

A Solution in Search of a Problem, with Adverse Effects on U.S. Businesses

Korean Legislative Proposals on Platform Regulation

Introduction and Summary

Over the past year, Korea has been actively considering a range of legislative proposals, modeled on the EU's Digital Market Act (DMA), to impose prescriptive regulation on select digital service suppliers, based (like in the EU) on arbitrary definitions and thresholds. The [latest bill](#), reflecting recommendations of the Korea Fair Trade Commission, was introduced on October 28. Like the DMA, these proposals are designed to curb certain conduct deemed presumptively anticompetitive, despite being common business practices that often have pro-competitive effects and enhance consumer welfare. Market dynamics in Korea make this approach particularly questionable: unlike in the EU, where failure to nurture internet-enabled companies prompted heavy-handed intervention, Korea boasts a thriving homegrown digital ecosystem representing a diverse and growing number of successful companies.

Despite this key difference, proponents of platform regulation in Korea are using the EU's approach of an arbitrary mix of hand-crafted sectoral definitions and financial and other market thresholds to selectively target specific companies. These proposals have focused on "marketplace" services, search, video, social networking, operating systems, and advertising; with thresholds and exemptions defined by levels of revenue, market capitalization, number of users, market share, and/or number of market participants. Although proposals appear to scope in two Korean digital platforms (Naver and Kakao), they exclude major Korean companies (Samsung, LG, SK, EMart, Lotte) and new Chinese entrants (Alibaba, Tencent, Temu, Shein and Tik Tok)¹.

The sudden influx of Chinese firms (whose cross-border sales doubled in 2023²) is illustrative of both the dynamism of the Korean market but also the potential security risks this new entry poses, exacerbated if these firms gain a regulatory advantage. While falling below proposed thresholds, Chinese firms as a group are expected to earn over \$2 billion in Korea this year, and acquire (in total) over 30 million Korean subscribers.³ Given the importance of U.S.-Korea security ties, providing preferences to operators in a data-intensive sector who, by choice or mandate, maintain close links to the Chinese government raises serious concerns.

Based on the arbitrary nature of Korea's approach, its impact on select market participants and the disproportionate effect it will have on successful U.S. companies, U.S. (and Korean) industry have pressed for a more deliberative process before rushing into legislative proposals. Notably, Korea has not attempted any comprehensive market analysis to justify the need for

¹ Leading Chinese firms offering services in Korea in online marketplaces, social networking, and video content fall outside of the thresholds for monthly domestic users—these firms include Alibaba ([8.05 million](#)), Temu ([6.36 million](#)), WeChat ([5 million](#)), Shein ([660,000](#)), and TikTok (between [3.9](#) and [5.6 million](#)).

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<https://www.euromonitor.com/article/safety-concerns-mount-as-chinese-cross-border-e-commerce-sales-surge-in-south-korea#:~:text=AliExpress%20and%20Temu%20are%20the,personal%20care%20to%20small%20appliances>

³

<https://pulse.mk.co.kr/news/english/10998510#:~:text=Chinese%20e%2Dcommerce%20platforms%20AliExpress,growing%20penetration%20among%20local%20rivals>

such prescriptive intervention nor a regulatory impact analysis to examine the unintended consequences of such a step. The discriminatory aspects of the proposals implicate Korea's trade obligations under both the WTO and the Korea-U.S. Free Trade Agreement (KORUS).

Legislative Proposals

There are at least sixteen legislative proposals for platform regulation that have been introduced in the National Assembly in 2024. Apart from the most recent bill noted above (proposed by Kang Min-guk of the ruling party), the most prominent alternative bill⁴ is that introduced on July 5th by Kim Nam-geun of the opposition Democratic Party. All bills are modelled to some extent on the DMA's *ex-ante* regulatory approach, including a mix of prohibited conduct (*e.g.*, self-preferencing) and, in some bills, mandatory action (sharing source code and algorithms).

The KFTC's original legislative goals⁵ faced strong opposition from academics and firms from both the United States and Korea, and concerns about excessive regulations from the Ministry of Science and ICT. In response, the KFTC recently [announced](#) a revised approach, ostensibly moving away from *ex-ante* regulation in favor of a prescriptive enforcement framework. Rep. Kang Min-guk's October 28 bill reflects this approach and, presumably, KFTC input. Although cast as a compromise, it retains the fundamental flaws of all bills introduced to date: it seeks to regulate presumptively anticompetitive conduct, applicable only to a subset of market participants, and allows for temporary suspension orders before a final ruling is made. While this approach differs operationally from that of competing bills, its effect will be similar, as are discriminatory thresholds and "gatekeeper" definitions.

Both the KFTC-inspired proposal and competing bills require a targeted company defending itself to prove that the identified conduct is not anticompetitive or is welfare-enhancing. Given that reversed burden of proof, and the heavy fines that can result from an adverse finding, the chilling effect on legitimate commerce is obvious.

Both these approaches disproportionately impact U.S. firms and put them at a competitive disadvantage vis-a-vis a broad range of Korean (and Chinese) companies offering similar services, who are free to engage in practices that are presumptively illegal for in-scope companies.⁶ By targeting U.S. companies through arbitrarily tailored thresholds, and proscribing conduct these companies' competitors are free to engage in, both approaches reflect protectionist competition policy and are potentially inconsistent with Korea's international trade commitments, including under KORUS.

