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A New Kid on the Block: Korean Competition Law, Policy, and Economics

Sang-Seung Yi and Youngjin Jung

For a relatively young agency with only a quarter-century history, the Korea Fair Trade Commission (KFTC) has achieved some remarkable success in cartel enforcement and competition advocacy. However, its track record in enforcing merger control leaves much to be desired and its recent ambitious foray into regulating unilateral conduct by global firms such as Microsoft has received a mixed review. In order to achieve its aspiration to be recognized as a global force in antitrust—for which it has already made significant progress—the KFTC should take measures to encourage private suits, strengthen its economic analysis unit, fundamentally overhaul chaebol (large Korean conglomerates) regulation, establish a "Chinese wall" between its investigative and adjudicative offices and personnel, and reinforce its efforts to guarantee proper procedural rights to defendants. In taking these steps, the KFTC can grow from its current new kid on the block status to a leader in global antitrust.

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I. Introduction

This paper provides two authors' perspectives on the achievements, shortcomings, controversies, and challenges ahead for Korean competition law and policy. The Korean Competition Law, formally known as the Monopoly Regulation and Fair Trade Act (MRFTA), was enacted on the last day of 1980.[1] In the past quarter-century, since its establishment in 1981 as the principal enforcer of the MRFTA, the Korea Fair Trade Commission (KFTC) has achieved significant successes, especially in the area of cartel enforcement and competition advocacy. In recent years, it has accepted economic analysis as the proper basis for determining antitrust violations and has established an economic analysis unit.

The acceptance of economic analysis in competition law matters is not limited to the KFTC. Earlier this year, a Korean court reached a landmark decision in a collusion case in which it based its damages awards on sophisticated econometric estimation.[2] Indeed, the Korean courts have led the KFTC in one important area of applying economic analysis to competition law. In 2004, a Korean court formally applied the critical loss analysis based on the hypothetical monopolist paradigm for defining the relevant market for horizontal mergers—two years before the KFTC followed suit.[3]

Along with these achievements, however, there have been disappointments and controversies. First, in the merger area, the KFTC's role has largely been a "declaratory" one. It has found several high-profile mergers to be anticompetitive, but the imposed remedies have been largely symbolic, although there are encouraging signs that the KFTC is now taking merger control much more seriously. Second, the KFTC's regulation of cross-share holdings and business dealings among the big Korean conglomerates, known as chaebol, is based on rigid formulae that do not take account of actual economic effects.

Third, until recently, the KFTC's enforcement with regard to abuse of market dominance has been anemic. Its recent ambitious foray into this area, which culminated in its 2006 decision against Microsoft's inclusion of digital media playback and instant messaging capabilities in its Windows operating system, has received a mixed review. While the European Commission expressed its support

1 For the Korean MRFTA [hereinafter MRFTA] and other documents, *see* Korea Fair Trade Commission Homepage, *at* http://ftc.go.kr/eng/ (in English) (last visited Oct. 4, 2007). *See* Monopoly Regulation and Fair Trade Act, Law No. 3320 (December 31, 1980), *available at* http://ftc.go.kr/data/hwp/(1)mrfta.doc.

2 Republic of Korea v. SK, Inc. et al., 2001 gahap 10682 (Seoul Central District Ct. Jan. 2007).

3 It is our understanding that since 2002, the KFTC began using consumer survey data on the likely effects of hypothetical price increases on consumer behavior for market definition exercises. However, prior to the Seoul High Court's 2004 decision, the KFTC did not ask if the price increases would be *profitable* for a hypothetical monopolist of the putative market, which is the critical question in defining the relevant market.

for the KFTC's decision, the U.S. Department of Justice issued a formal statement that criticized the KFTC's order to release a version of Windows without these features as potentially harmful to innovation. Both the KFTC's theory of harm and its economic evidence have been vehemently challenged by Microsoft in an appeals court. It remains to be seen if the KFTC's condemnation of technological tying chills innovation—as one author of this article (Yi) and Microsoft believe—or a minimum necessary intervention to restore competition—as the article's other author (Jung) and KFTC claim.

Despite these shortcomings and controversies, it is our overall assessment that the KFTC and the Korean Competition Law have emerged as serious forces to be reckoned with in global antitrust. Since Microsoft, the KFTC has turned its attention to Intel and Qualcomm, as well as leading Korean firms, as potential targets for abuse of dominance investigations. It has actively cooperated with the U.S. Department of Justice and European Commission over international cartel investigations. Developing countries are increasingly looking at the KFTC as a potential role model, on the assumption that they lack institutions needed for the kind of sophisticated antitrust enforcement seen in the United States or Europe.

DESPITE THESE SHORTCOMINGS AND CONTROVERSIES, IT IS OUR OVERALL ASSESSMENT THAT THE KFTC AND THE KOREAN COMPETITION LAW HAVE EMERGED AS SERIOUS FORCES TO BE RECKONED WITH IN GLOBAL ANTITRUST.

Nevertheless, serious challenges lie ahead for the KFTC and the Korean Competition Law. In this article, we identify four of them. First, it is time to fundamentally overhaul chaebol regulation. Ex ante limits on cross-shareholdings among chaebol affiliates based on the vague and ill-defined concept of "concentration of economic power" should be abolished. In its place, enforcement should be strengthened with regard to conventional areas of competition law, such as cartels, mergers, and abuse of dominance. At the same time, other clauses of the MRFTA designed to protect minority shareholders should be taken out and enacted in a separate law (the title that we propose is "A Special Law on the Protection of Minority Shareholders of Large Business Groups") or incorporated into the Corporation Part of Korea's Commercial Code.

Second, although the KFTC has recently achieved remarkable success in identifying cartels using a leniency program, collusive culture is still widespread among Korean firms, fostered by formal and informal administrative guidance directed by various government ministries during the era of government-led growth. In order to combat hard-core cartels more effectively, the KFTC should intensify criminal law enforcement in collaboration with the Prosecutor's Office.

