

# Overview of Current Antitrust Enforcement in Korea

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Antitrust enforcement in Korea has witnessed many changes in the past year since a new political leadership took place as a result of the December 2012 presidential election. Ever since the 2008 global financial crisis, Korea has experienced economic difficulties similar to most other economies in the world. Korea's difficulties were considered more troubling because they dramatically exacerbated many of its existing problems. Experts have been concerned with Korea's loss of potential economic growth momentum in two aspects: limitations of existing growth strategies and economic and social bi-polarization. The new administration has tried to solve these issues by emphasizing the so-called "creative economy" as a key economic policy and by taking measures to protect small and medium sized firms (the "SMEs"). As Korean competition policies were mandated to play a major role for this latter goal, it seems to have dominated Korean competition policy for the last one and a half years.

As widely known, Korean competition policy is composed of two large blocks: on one hand, there are the traditional antitrust policies that pay attention to the creation and maintenance of market power in the context of market competition; and on the other, fair trade policies that aim to control unfair trade practices deemed to harm firms in inferior transaction positions or SMEs. Recent political and social circumstances required the Korea Fair Trade Commission (the "KFTC") to concentrate on fair trade policies to protect SMEs, especially in the distribution industry and retail markets.

This short article briefly describes Korean antitrust enforcement since 2013 to its present stage.

### **Antitrust Enforcement**

Since the landmark POSCO Decision in 2007 that set a limitation to the application of the abuse of market dominance clause by requiring a rigorous show of anti-competitive effects, the KFTC seems to have become cautious to enforce the provision. Instead the KFTC has relied on the unfair trade practice clauses in regulating single firm conducts that require proving unfairness of conduct rather than its restrictive effects on market competition. This approach resulted in a smaller number of abuse of market dominance cases. Since the 2009 Qualcomm and Intel cases that involved loyalty rebate practices, we haven't seen many notable cases of abuse of market dominance. In fact, since 2011 until today, the KFTC has been successful in only one case about hindering kiwi fruit distribution to impose corrective orders and fines of half a million USD. This is a dramatic decline compared to the 38 successful cases pursued in the sole year of 2007. Many experts are concerned with this trend pointing that it may undermine the reputation of the KFTC as the guard of sound market competition.

However, the story of cartels is totally different. The KFTC has maintained a strict approach regarding cartels throughout the recent years and private damages suits have become more popular than ever. In 2013, the KFTC imposed corrective orders on 29 cartel cases with monetary fines totaling more than USD 354 million. Major cartel cases have involved various industries including express railway construction, life and fire insurance, atomic power plant construction, car rental, and etc. The KFTC has also been active in penalizing international

cartels. In July 2013, it imposed fines totaling USD 89 million on six global automakers, including local Hyundai Motor Co., for price fixing of truck prices.

In the last several years, we have seen a significant increase in the number and volume of private damages actions even without further legislative action promoting private enforcement. Although the exact number of damages suits is hard to identify, experts estimate that at least 30 damages suits were pending at civil courts as of the end of 2013. Most of the actions were follow-on lawsuits filed after a KFTC decision. The plaintiffs were diverse, ranging from corporate purchasers to a large number of indirect purchasers (for example, taxi drivers in LPG price fixing cases), and even public enterprises and local government. Several reasons may be attributed to this increase, but tough sanctions by the KFTC and antitrust policies encouraging damages suits (so that cartel gains are minimized) are acknowledged as the primary drives. Leniency policies, which became extremely popular for businesses to avoid heavy monetary fines, are also considered a major cause. In leniency cases, cartelists have a hard time avoiding liability at civil courts due to the clear evidence the KFTC obtains from leniency applicants which is then passed on to the civil courts. Hence, in such cases, the only issue remaining is calculation of the amount of damages.

The largest damages suit to be successful in history was the military oil bid rigging case in which the civil court utilized model econometric methods to quantify damages. In 2013, after thirteen years of tough litigation, the parties settled for USD 132 million to be paid to the Korean government. The most significant and influential case among recent cases was probably the 2012 wheat flour cartel case in which the Supreme Court awarded damages of USD 1.5 million to one of the largest bakery firms. In the ruling, the Court refused to recognize the passing-on defense but agreed to adjust amount of damages to avoid double compensation for fairness. Because of the significant amount of damages and findings of law confirmed in the court proceedings, this case is considered to have laid the foundation for the increased level of private litigation as seen today, despite generally hostile circumstances for antitrust damage actions.

