



# Recent Developments in Korean Competition Law Enforcement

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## Introduction

The Korea Fair Trade Commission (“KFTC”) has gained attention as one of the most active competition authorities in the world. It has enjoyed a reputation of closely following global enforcement trends of more developed competition authorities, such as the relevant authorities of the United States and European Union. Yet despite these developments, there remain many challenges for the KFTC.<sup>2</sup> There is also ongoing dialogue regarding the KFTC’s deviation from the core mission of competition agencies by placing emphasis on issues that are unrelated to promoting competition. Such activities are, in part, due to the KFTC’s a broader mandate under the Monopoly Regulation and Fair Trade Act (“FTL”, the primary competition law in Korea) than that of other competition regimes. For instance, the FTL includes a Chapter aimed to address issues associated with economic concentrations in the Korean economy that have plagued Korea for many years. Moreover, because the KFTC is positioned as more than an enforcement agency, the focus of the KFTC enforcement has been viewed as not necessarily consistent with the putative mandate of other competition agencies.

In this paper, the authors do not touch upon these broader issues under the Korean competition regime; rather, this paper offers a snapshot of where the KFTC’s enforcement activities have been focused, and sheds some light on the future of the Korean competition regime. In particular, the authors delve into the activities of the KFTC over the past several years, which have been marked by various important amendments to the competition law and significant decisions from the court and the KFTC, providing a clearer interpretation on Korean competition law. We highlight some of these key developments below.

### Cartel Regulation and Criminal Enforcement

There had been increasing debates on the effectiveness of administrative sanctions to deter anti-competitive behavior, especially cartels, throughout the past decade, which have led to attempts by law enforcers and lawmakers to strengthen the criminal enforcement of competition law during the past several years. More specifically, the National Assembly passed an amendment to the FTL in 2013, which went into effect in 2014, to grant additional agencies (namely, the Bureau of Audit and Inspection, Public Procurement Service and Small and Medium Business Administration) the authority to request the KFTC to make criminal referrals to the Prosecutor’s Office (“PO”) against companies and individuals for violations of the FTL. Upon receiving a request from any of these agencies, the KFTC is now required to criminally refer the relevant company or individual to the PO. These amendments undermined the KFTC’s previously exclusive authority and discretion to make criminal referral, without which the PO could not prosecute the companies or individuals in violation of the FTL. These amendments have also added further motivation for the KFTC to file criminal complaints in

cartel cases. Indeed, following the amendment, there have been more criminal complaints involving individual officers and employees.

This aggressive foray into criminal sanctions is not limited to local companies. Since last year in the *Bearing* cases, after imposing administrative fines amounting to tens of millions (USD) against domestic and foreign ball bearing suppliers for engaging in a price-fixing scheme for more than 10 years, the KFTC referred all respondent companies, including foreign companies, to the PO for criminal sanctions. This was the first case in which the KFTC criminally referred foreign headquarter companies to the PO.

As a part of this development, in August 2014, the KFTC amended its Guidelines on Criminal Referrals to establish new standards for criminal prosecution of individuals involved in cartel activities. Under the amended guidelines, individuals who ordered or approved conduct in violation of the FTL, as well as those who actively carried out such conduct, are subject to criminal referral.

The PO itself has also become increasingly involved and active in enforcing competition law on its own by establishing a new division responsible for competition law matters. A newly-established division within the PO recently requested the KFTC to criminally refer a construction company, which had already been sanctioned by the KFTC with administrative fines for its involvement in a cartel activity with other 11 construction companies but not criminally referred to the PO. This is the first request made by the PO after the amendment of the FTL loosening the KFTC's exclusive authority to make criminal referrals in 2014. The PO has reportedly also commented that it would consider requesting the KFTC to make criminal referrals against even leniency applicants, depending upon the severity of the violation. That said, given that such a move would potentially undercut the KFTC's leniency regime, it is not clear whether the PO indeed has plans to take its enforcement authority this far.