Third, the KFTC needs to relinquish its near monopoly over the enforcement of the Korean Competition Law. The KFTC should embrace competition as the main driving force for development in antitrust enforcement, as it advocates in

other areas, and measures should be taken to facilitate private antitrust litigation. For instance, the MRFTA should be amended to allow private parties to file lawsuits seeking injunctions against suspected competition law violators in court (in addition to filing complaints before the KFTC). Class action lawsuits to recover damages by end-user consumers should also be allowed, though rules should be devised to discourage frivolous lawsuits.

Fourth, the KFTC should enhance its efforts to establish itself as a quasi-judicial body with full procedural rights conferred to investigation targets, and to fully develop its economic analysis unit. We are encouraged by the fact that the KFTC has recently been moving in this direction, but it needs to move much faster in order to achieve its aspiration to become a major player in global antitrust.

II. Historical Perspective

Proper understanding of an institution often requires a historical perspective. The unique features (and shortcomings) of the Korean Competition Law and the KFTC are, in large part, the products of Korea's unique history. Hence, we begin with a very brief overview of Korea's economic history in the past half-century, during which Korea has accomplished breathtakingly fast economic growth. Its nominal per-capita GNI (gross national income) has increased 224-fold from US$82 in 1961 to US$18,372 in 2006.[4]

The Korean government has taken an active role in transforming Korea from a backward rural economy into the thirteenth largest economy in the world within the span of five decades. After seizing power in a military coup in 1961, President Jung Hee Park declared that economic growth would be the number one priority of his government and engaged in what could be characterized as an "export-oriented industrial policy." Realizing that Korea lacked natural resources such as oil, President Park determined that the only way to lift Korea out of poverty was to tap the export markets. The Economic Planning Board, which President Park established to implement his export-led growth policy, instituted a series of "5 Year Economic Development Plans" that envisioned a path for growth for Korea that would begin with light manufacturing industries and then move on to heavy manufacturing and service industries.[5] The early Korean industrial policy was unique in that it had a strong market discipline built in. Companies in the government-targeted industries received low-interest (often negative-interest) loans, export subsidies, and tax credits, but only if they successfully competed in the open international markets.

4 In real terms, the annual GDP growth rate averaged 8.16 percent from 1961 to 1990, but as the Korean economy has matured, the annual growth rate has slowed down to 5.61 percent from 1991 to 2006. Bank of Korea, Economic Statistics System, *at* http://ecos.bok.or.kr (last visited Aug. 17, 2007).

5 In 1982, the Korean government changed the name of the "5 Year Economic Development Plan" to "Economic Social Development Plan" and the planning elements were largely dropped.

Beginning in the mid 1970's, Park's government steered the Korean economy into heavy equipment manufacturing and petrochemical industries as the next step in the government-led economic growth plans. Large-scale investments in these industries were carried out by a handful of family-controlled large conglomerates, known as chaebol, that continue to dominate the Korean economy to this day. This period also produced the too-big-to-fail syndrome. Encouraged by government subsidies and below-market-rate loans, some chaebol made huge investments in heavy industries financed by enormous debt. Out of the fear that allowing unprofitable chaebol to go bankrupt would trigger a chain reaction throughout the entire economy, the Korean government continued to bail them out. Under this policy environment, it was rational for chaebol to choose very risky, large-scale investments with little consideration of profitability. If the investments turned out to be profitable, chaebol reaped the benefit. If the investments failed, then the chaebol could count on more-or-less certain government bailout. These investments contributed to outward growth in the 1980's and 1990's, but sowed the seeds for the deep economic crisis that gripped the Korean economy in 1998 when the Asian foreign exchange crisis in late 1997 exposed the vulnerability of many chaebol.

Throughout this entire period, especially before 1980, competition law was perceived as a luxury that Korea could not afford. When calls were made to introduce a competition law following the public uproar over collusion by leading chaebol on such household necessities as sugar and flour in the 1960's, Park's government decided that economic growth was more important than consumer welfare. Repeated calls throughout the 1970's for a competition law were ignored by Park's government on the ground that Korea was not yet ready.[6] Intense lobbying by chaebol played no small part in blocking the enactment of a competition law. It is telling that only after another coup in 1980, did the new military government pass the MRFTA.[7]

The historic enactment of the Korean Competition Law reflected an increasing consensus among policymakers and leading academics that Korea needed to make a transition from a government-led regime based on industrial policy to a more market-oriented regime based on competition policy.

When it was established in 1981, the KFTC began, humbly, as a division within the Economic Planning Board. Over time, it has grown into one of the most important agencies in the Korean government. It became an independent, vice-ministerial agency under the direct auspices of the Prime Minister in 1994 and

6 For a more detailed discussion of Korea's early attempts to introduce competition law, *see* Youngjin Jung & Seungwha Chang, *Korea's Competition Law and Policies in Perspective*, 26 NW. J. INT'L L & BUS. 687, 688-94 (2006).

7 In 1987, Korea made a peaceful transition to democracy.

was elevated to the level of ministerial agency in 1996.[8] The key impetus for the increasing authority and power of the KFTC was the dominance of chaebol over the Korean economy. In order to curb the expansion of chaebol, the MRFTA was revised in 1986 to include direct controls over the total amount of equity investments by chaebol and a prohibition of holding companies. As a result, the KFTC has become the powerful regulator of chaebol, as well as the enforcer of more traditional competition law. Indeed, the KFTC is more widely known as the chaebol regulator among ordinary Koreans. But, following the economic crisis in 1998, the KFTC has greatly stepped up its enforcement of competition law, as we elaborate in the following sections.

