision on extraterritoriality, which states that the FTL applies to conduct taking place overseas, as long as the conduct affects the Korean market. Extraterritoriality has not been an issue in previous regulations regarding online platforms, and probably will not be in the future either, as it is difficult to to apply geographical boundaries in the case of platform-related activities. In other words, it would be difficult to view that a certain conduct of a platform operator has occurred "overseas" in the first instance and therefore the extraterritoriality clause is not likely to be invoked.

IX. Conclusion

Ancestry tracking shows that the KFTC's Review Guidelines on Abuse of Market Dominance by Online Platforms (Guidelines) has taken after kindred legislations and bills, as well as past regulatory precedents abroad and of the KFTC itself. While doing this, the Guidelines have adapted the structure and concepts being employed to best fit the existing FTL regime in Korea, and tried to bridge the gap in scope and precedents.

The Guidelines are clearly intended to strengthen enforcement of the FTL on online platforms. However, as each portion being imported into the Guidelines brings its own DNA in terms of legislative intent and regulatory precedent, it is inevitable that their application must be reviewed and assessed from the wider perspective of competition policy around the globe. The KFTC has a big job in making sure this *ex ante* regulation works in congruence with its ancestry, and at the same time, staying true to its statement upon enactment of the Guidelines, namely that the Guidelines are not intended to create new regulations but to supplement interpretation of existing regulation in consideration of the characteristics of online platforms.