## Merger Control

In line with the revival of global M&A transactions around 2013, the merger control activity of the KFTC has also become more active, especially in the IT and healthcare sectors both in terms of number of reviewed cases as well as the scope of remedial orders. For 2014, the KFTC reviewed a total of 571 business combinations with a combined transaction value of around KRW 21 trillion (approximately USD 19 billion, a 27.3% increase from the previous year).<sup>3</sup> Further, the KFTC has routinely cooperated with other competition authorities in reviewing major global transactions. Notwithstanding this increased cooperation, the KFTC has reached decisions in global transactions that are not always congruent with those of other competition authorities.

For example, MediaTek's acquisition of 48% shares in MStar Semiconductor was known to have been reviewed by competition authorities in China, Chinese Taipei and Korea in 2013. While competition authorities in Chinese Taipei and Chinese MOFCOM imposed behavioral remedies of prohibiting general activities restraining competition, the KFTC approved MediaTek's acquisition of 48% shares in MStar Semiconductor after imposing specific behavioral remedies, including price cuts.

Also in 2013, while reviewing (and ultimately conditionally approving) ASML's contemplated acquisition of 100% shares in Cymer, the KFTC reportedly coordinated with competition authorities in other jurisdictions, especially the Japanese Fair Trade Commission, regarding various substantial and procedural issues, including market definition and potential impact on the relevant markets. The competition authorities in the U.S., Chinese Taipei and Israel also reviewed this case. While being slightly broader in scope, the behavioral remedies imposed by the KFTC were in line with those discussed or imposed by other competition authorities, which reportedly reflected the relevant market in Korea where significant purchasers of semiconductor equipment were participating. In 2014, Microsoft's acquisition of Nokia's handset business was subject to merger review in multiple jurisdictions, including the United States, the European Union, Brazil, India, Chinese Taipei and Korea. Remedial orders have been imposed only in China and Chinese Taipei while other competition authorities unconditionally approved the transaction. The KFTC, however, is still reviewing the case.<sup>4</sup>

As it becomes increasingly engaged in reviewing global transactions, the KFTC has demonstrated that it does not want to be seen as following other competition authorities in terms of shaping remedies. Most recently, the KFTC was reported to have issued an examiner's report to block Applied Materials' proposed merger with Tokyo Electron, which was the first official step among the competition authorities reviewing the transaction.<sup>5</sup>

### **Vertical Restraints including Abuse of Market Dominance**

The KFTC has been actively engaged in investigating abuse of market dominance issues since its investigation against *Microsoft* in 2006. This trend began to swing in another direction in the late 2000's as the Supreme Court rendered decisions in the aftermath of the seminal *POSCO* decision, which required the following factors for an exclusionary act, 'refusal to deal': (i) the refusal to deal must have been made with the intent or purpose to maintain or reinforce dominance, i.e., to affect the relevant market through impeding free competition ("subjective requirement"); and (ii) the refusal at issue would raise concerns about anti-competitive effects on the relevant market ("objective requirement"). In the aftermath of the *POSCO* decision, the KFTC seemed to approach abusive acts under the

framework of unfair trade practices, which is based more on the concept of ‘fairness’ and does not require dominance. Accordingly, commentators raised significant concerns in *POSCO*’s mandating a “subjective requirement” given the daunting task to discern illegitimate abusive acts from legitimate fierce competition in the market. This decision has had deleterious effects on subsequent cases both at the KFTC and within the courts, which has led to revoking many of the KFTC’s decisions. Moreover, we have yet to see notable abuse of market dominance cases since the *POSCO* decision.

