

## Landmark Developments Bring Tech Competition Issues Into Focus



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The economic slowdown induced by the COVID-19 pandemic has negatively impacted and fundamentally changed businesses across different sectors. Nevertheless, the technology industry has thrived in the post-pandemic era as consumers' appetite for tech has rapidly increased in light of remote working. However, the growth of the tech world has not always been a bed of roses and anti-competitive practices have been particularly prevalent within the big tech companies, such as Google and Facebook, on an international level.



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The steady growth and sheer size of big tech companies have allowed companies to potentially abuse their market dominance and impose restrictive practices on their business partners and customers. Anti-competitive practices carried out by these tech companies have not gone unnoticed, as they have become the focus of competition regulators in a number of jurisdictions. South Korea has recently been at the forefront of competition regulation in the technology sector as it manages new aggressive anti-competitive practices.

This article explores the various tech-related competition issues which have been emerging globally in the past year and the measures adopted by competition regulators in various jurisdictions to suppress anti-competitive practices and encourage healthy competition in the tech industry.



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### Korea Fair Trade Commission's decision on Google's operating system<sup>1</sup>

On 14 September 2021, South Korea's competition regulator, the Korea Fair Trade Commission (**KFTC**), issued a corrective order and a fine against Alphabet Inc's Google for abusing its market dominance in the mobile operating system (**OS**) market. It was reported that the US tech giant had abused its dominant market position in the mobile OS market (via the Android OS), by forcing mobile device manufacturers such as Samsung and LG to sign Anti-Fragmentation Agreements (**AFA**). The contents of the AFA prohibited mobile device manufacturers from installing a customised OS, called "Fork OS" or "Android Forks", which is a modified version of Google's Android OS.



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It was purported that Google had closed in on these device manufacturers by enforcing the AFA as a condition for mobile device manufacturers to enter into Google Play Store Licence Agreements and Android OS Pre-Access Right Agreements, which are crucial for the deployment and use of applications across several types of devices.

<sup>1</sup>

Sohee Kim and Vlad Savov, 'South Korea Fines Google for Abusing Smartphone Dominance' (*Bloomberg*, 14 September 2021) <https://www.bloomberg.com/news/articles/2021-09-14/south-korea-fines-google-for-abusing-smartphone-dominance>

The implications of Google's anti-competitive practices had led to the restriction on other competitors from being able to penetrate the mobile OS market, as mobile device manufacturers were bound by the AFA which restricted their autonomy to implement competitor OS. It was determined that the constraints imposed on Fork OS's entry into the market had led to reduced consumer accessibility to devices functioning on Fork OS.

As a result of Google's anti-competitive practices, the KFTC imposed a staggering fine amounting to approximately USD177 million. In addition to the fine, KFTC also issued corrective orders demanding that Google perform the following:

- (a) stop forcing device manufacturers to enter into the AFA in connection with the Google Play Store Licence Agreement and Android OS Pre-Access Rights Agreement;
- (b) notify device manufacturers of the KFTC's sanctions; and
- (c) modify the existing AFA to set out the corrective orders imposed and report the amendments to the KFTC.

The measures issued by the KFTC also expand to other Android-powered connected devices, as Google's AFA also limited the launch of other tech companies' devices, such as smart watches and televisions.

This decision is not only a positive step in spurring competition in the mobile OS market, but also reiterates the KFTC's stance that even tech giants, such as Google, will not escape regulation in an ever-changing industry.

### **South Korea's Bill preventing proprietary in-app payment services<sup>2</sup>**

In addition to the foregoing, South Korea shows no sign of slowing down in regulating giant tech companies with a tight fist as Google and Apple were under scrutiny for their practices in the app payment market. In August 2021, South Korea became the first country in the world to pass amendments to its Telecommunications Business Act, nicknamed the "Anti-Google law", which prevents Google and Apple from forcing developers to use their in-app billing systems and restricting them from charging app developers commission on in-app purchases.