III. Basic Features of Korea's Competition Law

Historically speaking, competition law began as an Anglo-American institution. In Japan, the U.S. occupation force, led by General MacArthur, introduced competition law after World War II, but its main purpose was to dissolve and prevent the resurgence of the zaibatsu, the family-controlled large conglomerates that financed the Japanese war machine. The same U.S. force that liberated South Korea from Japanese colonial rule saw no such need, in large part because chaebol were yet to emerge in Korea.[9] Korea lived without a competition law for the next thirty-five years. When the Korean government finally enacted the MRFTA in 1980, it was modeled after the Japanese law, as many Korean administrative laws at that time were. As a result, the statutory framework of the Korean MRFTA is quite similar to that of the Japanese Antimonopoly Law.[10]

However, the statutory similarity belies the fact that the two laws have significant differences in practice. One of the interesting features of Korean competition law and practice is the extent to which the jurisprudential developments in U.S. and EC competition law have influenced Korean competition law and policy. Cases and economic theories that evolved in the United States and the European Community have been routinely referenced in the briefs filed with the KFTC and the courts. This practice facilitates international judicial communication and has served as the basis for a more mature and sophisticated develop-

8 Korea Fair Trade Commission, A Twenty-Year History of the KFTC (2001) (in Korean). In 1994, the Economic Planning Board was dissolved. Part of it became Ministry of Planning and Budget and the rest was absorbed by the Finance Ministry.

9 The pre-war zaibatsu in Japan and the post-war chaebol in Korea resemble each other in that they are family-controlled conglomerates.

10 One exception is that the former has embraced the concept of abuse of market dominance whereas the latter has adopted the concept of monopolization. In order to see the statutory similarities and differences from the Japanese Antimonopoly Law, *see* The Act on Prohibition of Private Monopolization and Maintenance of Fair Trade, Act No. 54 (April 14, 1947) (in English), *available at* http://www.jftc.go.jp/e-page/legislation/ama/amended_ama.pdf.

ment of Korean competition law and practice.[11] At another level, it is our opinion that in recent years, the KFTC has been more active than the Japan Fair Trade Commission (JFTC) in three key areas: cartels, competition advocacy, and abuse of dominance.[12]

Three key features set Korean competition law and policy apart from antitrust law in the United States. First, as mentioned above, the Korean Competition Law entrusts the KFTC with the primary responsibility to enforce the law. The Prosecutor's Office may enforce Korean competition law with respect to criminal liability, but only if the KFTC refers the matter to it. In practice, the referral to the Prosecutor's Office has been limited to cases involving hard-core cartels.

The courts play a role mainly in two ways. One is when a defendant challenges a KFTC decision before the Seoul High Court, which has exclusive jurisdiction over the appeal of a decision by the KFTC. The courts also adjudicate private antitrust suits—currently limited to damages suits—which do not have to rely on actions by the KFTC. In the past, it was not common for firms to challenge a government agency's decisions in court, because the agency would typically have subsidies, tax credits, and other policy tools at its disposal. Government agencies typically implemented industrial policy to develop "strategic" industries, but at the same time regulated competition, and sometimes directly imposed price controls. After becoming an independent agency, the KFTC has had a single mandate—to enforce the MRFTA. As a result, firms are increasingly willing to challenge the KFTC's decisions in court, especially when a big amount of administrative surcharges is involved.[13]

On the other hand, private antitrust litigation is not a potent force in Korea, mainly because the MRFTA does not allow private parties to file for an injunction against suspected MRFTA violations directly in court and because class action lawsuits are not permitted in antitrust matters. As we elaborate below, we

11 For more discussion on this point, *see* Youngjin Jung, *Transjudicial Communications in International Competition Law: The Korean Competition Agency's Landmark Microsoft Decision*, 10 Infomedia L.J. 19 (Fall 2006) (in Korean).

12 An industry review magazine shares our assessment. According to the Rating Enforcement of Global Competition Review, the KFTC was ranked as the top rated competition authority in Asia, ahead of the JFTC in 2006. For details, *see* Rating Enforcement, Global Competition Rev. (Jun. 10, 2007), *available at* http://www.nmanet.nl/Images/Global%20Competition%20Review%20Rating%202006_tcm16-103767.pdf.

13 The ratio of the court challenges with respect to KFTC's adverse decisions is not high. Still, the willingness of Korean firms to challenge the KFTC's decisions in court is in sharp contrast to the experiences with other Korean regulators such as the Broadcasting Commission and the Telecommunications Commission. The Broadcasting Commission and the Ministry of Information and Communications (of which the Telecommunications Commission is a part) have large budgets and other policy tools over the regulated firms. As a result, the decisions by these two commissions are rarely challenged in court, in large part because the regulated firms fear that challenging the regulator would have adverse consequences in other areas.

believe that this is one area that needs urgent attention in order for Korean antitrust law to take another leap forward.

In sum, it could be argued that the KFTC is currently the single, most important enforcer of Korean competition law. The KFTC's quasi-monopoly of enforcement of Korean competition law is distinct from the U.S. antitrust law, in which various stakeholders such as individuals and state governments may also initiate actions to enforce U.S. antitrust law.

Second, as with competition laws in other jurisdictions, the MRFTA declares that the promotion of "fair and free competition" as its overall objective. However, another goal of the MRFTA is "to strive for balanced development of the national economy by preventing . . . the excessive concentration of economic power."[14] In this regard, Korean competition law differs from U.S. competition law, which arguably purports to maximize economic efficiency and consumer welfare. The Japanese Antimonopoly Law also sets "preventing the excessive concentration of economic power" as an objective, but the dominance of chaebol over the Korean economy has compelled the KFTC to implement far more stringent regulations, including complete prohibition of debt guarantees among chaebol affiliates.[15]

Nevertheless, after the economic crisis in 1998, the KFTC devoted increasing amounts of resources to enforcing the traditional aspects of competition law. We expect that the KFTC will continue its transformation from chaebol regulator to a competition authority in the more traditional sense. One impetus for the continuing shift in policy is the international effort to harmonize competition laws. For example, the Competition Chapter of the Korea-U.S. Free Trade Agreement (FTA), signed in June 2007, states:

WE EXPECT THAT THE KFTC WILL CONTINUE ITS TRANSFORMATION FROM CHAEBOL REGULATOR TO A COMPETITION AUTHORITY IN THE MORE TRADITIONAL SENSE.

