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Digital Trade Wars 2: New US Legislation Labels KFTC's Tech Regulation Discriminatory, But Is It?

Published October 11, 2024

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Category: [Technology](#)



This piece builds upon previous analysis titled, "[Digital Trade Wars: What U.S. Policymakers Need To Understand about South Korea's Tech Regulation](#)," published on March 28, 2024.

New legislation introduced in the US Congress suggests that a major US-South Korea digital trade dispute could be unfolding, with Korea's recently proposed regulation of online platforms in the crosshairs of US policymakers. Despite a shift by the Korea Fair Trade Commission (KFTC) from its earlier regulations, tensions remain, mainly stemming from conflicting views and misunderstandings regarding the goals of Korean regulators. While US critics highlight the negative effects on US tech companies, Korean regulators emphasize that the intent of the proposed law is neither discriminatory nor protectionist but instead aims to address challenges in the Korean digital market today.

A key question is whether the proposed KFTC regulation is truly discriminatory, as claimed by prominent voices in Washington, DC. This comes at a time when, following the European Union's Digital Markets Act (DMA) and the resulting "[Brussels Effect](#)," more countries are adopting regulations that impact dominant tech companies, most of which are American. At a practical level, examining the specifics of the revised Korean regulation is essential to assess whether US claims of discrimination have merit. At a broader level, this dispute illustrates different interpretations of discrimination, the principles underlying the global trading system, and the difficulty of adjudicating trade disputes over digital regulation.

The KFTC's Pivot in Approach

On September 9, the KFTC revealed a shift in its approach to regulating unfair practices by dominant online platforms operating in Seoul. This marked a step back from its announcement in December 2023 that it would introduce the Platform Competition Promotion Act (PCPA), inspired by the EU's DMA. Instead of pursuing a DMA-style regulation, which designates gatekeepers and implements "ex-ante" prohibitions and obligations, the KFTC proposed amendments to the existing competition law, the Monopoly Regulation and Fair Trade Act (MRFTA).

While an ex-ante approach acts preemptively and is quicker to regulate potential anti-competitive behavior, the revised approach adopts an "ex-post" framework, including legal presumptions to identify dominant platforms based on market share and user thresholds. To address concerns about delays in investigations and enforcement, the KFTC plans to implement an interim order system designed to swiftly halt unfair practices across six sectors, including online search and social networking services. In addition, to protect emerging companies and startups, platforms with an annual revenue below 4 trillion KRW (approximately 3 billion USD) will be exempt from these presumptions. The cap on fines will also be raised from the current 6 percent to 8 percent of relevant revenue, and the burden of proving fair practices will now fall on dominant platforms.

In response to criticisms that the KFTC "conceded too much" by abandoning its initial pre-designation approach, Chairman Han Ki Jeong stated the ex-post presumption method should significantly enhance the speed of enforcement. While some argue that this revised approach is less stringent than the DMA, the KFTC remains confident that it will still achieve the law's intended effect by placing greater responsibility on platform businesses in court.

The KFTC's decision to retreat from its earlier ambitious plan was influenced by strong criticisms both at home and abroad, particularly from the United States. Notably, Robert O'Brien, former national security advisor under former President Donald Trump, publicly opposed the PCPA. His views were echoed by many others, including the US Chamber of Commerce, which led South Korea's Minister of Trade Cheong In-kyo to address the need to consider the trade implications of the regulation, citing concerns raised by Seoul's key partners. Domestically, a lack of trust in the KFTC's ability to fairly regulate both Korean and foreign tech companies also fueled opposition.

US Concerns about South Korea's Tech Regulation Continue

Despite the KFTC's announcement of a more measured approach, pushback from major US policy voices persists. Much of the debate is framed within the US-China competition, with claims that South Korea's new regulation could disadvantage US tech companies and benefit Chinese ones. In this regard, there have been arguments in Washington that Seoul is targeting and discriminating against US tech companies.

This view was stated during a recent congressional hearing by Representative Carol Miller (R-WV), who expressed deep concern that a key ally like South Korea is "pursuing economic policies that target and discriminate against US technology companies" while "welcoming state-owned Chinese companies with open arms." On September 27, she introduced legislation, titled the U.S.-Republic of Korea Digital Trade Enforcement Act, to "stop the Korean government from implementing these blatantly discriminatory laws that will cause an unnecessary irritant to such a vital relationship [between the two countries]."

The bill notes that South Korea is considering “additional discriminatory digital regulations that would unduly burden United States businesses while benefiting Chinese technology companies.” To “ensure a fair and nondiscriminatory regulatory environment,” it requires the United States Trade Representative (USTR) to report to Congress if Korea enacts laws or regulations that “predesignate or post-estimate a United States online or digital platform operator and impose discriminatory business restrictions.” The report will include a determination of whether a US entity was negatively impacted, if any trade agreement violations exist, and whether the law or regulation burdens or restricts US commerce as outlined in Section 301 of the Trade Act of 1974. Following the report, USTR may take action to protect US commerce, such as initiating a WTO dispute, a Section 301 investigation, a KORUS FTA dispute, or reaching an agreement with Seoul to mitigate the impact.

Section 301 may be particularly important here. Following the KFTC’s earlier announcement of plans to push for the PCPA, Clete Willems, former deputy director of the US National Economic Council during the Trump administration, warned in an interview with the Korean press that if the PCPA is enacted, “the activation of Section 301, which provides remedies for unfair trade practices abroad, could escalate tensions between the two countries.” Section 301 authorizes the USTR to investigate foreign trade practices deemed unfair or detrimental to US commercial interests, which was notably used by President Trump to impose tariffs on China.