Regarding merger control, the most recent big case was the abandonment of the proposed P3 Network alliance. The KFTC and the Anti-Monopoly Bureau of the Ministry of Commerce in China ("MOFCOM") have been reported to have cooperated to evaluate the potential competitive effects of the proposed establishment of an alliance among top three international ocean shipping companies. In June 2014, MOFCOM announced its prohibition decision and the companies eventually dropped the proposal. Consequently, the KFTC closed the case. This was a surprise to many because it came after an approval decision from the US Federal Maritime Commission and a similar approval by the European Commission. Hence, it was considered to show the new regulatory power of Asian jurisdictions while also exhibiting the trend of cooperation among Northeastern Asian antitrust authorities to deal with major international antitrust cases.

Regarding antitrust enforcement on IPRs, the new administration's economic policy focuses on the "creative economy" deeming it vital to revive a bad economy. Hence, policies to create and protect IPRs tend to take top priority. IPRs are considered critical because of their significant share of the IT industry in Korean economy, *e.g.* Samsung Electronics. This has been reflected in antitrust policies and the KFTC has implemented many tools to achieve such goals. The KFTC has amended antitrust guidelines to regulate IPRs and performed several Market Inquiry and Surveys to obtain market information and identify potential violations. These efforts led to the pay-for-delay case between GlaxoSmithKline Korea and Dong-A Pharmaceutical Co., Korea's no. 1 pharmaceutical company. In 2011, the KFTC imposed fines of approximately USD 2.6 million for GSK and USD 1.8 million for Dong-A, along with a cease-and-desist order. These sanctions were finally approved by the Supreme Court in February 2014. It made Korea the second jurisdiction in the world to produce a final court's judgment that confirmed cartel liability of reverse payment practices.

Lastly, regulations over unfair trade practices have become more important in recent years due to its connection to correcting unfairness among firms. This category of enforcement has been considered a tool to protect SMEs from abuses of superior bargaining positions of large businesses. In Korea, small retailers and manufacturers have been considered to be a victim of aggressive and unfair practices by large firms. Also, as the prohibition of unfair trade practices has recently acquired more attention, several new legislations have been enacted to make clear that certain trade practices are regulated in particular industries. The most recent one was the "Act on the Fair Trade in Large-Scaled Distribution Businesses," enacted in 2012 (amended in July 2013) that aimed to protect interests of small suppliers and store lessees by prohibiting certain conducts of large distribution channels like discount stores or department stores. Typical violations include delaying payment of sales prices, refusing or delaying receiving goods, passing on sales promotion costs, and etc. However, such strict enforcement of unfair trade practices has also drawn criticism from experts in that it may ignore economic efficiencies in attempting to protect inefficient SMEs. Such critics argue that such a role should be played by other government agencies rather than the KFTC even if it is deemed necessary.

### **Enforcement of Subcontract Transactions Act**

As noted earlier, current mandates of the KFTC seems to extend to protection of SMEs. In Korea where subcontracting is extremely widespread in most industries, protecting the interests of SME subcontractors is considered essential to maintain a sound market structure. As economic bi-polarization has worsened in recent years, this issue has become the top priority of competition policies and the KFTC has invested a lot of resources in this area. For example, treble damages were introduced to certain violations like unfair price cuts or cancellation of orders. Until present, only one violation of the misappropriation of technologies was subject to treble damages. The introduction and expansion of treble damages is significant in that it was pursued against opposition from many experts who argued that it was not in harmony with the Korean judiciary system.

Such aggressive enforcement efforts led to the 2013 Daewoo Shipbuilding & Marine Engineering Co. (one of the largest shipbuilders in the world) case in which a record high fine of USD 25 million was imposed for unilateral price-cutting.

### **Regulations Over Large Corporate Groups**

Korean competition policy has long concentrated on regulations over certain large corporate groups (the “Chaebols”). While most of existing regulations regarding Chaebols were lifted during the last administration that valued the efficiencies of Chaebols, such issues resurfaced in the last presidential election as critical points. Their significance grew due to the aggravated economic situation of SMEs, and as a result “economic democratization” became a core issue of election debate. The current president promised to push for such economic democratization and, as a result, relevant parts of Korea competition law were amended in 2013.

Among these, provisions that prohibited direct cross-shareholding between two affiliated companies under a same large corporate group were amended to extend to circular shareholdings, and hence, any new circular shareholdings and or any measure to strengthen existing circular shareholdings among three or more affiliated companies were made illegal. The rationale of such regulation is that circular shareholding makes it possible to increase or maintain the control of a corporate group with a small amount of shares, and also be used to facilitate inheritances. The amendment does not apply to the existing circular shareholdings, but it requires disclosure of important decisions made by the board of directors, thereby indirectly influencing the voluntary dissolution of existing circular investments.