> "Each Party shall maintain or adopt competition laws that promote and protect the competitive process in its market by proscribing anticompetitive

14 The full text of Article 1 ("Purpose") of the MRFTA is as follows:

> The purpose of this Act is to promote fair and free competition, to thereby encourage creative enterprising activities, to protect consumers, and to strive for balanced development of the national economy by preventing the abuse of Market-Dominant Positions by enterprisers and the excessive concentration of economic power, and by regulating improper concerted acts and unfair business practices.

MRFTA, *supra* note 1, at art. 1.

15 *Id*. at art. 10-2.

> business conduct. Each Party shall take appropriate action with respect to such conduct with the objective of promoting economic efficiency and consumer welfare."[16]

Third, Korea has adopted a civil-law system as opposed to a common law system. Therefore, it maintains a fairly elaborate statutory framework, which places limits on judicial lawmaking. As a result, the KFTC and Korean courts routinely confront issues that have not been dealt with in U.S. antitrust law. For instance, in the *Microsoft* case, the court has to deal with the fact that most media players and messengers are apparently provided for free, because while the provision on abuse of market dominance does not explicitly require "positive" pricing, the provision on unfair trade practices stipulates that the transaction that is alleged to constitute tying be done for a positive price. Under the provisions of the MRFTA, therefore, if the product is, indeed, free, then the courts will have to find a rationale to get around the statutory requirements as far as the provision on unfair trade practices is concerned.[17]

More generally, because the Korean legal system basically follows the European civil law system, some Korean legal scholars and practitioners argue that the MRFTA does not lend itself to U.S.-style antitrust enforcement tools such as treble damages and class actions. It is true that the Korean civil law is not amenable to the concept of punitive damages such as treble damages. However, class action is just a procedural facilitator for private litigation. Hence, it is a matter of policy whether to introduce class action in the Korean legal system. In the area of securities litigation, class action lawsuits have already been introduced (albeit in a very limited scope). There is no compelling reason why class action lawsuits cannot be introduced for antitrust matters as well.

The consent decree is another procedural innovation Korea has decided to borrow from the United States. As part of its continuing efforts to modernize the Korean Competition Law, the KFTC proposed a revision of the MRFTA in late 2006 which, among other things, included the introduction of consent decrees.

16 United States-Korea Free Trade Agreement (draft of Jun. 30, 2007) (not yet in force), *available at* http://www.ustr.gov/Trade_Agreements/Bilateral/Republic_of_Korea_FTA/Final_Text/Section_Index.html. Chapter 16 of the Agreement addresses "competition related matters."

17 In its Decision, the KFTC ruled that whether or not the tied good in question is provided for free is irrelevant for "coerced purchase." KFTC Decision 2006-042, 127-129, Concerning Abuse of Market Dominant Position, etc. by Microsoft Corporation and Microsoft Korea Yuhan Hoesa [hereinafter *Microsoft*] (Feb. 2006) (in Korean). From an economic point of view, the first author of the current paper (Yi) believes that because media players and messengers can be downloaded easily for free using broadband Internet, pre-installation of Windows Media Player and Microsoft messengers do not prevent consumers from acquiring competing media players and messengers and thus have little foreclosure effects. This issue should be resolved with empirical data, over which the KFTC and the second author of the current paper (Jung), and Microsoft and the first author (Yi) have sharply different views.

However, due to the objection of the Ministry of Justice, the revised bill of April 2007 omitted a provision for consent decrees. However, as part of the FTA, the U.S. and Korean governments agreed to introduce consent decrees to the MRFTA. The revised legislation, proposed by the KFTC in August 2007, calls for explicit consultation with the Attorney General as well as other interested parties in the 30-day public consultation period.

IV. Cartels

Cartel enforcement is arguably the single most significant achievement of the Korean Competition Law since its enactment in 1980. In a landmark decision in 2000, the KFTC found five oil refineries liable for colluding in bidding on military oil and levied a record surcharge of 190 billion won (over US$200 million under the current exchange rate).[18] In our view, this was a watershed decision that signaled that the transformation of the KFTC from chaebol regulator to traditional competition authority had begun in earnest.

Based on this finding of liability, in 2001 the Ministry of Defense filed a damages lawsuit for 158 billion won. On the joint recommendation of both the plaintiff and the defendants, in 2003 the Seoul Central District Court appointed a group of economists to assess the appropriate damage award.[19] They employed a sophisticated econometric model to estimate the damages. After considerable scrutiny by the defendants over all aspects of the estimation ranging from data to model specification, in 2007 the district court accepted most (but not all) of the analysis done by the court-appointed experts.[20] This decision is widely commended as heralding the acceptance of economic analysis in antitrust by the Korean courts. Like other Korean observers, we are impressed by the court's ability to digest the complex econometric model, narrow down the key issues, and reach (in our opinion) a sensible decision.[21]

18 KFTC Decision No. 2000-158, Concerning improper concerted acts by five oil refineries in military oil bidding in 1998, 1999, and 2000 (Oct. 2000) (in Korean). This amount is more than twice the combined (nominal) amounts of all surcharges on cartels since 1981. The KFTC later reduced the surcharge to 121 billion won on the grounds that some defendants (both the companies and individuals) were indicted (on which they were later sentenced to pay criminal fines) and the Ministry of Defense filed a damages lawsuit that we discuss in the main text.

19 The first author of the present article (Yi) was one of the court-appointed experts affiliated with the Center for Corporate Competitiveness of the Institute for Economic Research at Seoul National University.

20 Republic of Korea v. SK, Inc. et al., 2001 gahap 10682 (Seoul Central District Ct. Jan. 2007). After deducting 9 billion won for oil supplied for free in 1998, the final amount that the defendants were ordered to pay was 81 billion won. The court-appointed experts' original estimation was 105 billion won (after the deduction).

21 For another commentator who is "moved" by this decision, *see* Sun Hur, *Let's Discuss the Evidentiary Value of Economic Analysis in Fair Trade Cases*, 132 J. Competition 3 (May 2007) (in Korean).