⁴ https://likms.assembly.go.kr/bill/billDetail.do?billId=PRC_V2D4D0C6J2I1H1D0A1Z4I5H9Q2P2J4

⁵ <https://www.lexology.com/library/detail.aspx?g=311f5d4c-c6de-4e2f-9e86-bde29aa708af>

⁶ For example, three firms, Lotte, Shinsegae and Hyundai control around 90 percent of department store sales in Korea, and all offer private-label products which they promote--a form of self-preferencing. See <https://www.linkedin.com/pulse/retail-korea-05-decoding-korean-department-store-2023-juampi-wzrsc/>; and <https://www.koreapost.com/news/articleView.html?idxno=5501>

Key Elements of Representative Proposals

	Kang Min-guk Bill (Bill 4947)	Kim Nam-geun Bill (Bill 1430)
Thresholds	<ul style="list-style-type: none"> • 10 million monthly domestic users and a market share of 60%; or • 20 million monthly domestic users shared among three or fewer platforms with a combined market share of 85%. • exemption for companies with annual revenues not exceeding 3 trillion KRW (2 billion USD) 	<ul style="list-style-type: none"> • Capitalization of 15 trillion KRW (about \$11.3 billion) • Annual revenue of 3 trillion KRW (about \$2.2 billion) • Average users of 10 million (consumers) or 50,000 (businesses)
Services covered	<ul style="list-style-type: none"> • Online intermediary services (marketplaces) • Online search • Online social networking • Online video content • Operating systems • Online advertising provided by operators providing the above services • Other services defined by Presidential Decree 	Same
Obligations	<p>Restrictions on:</p> <ul style="list-style-type: none"> • self-preferencing (favoring one’s own products or services on the platform, and using non-public data collected from third-party sellers to promote one’s own services) • tying/bundling (conditioning access to the platform, or purchase of a specific good or services, on the use of or purchase of one’s own specified products or services, or providing a non-essential service in connection to a platform service) • “multi-homing” (preventing, or disincentivizing use of, competing third-party services related to platform functions); • Most-favored-nation, or “MFN” (Requiring best terms and conditions offered elsewhere as a condition for use of the platform) 	<p>Same, plus restrictions on:</p> <ul style="list-style-type: none"> • anti-steering (hindering customers from direct access to competing services/functions offered by a business (e.g. payment systems) • data access preventing the access to, or transfer out, of data collected by the platform that that is relevant to a merchant’s use of platform
Fines/Injunction	<ul style="list-style-type: none"> • 8% of relevant sales or (in the absence of relevant sales) a fine of up to 3 billion KRW (2 million USD) 	<ul style="list-style-type: none"> • 10% of relevant sales • Temporary suspension order

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The Persistence of Unjustified Restrictions and Discriminatory Effect in both Proposals

Both leading bills under consideration in the National Assembly suffer from similar flaws:

- The presumption that conduct that is common in many industries is anticompetitive, simply when carried out by a firm of a certain size, in a selectively-defined market, is unjustified.
- Neither the KFTC nor parliamentarians have shown any systemic, evidence-based harms or impact assessment justifying proposed regulation.
- The KFTC-inspired bill (Kang Min-guk bill) authorizes interim (injunctive) measures for swift action. This creates significant legal uncertainty, as it applies to common business practices. As it applies only to subset of digital firms (and not at all to other industries), it also appears discriminatory.
- The fact that such prohibitions will apply disproportionately to U.S. firms and exclude a wide swath of Korean and third-country firms (particularly from China) implicates fundamental trade principles embedded in Korea's bilateral commitments to the United States (the Korea-United States Free Trade Agreement, KORUS) and multilateral commitments in the World Trade Organization (WTO).
 - **National Treatment** obligations require Korea to accord U.S. service suppliers treatment no less favorable than it accords similar Korean suppliers. By prohibiting certain conduct when carried out by U.S. firms, but allowing it by their Korean competitors, Korea puts U.S. firms at a competitive disadvantage. The arbitrary thresholds Korea is looking to institute cannot justify this disparate treatment, and would be a clear basis for a dispute settlement claim. The fact that some Korean suppliers may fall within the threshold does not relieve Korea of its obligation to provide U.S. firms no worse treatment than that provided to others in the market.
 - **MFN** obligations prevent Korea from advantaging third-country suppliers: if such suppliers are exempt from the proposed prohibitions, Korea would be discriminating in their favor, at the expense of the U.S. suppliers who happen to fall within the prescribed thresholds. The recent influx of Chinese companies into Korea, who would not fall within the scope of the measure, underscores the real impact that such differential treatment would have on U.S. suppliers. Arbitrary thresholds are not a sufficient basis for engaging in such discrimination, even if some foreign companies are also captured.
- One key missing step in Korea's approach has been adherence to KORUS: transparency obligations (Chapter 21⁷) that require, *inter alia* that: *To the extent possible, each Party shall: (a) publish in advance any such measures that it proposes to adopt; and (b)*

⁷ https://ustr.gov/sites/default/files/uploads/agreements/fta/korus/asset_upload_file503_12720.pdf



provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.

A Path Forward: A Formal, Open Process for Stakeholder Consultation

Given broad industry concerns, articulated by both U.S. and Korean stakeholders, and serious questions about compliance with trade obligations, any legislative proposals to introduce asymmetric obligations in the digital marketplace should be subject to extensive stakeholder and governmental consultation and comprehensive impact assessment before advancing in a legislative process. This is particularly important for legislation with significant implications for American businesses, given Korea's obligations under KORUS. We urge both the Korean government and lawmakers pursuing new legislation to ensure a transparent and inclusive process for gathering and considering stakeholder input, and to address trade concerns, before advancing any substantive legislation.