Another important regulation was the extension of existing prohibitions regarding unfair intra-group assistance. Providing abnormal benefits to families of group owners was illegalized and recipients and providers of such unfair assistance are subject to fines alike (before only providers were fined).

### **Issues regarding Enforcement Procedures**

One of the most notable issues is the availability of the new consent order system. Before 2011, when consent orders were first introduced as a result of Korea-U.S. Free Trade Agreement, there was no way to terminate an antitrust case by settlement between a defendant and the KFTC. This problem became an issue in the 2004 Microsoft tying arrangement case in Korea. Even after its introduction, however, no consent order cases were brought because the KFTC and companies were worried about public criticism about suspicions of potential collusion. In fact, many critics considered this measure contrary to legal justice and beneficial only to large companies. Yet, for the first time in 2013, the NHN Corp. and Daum Communication Co., the two largest Internet portal companies in Korea, applied for consent orders in an unfair trade practice case. These consent orders were approved in February 2014 after long negotiations regarding the appropriate remedies. The remedies included measures to address anti-competition problems that were charged to harm SMEs and consumers and financial support of



one hundred million USD for SMEs. Recognizing its intrinsic efficiency, many expect consent order to be utilized more frequently in the future.

Most currently, debates over the case handling procedures at the KFTC and the appeal system against KFTC decisions have emerged as a hot topic. Many experts and companies are asking for the introduction of more sophisticated procedures for both investigation and adjudication at the KFTC, arguing that the current procedures do not guarantee full opportunities for self-defense. In addition, the current exclusive jurisdiction of the Seoul High Court for appeals against KFTC decisions is under debate, due to criticism that antitrust appeals should not be an exception when it is a general rule that appeals against government agency actions go to courts of first instance. The criticism over KFTC procedures is expected to function as pressure to make KFTC procedures more similar to judicial procedures. However, it is also recognized that there are certain limitations in improving this issue while the KFTC is obligated to process thousands of complaints every year that is a clear overload.

With regard to criminal enforcement, the exclusive authority of the KFTC to make referrals to the prosecutor's office for criminal accusation was taken away due to the concerns over inactive enforcement. In addition to the KFTC, the Public Procurement Service, the Small and Medium-sized Business Administration, and the Bureau of Audit and Inspection were also granted an authority to request criminal referrals. While the amendment is expected to check the authority of the KFTC and invigorate criminal enforcement, there also exist concerns that it may cause over-deterrence because even minor violations of the law like unfair trade practices could, in theory, be criminally prosecuted. It is left to be seen how actively this new measure will be utilized. Despite these changes, for effective enforcement of the KFTC's leniency program, leniency applicants are provided with an exemption to criminal enforcement.

### **International Cooperation**

The KFTC has attached much importance to international cooperation. The KFTC has entered into MOUs with more than fifteen competition authorities as of present; some of the recent ones include China, Indonesia, Brazil and Japan. It is understood that KFTC's cooperation with antitrust authorities of U.S., European Commission, and China is significant and increasing in frequency. The KFTC has also been actively involved in negotiating competition chapters in the free trade agreements with Turkey, Columbia, Australia, and Canada while participating in international organizations, such as the OECD and ICN. Its recent efforts to share its enforcement experience with China and other Asian countries through expert dispatch programs and Knowledge Sharing Program is also worth noting.

### **Conclusion**

Korean antitrust law enforcement has been well known for its sincere efforts to realize active market competition in a culture and economy that respects government policy leadership and Chaebols' efficiency. However, recent changes of administration and economic difficulties asked for significant changes in the competition policy area to support SMEs and help boost a

“creative economy.” It led to emphasis on the enforcement of unfair trade practices to protect SMEs and regulation over abuse of IPRs. Enforcement of traditional antitrust laws, especially attention to the regulation over abuse of market dominance, has been weakened as a cost. At the same time, the KFTC’s role of competition advocacy to ease market concentration and make general economic policies more competition-oriented has become relaxed, too, to go along with government policy to revive economy. It is to be seen whether such changes would prove successful or not but under difficult situation of bi-polarization, it should not be an easy job.

In any event, even after such problems described above, it can be said that Korean antitrust policy remains generally very active in building sound market competition. The KFTC keeps pushing to regulate cartels and anti-competitive mergers. Careful monitoring of IPR licensing practices is taking place. The KFTC’s role in international policy leadership, especially in Northeast Asia, is another aspect to be noted. Private enforcement of cartel prohibition began to work.

The remainder of the year of 2014 is meaningful in that we will be able to see whether the policy changes in the last year result in success in line with the new Korean economy.