The KFTC has continued to step up its enforcement activities against cartels. Several noteworthy changes took place in 2005. First, the revised MRFTA went into effect, raising the maximum level of surcharges on cartels from 5 percent to 10 percent of the enterprise's average turnovers for the three previous years.[22] Second, the KFTC's cartel team was expanded into a new Directorate, the Cartel Bureau. Third, the leniency program was reformed to guarantee mandatory surcharge reductions to the first two cartel members who report their illegal collusive behavior to the KFTC (100 percent to the first informer and 30 percent to the second), provided certain statutory conditions are met.[23]

Combined together, these reforms have been very successful. From flour to sugar to petrochemicals to fire insurance, former cartel members have rushed to become the first to report their wrongdoing to the KFTC to qualify for the reduced surcharges. However, the way the leniency program is administered has created some controversies, because of the accusations that cartel organizers were often the beneficiaries of the program. Amid a mounting criticism of the legitimacy of the leniency program based on social justice concerns, the KFTC announced the revision of the Executive Decree in August 2007, providing that the companies which "force" other firms to participate in the cartel will no longer be eligible for leniency.[24] The KFTC's increasingly aggressive enforcement actions are laudable and have greatly contributed to breaking through the ingrained collusive culture among Korean businesses.

Cartel enforcement is often mentioned as the area where the convergence of different antitrust regimes has been most significant. We are pleased to see that Korea has been an active participant in this convergence. For example, the KFTC has been active in applying the MRFTA extraterritorially to foreign cartels, beginning with an 11 billion won surcharge on the graphite electrode cartel in 2002 and a 4 billion won surcharge on the vitamin cartel in 2003. The Korean Supreme Court has rejected the challenge by the defendants in the graphite electrode cartel case based on the lack of a specific clause in the

22 Because private damages suits and criminal enforcement are not very prevalent, the administrative surcharge is the most potent deterrent to cartel formation in Korea. The revision history of the maximum allowed surcharges on cartels nicely illustrates the increased emphasis that the KFTC has put on enforcing the traditional competition law (as opposed to chaebol regulation). The original MRFTA of 1980 had *no* surcharge clause regarding cartels. The first revision of the MRFTA in 1986 introduced a modest level of one percent of relevant sales and in 1994, the maximum level was raised to five percent.

23 Korean courts have also stepped up criminal sanctions against hard-core cartels. In 2007, a court handed down the first prison sentences (sentenced for one year, suspended for two years) for the executives who formed a cartel on detergents.

24 At the same time, the second informer will receive 50 percent reduction (increased from the current 30 percent) in surcharges. For details, *see* Press Release, Korean Fair Trade Commission, Announcement for the revision of the Executive Decree of the MRFTA (August 10, 2007) (in Korean), *available at* http://www.ftc.go.kr/new_content/info/info_023v.php?ymd=2007-08-10&no=0011&ddcode=&av_pg=&ref_val=&mode=&field=&qrytext=&sDate=&eDate=.

MRFTA authorizing the extraterritorial application of the law.[25] In order to eliminate any lingering uncertainty, in 2004 the MRFTA was revised to include an explicit provision (Article 2-2) that allows for extraterritorial application of the MRFTA based on the so-called "effects doctrine."[26]

In order to take the next leap forward in cartel enforcement, however, we believe the Korean Competition Law needs two changes. First, in close collaboration with the Prosecutor's Office, the KFTC should be given criminal law enforcement tools to use against hard-core cartels. Currently, investigation targets can refuse to cooperate with the KFTC's investigators.[27] Of course, many firms voluntarily cooperate with the KFTC out of the fear that failure to do so will have negative consequences when the KFTC exercises its discretion in setting the surcharges based on the (lack of) cooperation of respondents. That said, given that the KFTC is the primary enforcer of Korean competition law, it should be endowed with proper investigation tools. The KFTC should cooperate with the Ministry of Justice in order to find a mutually agreeable middle ground and secure strong investigation powers.

Second, an oddity of the Korean Competition Law is that Article 19-5 of the MRFTA allows the statutory presumption of illegal agreements based on parallel actions. In a 2003 ruling, the Korean Supreme Court held that the presumption within the meaning of Article 19-5 obviates the need for any additional demonstration of circumstantial evidence that would indicate the agreement or tacit understanding among enterprises.[28] This statutory presumption clause, which was added to the MRFTA in 1986, might have been necessary in the past in order to alleviate the evidentiary burden on the young agency. However, the KFTC now accepts the economic theory that parallel behavior among oligopolistic firms may arise naturally. We are pleased that the KFTC's proposed changes to Article 19-5, which require so-called plus factors, were passed by the National Assembly of Korea in July 2007. Specifically, the amended Article 19-5 of MRFTA stipulates that agreement for cartel is presumed if there is a considerable likelihood that the enterprises have jointly engaged in the alleged acts in light of all the circumstances, including characteristics of the relevant line of business or product or service, economic reasons or impact of the relevant act, and frequencies and patterns of contacts among the firms. This is very similar to facilitating or plus factors identified in U.S. case law. This amendment is certainly a step forward in the continuing modernization of Korean competition law.

25 Showa Denko KK v. KFTC, 2004 du 11275 (Supreme Ct. 2006). For more discussion on the extraterritorial application of the MRFTA, *see* Youngjin Jung, *Korean Competition Law: First Step Towards Globalization*, 4(2) KOREAN L.J. 177 (2005).

26 For the effects doctrine, *see* Hartford Fire Insurance Co. v. California, 113 S. Ct. 2891 (1993).

27 Currently, refusal to cooperate with a KFTC investigation can only be punished by negligible civil fines.

28 Hite Beer v. KFTC, 2001 du 946 (Supreme Ct. Feb. 2003).

It also happens that the success of the revised leniency program has obviated the need for the KFTC to resort to Article 19-5, and instead, has allowed the agency to directly apply Article 19-1 (which mainly applies when there is direct evidence of agreement) in several important recent cases. At the same time, however, the KFTC's recent tendency to rely on Article 19-1 of MRFTA, even when direct evidence is scarce at best and dubious circumstantial evidence is scattered, is worrisome.[29] In this regard, the hesitancy of the KFTC to weigh economic reports in cartel cases should be reconsidered. When there is direct evidence for cartel agreement, economic analysis is less likely to be informative. However, economic analysis is highly relevant in a cartel case where circumstantial factors are the key evidence available to prove the existence of a cartel. We hope that the KFTC will fully consider economic analysis when appropriate.