US arguments note that these trade tensions arise because Seoul’s regulatory efforts are an attempt to protect domestic companies from competition with US ones, an argument that O’Brien made in a follow-up op-ed. Robert Atkinson, founder and president of the Information Technology and Innovation Foundation, echoed this perspective in his response to Representative Miller’s remarks during the House hearing. He asserted that South Korea is now “copying the European DMA” to the detriment of US companies. Atkinson further argued that the law would benefit Korean companies but also have an incidental effect of benefiting Chinese ones.

A similar sentiment was echoed by Matt Schruers, president and CEO of the Computer and Communications Industry Association (CCIA). While acknowledging the KFTC’s revised approach, he urged Korean policymakers and legislators “to abandon both the ex-ante and ex-post proposals that would target US firms and exacerbate the risk of Chinese influence” on the US-Korea relationship. In response to Representative Miller’s bill, CCIA also released a statement welcoming Congress’ efforts “to curb discriminatory regulatory practices that systematically target US companies.”

The Brussels Effect and Nationality in Tech Regulation

South Korea is not the only country striving to foster fair competition in its digital market. Inspired by the EU’s DMA legislation, other countries are also adopting similar measures. The United Kingdom was one of the first to respond to the EU’s regulation by introducing the Digital Markets, Competition and Consumers Act (DMCCA), expected to take effect later this year. Like the DMA, the DMCCA enables the UK Competition and Markets Authority to designate companies with strategic market status, although the DMCCA does not include quantitative thresholds for designation.

Similarly, Japan has enacted the Act on Promotion of Competition for Specified Smartphone Software, known as the Smartphone Act. The new legislation allows the Japan Fair Trade Commission (JFTC) to label specific companies as “designated providers” based on quantitative criteria. While the KFTC focuses on online platforms, the JFTC addresses mobile software systems, with Google and Apple likely the primary targets of this new regulation. A JFTC official who oversaw the entire legislative process said in a rare interview with the Korean press, “The smartphone operating system market in Japan is dominated by Google and Apple, and their duopoly is causing numerous side effects.” He also emphasized that competition policy is independent of nationality.

Even the United States has taken more aggressive action, although via enforcement of existing laws rather than legislative or regulatory changes. As with other countries, US antitrust enforcers are focusing on domestic tech companies, given their dominance in the digital space. This summer, a US court ruled that Google violated antitrust laws by maintaining a monopoly in the search and advertising markets. Attorney General Merrick Garland hailed the ruling as a “historic win for the American people,” affirming that the Department of Justice would continue to “vigorously enforce our [US] antitrust laws.” At the same time, the Federal Trade Commission, under Chair Lina Khan, has been actively pursuing antitrust cases against major US tech companies, such as Amazon and Meta, which aligns with the Biden administration’s pledge to enforce antitrust laws against “dominant Internet platforms.” Such efforts illustrate that even if the regulatory focus is on ensuring fair competition in the digital space, the result may be that US companies are affected the most. When this occurs, however, it does not necessarily mean that there is intentional nationality-based discrimination.

Discrimination Debate

At the heart of the potential US-South Korea dispute lies a fundamental question: what is discrimination? US officials contend that South Korea’s new regulation disproportionately affects US tech firms compared to Chinese and Korean ones, which they believe constitutes discrimination. However, Korean antitrust authorities argue that the regulation is designed neutrally and lacks any discriminatory intent, thus not meeting the criteria for discrimination. Ultimately, in their view, the regulation is essential to ensure a fair and anti-monopolistic digital environment, without fear or favor over company nationality.

Of particular importance here is that the argument claiming US tech firms are being discriminated against in favor of Korean ones—suggesting protectionism is at play—is difficult to substantiate, considering South Korean tech companies, notably Naver and Kakao, have long dominated the nation’s digital market. The KFTC’s new regulations are highly likely to impact these Korean tech giants as well, indicating that the measures should not be viewed as protectionist. The concern in Seoul is relatively less about Chinese platforms entering the domestic market and gaining dominance and more about the perception that Korean platforms may be unfairly targeted compared to foreign companies, primarily US ones, due to factors beyond antitrust considerations potentially undermining their competitiveness. Against this backdrop, the KFTC Chairman responded to Representative Miller’s bill that the Korean competition law “has historically been enforced without favoring domestic operators.” He added that the upcoming amendments “will also be applied without discrimination between domestic and foreign businesses,” reflecting Seoul’s desire to provide a balanced treatment of large platforms, regardless of nationality.

With the US presidential election approaching, concerns about discrimination against the United States are expected to resonate more, particularly within the tech sector. This sentiment has already been voiced by [US Secretary of Commerce Gina Raimondo](#), who expressed “serious concerns” in reference to the EU’s DMA and [Digital Services Act](#), noting they are “disproportionately impacting US-based tech firms” and their ability to serve European customers. In a similar vein, during a [recent webinar](#), Willems highlighted the differing strategic objectives between the US presidential candidates, stating that the Trump administration would be “fighting for US companies abroad.” He elaborated by saying, “I would look at the Digital Marketing Act in Europe, I would look at the fact that both Korea and Japan are looking at protectionist digital measures, and I don’t think that the Trump administration is going to stand by while that goes on.” Whereas the Biden administration has been relatively restrained in challenging foreign digital regulations, a potential second Trump presidency would likely more aggressively promote the argument of discriminatory effects, which could strain the US-Korea alliance if not carefully handled.

As international trade and digital markets become increasingly intertwined, fostering an environment where all companies can compete fairly should take precedence over nationalistic rhetoric. This underscores the value of continued dialogue on discrimination in the digital space. It is important to understand that not every regulatory measure that has an impact on foreign companies should be classified as discriminatory or protectionist. US and South Korean trade and digital policy officials need to work closely together and carefully manage these challenging issues to prevent digital trade tensions from escalating and spilling over into other aspects of their vital relationship.

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