Notwithstanding the lack of notable cases, the KFTC entered into two consent orders in 2014 for cases involving alleged abuse of market dominance. The consent order process, which was adopted in November 2011 and introduced in 2012 in the aftermath of Korea-US FTA, allows businesses under investigation by the KFTC to voluntarily propose corrective measures to restore competitive order and remedy any potential consumer harm. In March 2014, for the first time in its history, the KFTC approved the consent order proposed by two local Internet search portal engines for their alleged violations of Korean competition law, including abuse of market dominance in the online search market. The approved consent order included voluntary corrective measures and a remedy program amounting to KRW 104 billion (approximately USD 94.6 million) in aggregate for both companies. In November 2014, the KFTC also confirmed a consent order proposed by a global renowned software company in relation to allegations involving termination clauses in its license and maintenance policies.<sup>6</sup>

### **Economic Democratization**

Under the rubric of the FTL, Korea has maintained unique regulations on *Chaebol* conglomerates both in structural and behavioral aspects designed to balance economic growth among the various players and reduce inequality between *Chaebol* conglomerates and small and medium-sized enterprises. Recently, as one of the key 2012 presidential campaign platforms, the two major presidential candidates promised a variety of “economic democratization” measures as part of such regulations. After the election, the incumbent President announced that the priorities of her administration’s competition policy included: (i) imposing stricter regulations against abusive acts by large business groups (mostly conglomerates); and (ii) enhancing protection for the “economically inferior” parties such as subcontractors and franchisees. A series of bills, as briefly outlined below, have also been recently passed to implement this competition policy.

The scope of the relevant provisions under the FTL that regulates unfair assistance between specially-related (affiliated) parties was amended in 2013 and came into effect in 2014. Prior to the amendment, the FTL prohibited the act of supporting a specially-related party by unfairly providing prepayments, loans, manpower, etc. on very significantly favorable terms. The

amendment lowered the threshold for unfairness by changing the unfair assistance requirement from “very significantly favorable terms” to “significantly favorable terms”. Equally important, the amendment broadened the scope of the parties subject to sanctions under the law by authorizing the KFTC to sanction not only the entity providing unfair assistance, but also the entity receiving unfair assistance. The amendment also prohibits the act of transacting through a specially-related party or another company that does not contribute substantively to the overall transaction. The purpose of this amendment is to prohibit the practice of a company injecting a third party company (usually an affiliate) into a transaction for the sole purpose of having the affiliate collect commissions or other revenues as middlemen.

Amendments to the Fair Transactions in Subcontracting Act (“Subcontracting Act”) also went into effect in 2013 and 2014, which most importantly included: (1) requiring subcontractors to pay the costs incurred to execute matters that are not stipulated in the agreement; and (2) placing the burden of handling complaints and costs related to accidents in the workplace on the subcontractor. The KFTC followed suit by publishing a new set of guidelines for reviewing and determining what constitutes unreasonable contractual restrictions under the amended Subcontracting Act. Prior to the amendments to the Subcontracting Act in 2013 and 2014, the treble damage system was added to Subcontracting Act in 2011 as punitive damages are not generally recognized under Korean law.

#### **Developments on the intersection of competition law and intellectual property rights.**

Article 59 of the FTL provides that the FTL shall not prohibit any conduct that is deemed as a fair or reasonable exercise of intellectual property rights (“IPR”). However, as in other jurisdictions, the KFTC’s Guidelines on Unfair Exercise of Intellectual Property Rights (“IPR Guidelines”) acknowledges that even an act that may appear at the outset as a fair exercise of IPR may be regulated under the FTL if in substance it deviates from the fundamental purpose of the intellectual property system.<sup>7</sup> The KFTC has been active in reviewing cases relating to the intersection between competition law and IPRs starting from mid 2000’s. The KFTC performed several rounds of sectorial inquiries of numerous companies in the healthcare, IT and chemical industries. Further, following significant amendment to the IPR Guidelines in 2010, the KFTC again made substantial amendments to the IPR Guidelines in 2014, mainly reflecting the implications of an injunction claim filed by a holder of a standard essential patent and possible abuse of patent rights held by non-practicing entities.

In February 2014, the KFTC dismissed a complaint against a holder of standard essential patents (“SEP”s) for mobile communications filed by a potential licensee of such SEP. In this matter, the potential licensee argued that the SEP holder violated the FTL by filing an injunction based on its SEPs, in violation of its FRAND commitment. While acknowledging

the SEP holder's market dominant position, the KFTC concluded that it was difficult to conclude that the potential licensee engaged in good faith negotiations or that the SEP holder did not engage in good faith negotiations. This was the first case where the KFTC considered whether an SEP holder's filing an injunction violated the FTL as a form of intellectual property rights abuse; the KFTC also concluded that the parties' good faith negotiations was an important factor in this determination.