V. Competition Advocacy

Another area in which the KFTC has achieved significant success is competition promotion. First, the KFTC has repealed or modified numerous laws that officially sanctioned or encouraged cartel formation. For example, in 1999, the KFTC introduced the Omnibus Cartel Repeal Act, which abolished cartels in nine certified professions such as law.[30]

Second, a line of defense that is often advanced by cartel members is that the agreement was a direct or indirect outcome of "administrative guidance" by the ministries which oversee them. The KFTC has increasingly taken a hard line on such defenses. In late 2006, the KFTC issued a guideline that makes clear its stance that administrative guidance, without an explicit legal basis, cannot be a legitimate defense for collusive behavior.[31] In an important decision in August 2007, the Seoul High Court agreed with the KFTC in rejecting the incumbent telephone company KT's defense that its agreement on local telephone tariffs with the entrant Hanaro Telecom was dictated by the Ministry of Information and Communications.[32]

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29 For example, the authors' review of the relevant material shows that the KFTC's evidence in the oil cartel case is scarce. KFTC Decision 2007-232, Concerning improper concerted acts by four oil refineries (Apr. 2007).

30 Omnibus Cartel Repeal Act, Law No. 5815 (Feb. 5, 1999), *available at* http://ftc.go.kr/data/hwp/G00013.doc (in English) (last visited Aug. 17, 2007).

31 The Korea Fair Trade Commission, Examination Guidelines for Improper Concerted Acts where Administrative Guidance Is Involved (Dec. 27, 2006) (in Korean).

32 KT v. KFTC, 2005 nu 20230 (Seoul High Ct. Aug. 2007). The court nonetheless vacated the KFTC's surcharge of 113 billion won on KT—the record surcharge on a single company in the KFTC's history—partly on the ground that the KFTC erred in finding that the collusion continued until August 2004, despite aggressive price cuts by Hanaro in April 2004. The first author of the current paper (Yi) submitted an economics expert paper (co-authored with others) to the Seoul High Court on behalf of KT which, among other things, examined when the cartel ceased to function.

Third, a unique feature of the Korean Competition Law gives the KFTC the power to promote regulatory reform. Article 63 of the MRFTA expressly requires other government agencies to consult with the KFTC on proposed laws or regulations that might restrain competition in order to minimize any adverse competitive effects. Other countries that try to develop competition law could learn from the Korean experience and institutionalize a similar requirement.

VI. Chaebol Regulation

Our most significant proposal to further the continuing modernization of Korean competition law concerns chaebol regulation. The dominance of chaebol over the Korean economy, in particular their debt-financed growth before the economic crisis in 1998, has compelled the Korean government to introduce extraordinary regulations not seen (or needed) in other countries. The KFTC has been at the forefront of chaebol regulation, and was given the legal authority to impose stringent ex ante limits on cross-shareholdings among chaebol affiliates, on levels of debt, and on debt guarantees to affiliates that chaebol could assume. The overarching goal of these measures was to limit the (sometimes reckless) expansion of the chaebol.

Such stringent ex ante regulations (for example, restricting the total amount of equity holdings of a chaebol affiliate to a percentage of its net capital in order to limit the expansion of the chaebol) can be justified only if there are serious market failures. We believe that the Korean economy before the economic crisis of 1998 indeed suffered from such a serious market failure in that the families that controlled the chaebol did not bear the full social cost of their debt-financed expansion.

As we discussed in Section II, under the policy environment characterized by the too-big-to-fail syndrome, the expansion-first strategy that many chaebol adopted before the economic crisis of 1998 was a rational decision for the families who controlled them, but imposed huge negative externalities on the Korean economy. As such, ex ante regulations on chaebol expansion could be justified to some extent.

However, the economic crisis of 1998 led to fundamental changes in the Korean economy. Fifteen of the top thirty chaebol in 1997 have since gone bankrupt, including Daewoo, then the fourth-largest chaebol in terms of total assets. Along with these bankrupt chaebol, the too-big-to-fail syndrome has largely disappeared as well. The chaebol that have survived the economic crisis have done so only after going through very painful restructuring processes. As a result, the surviving chaebol have emerged stronger than before.

The changes at Samsung Group, currently the largest chaebol in Korea, illustrate the sea changes that have taken place for the surviving chaebol in terms of debt ratios and profitability. Figure 1 shows that while the total assets of Samsung Group

Figure 1

Changes in Samsung Group's financial health after the 1998 economic crisis

	Total Assets (Trillion Won)	Total Equity (Trillion Won)	Total Debt (Trillion Won)	Debt-Equity Ratio
1997	50.7	13.8	36.9	267.2%
2005	100.4	67.0	33.4	49.9%
Difference	+49.7	+53.2	-3.5	-217.3%

Source: Sang-Seung Yi, A New Paradigm for Chaebol Regulation: Strengthening Competition Law Enforcement and the Introduction of "A Special Law on the Protection of Small Shareholders of Large Business Groups" (2006) (in Korean).

have nearly doubled from 1997 to 2005 (from 51 trillion won to 100 trillion won), total debt has actually decreased (from 37 trillion won to 33 trillion won), bringing down the debt-equity ratios from over 250 percent to below 50 percent.

The demise of the too-big-to-fail syndrome, the fundamental changes in how chaebol run their businesses (from a "growth first" strategy to a more balanced one and with proper attention paid to profitability of their investments), and the resulting huge improvements in profits and debt-equity ratios of surviving chaebol, call for fundamental rethinking of chaebol regulation. We propose that the KFTC abandon the vague and ill-defined concept of "concentration of economic power" and abolish ex ante regulations on cross-shareholdings, holding companies, and debt-equity ratios, because the Korean economy no longer suffers from the severe market failures associated with the debt-financed expansion of chaebol. In the place of these ex ante, one-size-fits-all regulations, we make two proposals.