This measure was a long time coming in order to prohibit tech companies from overexerting their dominance in the app payment market. The ramifications imposed by the South Korean lawmakers on these tech companies will likely cause a ripple effect throughout the

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<sup>2</sup> Heekyong Yang, 'S Korea's Parliament passes bill to curb Google, Apple commission dominance' (*Reuters*, 1 September 2021) <https://www.reuters.com/technology/skoreas-parliament-passes-bill-curb-google-apple-commission-dominance-2021-08-31/>

globe and potentially influence lawmakers and regulators in other countries to consider and take proactive action to deal with these issues.

### **Australia issues new media law<sup>3</sup>**

In exploring competition regulation of tech giants in other jurisdictions, Australia passed the Treasury Laws Amendment (News Media and Digital Platforms Mandatory Bargaining Code) Act 2021 in February 2021, which is a piece of legislation that amends the Australian Competition and Consumer Act 2010. The new law developed by the Australian Competition & Consumer Commission (**ACCC**) establishes a mandatory code of conduct (**Media Code**) that applies to news media businesses and digital platform corporations when bargaining in relation to news content made available by digital platform services. In essence, the Media Code imposes a requirement on digital platforms such as Google and Facebook to negotiate fair payment with news organisations when displaying news content in their search and newsfeed functions, respectively.

The Media Code was introduced in the midst of reports that Australian internet users were missing local news sites from Google's search results and following an 18-month inquiry conducted by the ACCC on digital platforms. In response to the allegations, Google admitted that it intermittently blocked some Australian news sites from users as part of "experiments" it was running on searches for newspaper websites.<sup>4</sup> Such experiments were sufficient to demonstrate that Google has inordinate power and can remove news and news content entirely should it wish to do so. The implementation of the Media Code is a step in the right direction of ensuring that publishers and journalists are paid a fair share for their individual work and it sets a precedent on regulating big tech companies in relation to monetising content.

### **Lessons to take away, and more to come....**

The legal framework which regulates the converging communications and multimedia industries in Malaysia is the Communications and Multimedia Act 1998 (**CMA 1998**), which falls under the purview of the Malaysian Communications and Multimedia Commission (**MCMC**).

In view of the CMA 1998 and guidelines issued by the MCMC, the MCMC does not have the power to crack down on tech companies which carry out activities that do not fall under the scope of the CMA 1998 (for instance, activities that do not require a licence from the MCMC). However, the Competition Act 2010 (**CA 2010**) remains the general competition framework that promotes and protects the process of competition in Malaysia and is under the purview of the

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<sup>3</sup> Saheli Roy Choudhury, 'Australia passes new media law that will require Google, Facebook to pay for news' (*CNBC.com*, 24 February 2021) <https://www.cnbc.com/2021/02/25/australia-passes-its-news-media-bargaining-code.html>

<sup>4</sup> Paul Karp, 'Google admits to running 'experiments' which remove some media sites from its search results' (*The Guardian*, 13 January 2021) <https://www.theguardian.com/technology/2021/jan/13/google-admits-to-running-experiments-which-remove-some-media-sites-from-its-search-results>

Malaysia Competition Commission (or MyCC). Notably, the CA 2010 also acts as a safety net in response to such regulatory gaps, and activities carried out by businesses in tech-focused companies that fall outside the scope of the CMA 1998 will still be subject to the CA 2010.

The measures which have been implemented by regulators in other jurisdictions set precedents which may potentially influence the MCMC to fine-tune current legislation and adopt a more holistic approach in the local regulatory practices. The MCMC's limited mandate over all activities in the digital tech industry will likely encourage future legal developments by the legislature to curb exploitive behaviours of tech giants. With this in mind, tech businesses should take note of the measures taken by the KFTC and Australian regulators as these may act as a reference for the MCMC to implement any changes to the CMA 1998 with the aim of taking a stronger approach in regulating anti-competitive practices. Having said that, it is pertinent to note that both the CMA 1998 and the CA 2010 prohibit (among others) abuse of dominance within the relevant markets and that any activity by a dominant player which significantly restricts competition will fall foul of existing laws and could be liable to financial penalties.

Moving forward, more uncertainties are expected to surface which will challenge competition regulators as digital giants try to deploy their dominant position in the marketplace to commercial advantage. Balancing the need to attract industry development and investment with ensuring a competitive environment for all players will redefine the role of regulators like the MCMC in taking a stronger approach in managing activities carried out by tech-enabled companies.

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