In February 2014, the Supreme Court rendered for the first time a decision on the meaning of Article 59 of the FTL, finding unfair collusion in a pay-for-delay agreement involving market entry of generic drugs. Interestingly, the KFTC framed the issues associated with the pay-for-delay scheme from a horizontal collusion perspective; this was affirmed by the courts. The Supreme Court found unfair collusion where: (i) the original drug manufacturer offered a generic drug manufacturer certain economic benefits in exchange for the generic manufacturer withdrawing patent litigation; and (ii) the generic manufacturer agreed to delay market entry of the generic drugs for a period beyond the term of the applicable patent. The Court held that "the determination of whether an exercise of patent rights is justifiable shall be made by taking into account the overall circumstances, including the purpose and intent of the Patent Act, the contents of the patent rights concerned, and the influence of the act on fair and free competition." In this regard, it may be cautiously inferred that the Supreme Court did not adopt *per se* rule for this case.

A patent-license linkage system was introduced by the recent amendment of the Pharmaceutical Affairs Act in 2014 modeled from the U.S. Hatch-Waxman Act as part of the Korea-US Free Trade Agreement. Under the newly introduced system, the KFTC would have more opportunities to review antitrust issues in settlement agreements between a listed patent holder and an applicant for approval of generic as certain types of agreements regarding manufacturing or sales of generics should be submitted to the KFTC as well as the Ministry of Food and Drug Safety.

### **Procedural Fairness and Investigative Techniques**

Procedural predictability remains a central issue surrounding the KFTC's enforcement activities. In recent years the KFTC has made various attempts to improve its procedural system. For example, the KFTC issued the Guidelines on the Submission of Economic Analysis, prescribing the basic procedural rules for submitting economic analysis in 2013.

On January 1, 2015, the KFTC announced three key amendments to the "Public Notification on Implementation of the Leniency Program for Leniency Applicants for Collusions, etc." as an effort to introduce greater efficiency and transparency in the KFTC leniency program. These amendments reflected recent court decisions regarding the requirements to obtaining

leniency status. The first amendment abolished the tentative approval of leniency status, which had allowed the Secretary General of the KFTC to tentatively confirm the leniency status of an applicant before the final confirmation by the KFTC Commissioners. The second amendment lowered the threshold faced by an applicant to prove collusion from “narrative evidence with supporting materials” to “narrative evidence that sufficiently proves the facts.” The third amendment barred the benefit of leniency for a second ranked leniency applicant in a two-party cartel and for any leniency applicant that filed for leniency more than two years after the first application for leniency has been filed with the KFTC.

The KFTC has also instituted the Guidelines on Operation and Procedures of Consent Order System, prescribing the procedural rules for the commencement of the consent order process in 2014.

While it is commendable that the KFTC has been working to improve its procedural system, there remain many areas for further improvement, including but not limited to some aspects of the KFTC Commission’s deliberation process and dawn-raid operations.

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<sup>2</sup> Sang-seung Yi and Youngjin Jung, *New Kids on the Block*, Competition Policy International (Autumn 2007), p 155.

<sup>3</sup> The 2014 business combination trends report announced by the KFTC

<sup>4</sup> It is reported earlier in 2015 that the KFTC decided to accept Microsoft’s application for consent decree and is under discussion with the relevant parties regarding detailed conditions of consent decree.

<sup>5</sup> The parties walked away from the transaction prior to the issuance of any final decision.

<sup>6</sup> The KFTC did not pursue this case under abuse of market dominance provision for various reasons.

<sup>7</sup> Youngin Jung, *KFTC’s Foray into the Intersection between Competition Law and Intellectual Property Law: A Path Towards Convergence or Divergence?*, Competition Law International (November 2011), p 21.