WE PROPOSE THAT THE KFTC ABANDON THE VAGUE AND ILL-DEFINED CONCEPT OF "CONCENTRATION OF ECONOMIC POWER" AND ABOLISH EX ANTE REGULATIONS ON CROSS-SHAREHOLDINGS, HOLDING COMPANIES, AND DEBT-EQUITY RATIOS, BECAUSE THE KOREAN ECONOMY NO LONGER SUFFERS FROM THE SEVERE MARKET FAILURES ASSOCIATED WITH THE DEBT-FINANCED EXPANSION OF CHAEBOL.

First, the KFTC should strengthen the application of traditional competition law—cartels, mergers, and abuse of market dominance—to chaebol, with special attention paid to the unique situation that Korea is in due to the dominance of the chaebol. For example, economic research has shown that multi-market contact among firms facil-

itates collusion.[33] Top chaebol operate tens of affiliate companies that compete with other chaebol affiliates in many different markets, from consumer electronics to heavy machinery to insurance. Such multi-market contact creates a ripe environment for collusive behavior, which calls for close scrutiny by the competition authority.

Second, the fact that Korea no longer suffers from serious market failures resulting from the chaebol's expansion does not mean that the chaebol does not create policy problems. To the contrary, the chaebol present unique issues that have not been addressed in other industrialized countries. In our opinion, the heart of the remaining chaebol problem concerns the potential appropriation of the wealth of small shareholders by the controlling minority shareholders.[34] For example, controlling shareholders can set up a new affiliate in which they have high stakes and engage in business transactions with other affiliates on terms favorable to the new affiliate.

More generally, the intricate web of cross-shareholdings among chaebol affiliates allows the controlling family (which only hold a minority share) to exercise voting rights far in excess of their cash-flow rights, thereby seriously marginalizing other small shareholders and potentially allowing the controlling minority shareholders to engage in transactions that enrich themselves at the expense of other shareholders. These so-called "tunneling" problems are at the heart of corporate governance in Korea. The KFTC currently regulates such transactions as "undue subsidization of affiliates" and also tries to prevent them by putting ex ante limits on the total amount of equity investments of a chaebol affiliate or on the minimum equity that a holding company should maintain in its subsidiaries.

There are two problems with the current approach. First, we strongly doubt that such ex ante limits on equity holdings can provide any meaningful solution to the potential tunneling problems. Second, one can question whether the KFTC is the proper institution to regulate the corporate governance structure of chaebol.[35] It is our assessment that the various legal tools at the KFTC's disposal

33 Douglas Bernheim & Michael Whinston, *Multimarket Contact and Collusive Behavior*, 21(1) Rand J. Econ. 1-26 (Spring 1990).

34 Since the controlling families of a chaebol are typically minority shareholders themselves we therefore call them "controlling minority shareholders." We refer to other minority shareholders as "small" shareholders in order to make a distinction between the two.

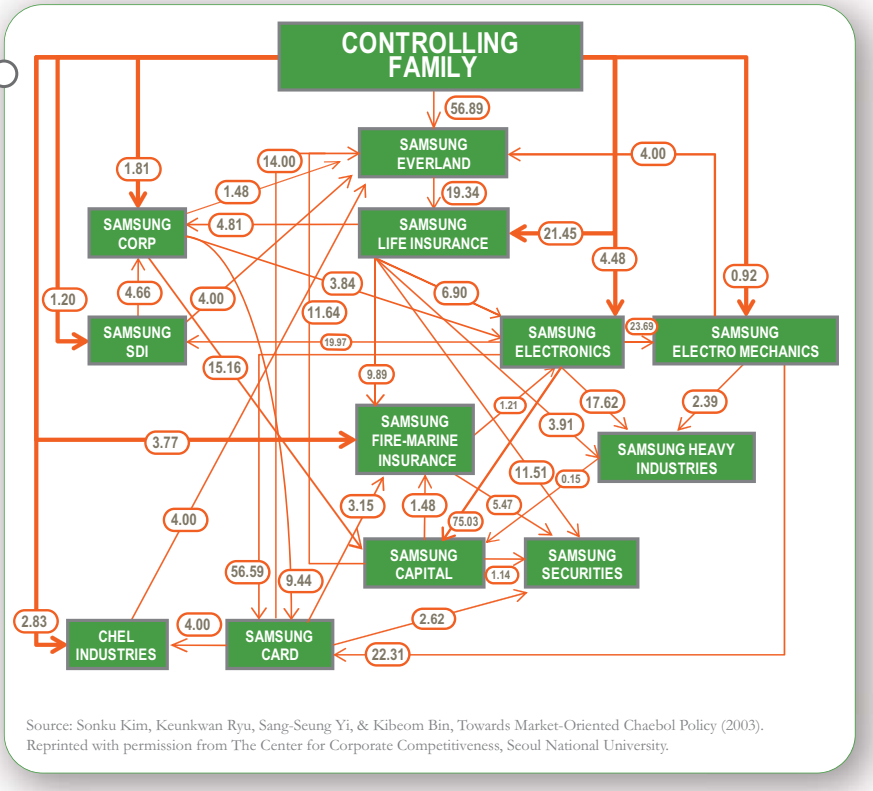
35 In addition to imposing ex ante regulations on the total amount of equity investments of a chaebol affiliate and on the minimum equity that a holding company should maintain in its subsidiaries, Chapter 3 of the MRFTA also contains provisions on disclosures to enhance transparency and on separation of the so-called "industrial" capital from the "financial" capital. The question arises whether the KFTC is a proper institution to administer these regulations. Although there are unique issues that do not squarely fit into other laws, as a matter of policy, these issues would be better overseen by other relevant laws, lifting the burden from the KFTC of this non-competition related undertaking. *See* Youngjin Jung, *Korean Competition Law: Policies and Development*, *in* Competition Law Today 364 (Vinod Dhall ed., 2007).

for chaebol regulation are not optimally tailored to address the issue of marginalization of minority shareholders. At a fundamental level, since these regulations pertain to the protection of shareholders, they are not the traditional prerogatives of a competition authority.[36]

We propose that these regulations intended to protect small shareholders of chaebol be spun off from the MRFTA and reenacted as a separate law or a separate chapter of the Korean company law with the clear mandate to protect small shareholders from the abuse of power by the controlling minority shareholders of chaebol. The starting point of our proposal is the analysis of chaebol from a corporate law perspective. In essence, a chaebol can be viewed as a group of de facto mutual joint holding companies. A very complex pattern of cross-shareholding exists among chaebol affiliates. Figure 2, for example, illustrates the cross-shareholding structure of some key companies of Samsung Group. While a traditional holding company holds 100 percent of equity of a subsidiary, chaebol affiliates indirectly hold equities of one another through circular investments (hence,

Figure 2

A spider web of cross shareholdings among key affiliates of Samsung Group



Source: Sonku Kim, Keunkwan Ryu, Sang-Seung Yi, & Kibeom Bin, Towards Market-Oriented Chaebol Policy (2003). Reprinted with permission from The Center for Corporate Competitiveness, Seoul National University.

36 Of course, if these inter-affiliate transactions have anticompetitive effects, they should be subject to competition law. However, current regulations do not even attempt to define relevant markets, let alone investigate whether there are likely or actual anticompetitive effects before condemning them.

they mutually serve as holding companies for one another)[37] and jointly hold equities of other affiliates (hence, they jointly serve as holding companies over other affiliates).[38]

Such complex cross-shareholdings raise difficult issues regarding the protection of small shareholders of a chaebol firm, who are, in effect, small shareholders of affiliate companies in which the chaebol holds equities directly or indirectly. In the United States, legal doctrines emerged to allow small shareholders of a holding company to file double derivative actions against the violation of fiduciary duties by directors of subsidiary companies. Currently, Korea lacks any legal provision for a double derivative suit even for a typical parent-subsidiary company structure, where one "parent" company holds all or most of shares of a subsidiary company. A recent attempt to allow a double derivative suit for such a typical parent-subsidiary relationship (with over 50 percent equity holding) failed due to opposition by chaebol. We believe that the uniqueness of the Korean situation calls for a much stronger measure because, as illustrated in the case of Samsung, a typical double derivative suit does not cover the vast majority of chaebol affiliates.

Hence, a key clause of a new law,[39] or a separate chapter of the company law for the purpose of protection of minority shareholders of large business group, would allow double derivative suits for shareholders of a chaebol company with regard to the actions of non-public (and hence, not subject to much market scrutiny) affiliates in which it holds non-negligible equity (e.g., one percent). Shareholders would also be given other rights such as the right to inspect the chaebol's accounting data in order to prevent tunneling problems (i.e., the exploitation of small shareholders by controlling minority shareholders of chaebol).[40]

37 Direct cross-shareholdings are prohibited among affiliates of chaebol with total assets over two trillion won.

38 For details, *see* Sonku Kim, Keunkwan Ryu, Sang-Seung Yi, & Kibeom Bin, Towards Market-Oriented Chaebol Policy, Powerpoint presentation (2003) (in English) (*based on* Sonku Kim, Keunkwan Ryu, Sang-Seung Yi, & Kibeom Bin, Desirable Directions for Revising the Ceiling on Total Equity Investments (2003) (in Korean)). Kim et al. (2003) was commissioned by the Ministry of Finance and Economy and submitted in 2003 to the Taskforce on the Vision for Market Reform organized by the Korea Fair Trade Commission. The first author of the current paper (Yi) was a member of that taskforce.

39 The title that we propose is "A Special Law on the Protection of Small Shareholders of Large Business Groups." This new law would begin with the definition of a large business group, as Article 2.2 of the current MRFTA does. Its main provision would be to allow double derivative suits as we explain in the main text. The provisions in the MRFTA intended to protect small shareholders of chaebol (such as Article 11-2 on the disclosure of business transactions among chaebol affiliates) should be moved from the MRFTA to the new law.

40 For details regarding this and other proposals on how to fundamentally overhaul chaebol regulation, *see* Sang-Seung Yi, A New Paradigm for Chaebol Regulation: Strengthening Competition Law Enforcement and the Introduction of "A Special Law on the Protection of Small Shareholders of Large Business Groups" (2006) (in Korean).

We note that the KFTC has recently been moving in the direction of easing ex ante regulations on chaebol. We also note that there is a sharp division of opinions among Korean intellectuals about how to reform chaebol regulation. For example, the first author of the current article (Yi) is of the view that the proposals suggested above should be implemented promptly because the current regulations do not provide any meaningful solution to the tunneling problems, whereas the second author (Jung) takes the view that the KFTC should gradually curtail its role as the chaebol regulator but should relinquish it only when the market mechanism can sufficiently discipline the tunneling problems.

VII. Mergers

The KFTC's track record on merger enforcement (at least until recently) is not something that a competition authority should be proud of. Indeed, in its own evaluation of its first 20 years, the KFTC candidly admitted that it had not been very active in the merger enforcement area.[41] Until very recently, the KFTC rarely banned mergers or imposed structural remedies such as divestitures.[42] Rather, its remedies were typically price controls[43] or sometimes, market share restrictions.[44] It goes without saying that these remedies run counter to the core principles of competition law.

The KFTC seems to be well aware that it needs to strengthen its merger enforcement regime. Indeed, there are encouraging signs that the KFTC is increasingly favoring structural remedies when feasible. For example, it recently banned two mergers, Muhak-Daesun, a 2003 merger attempt between two local soju (Korean hard liquor) companies, and Samik-Youngchang, a 2004 merger between two piano manufacturers, and ordered divestitures in several mergers (e.g., Hyundai Hysco-INI Steel, a 2004 merger between two steel companies, and DC Chemical-Columbian Chemicals, a 2006 merger between two chemical companies).

41 Korea Fair Trade Commission (2001), *supra* note 8.

42 For example, between 1981 and 2000, there were over 5,500 mergers, out of which the KFTC has banned only three, all of which were in rather small markets. *See id*. at 261-69.

43 For example, in a 1999 merger between Hyundai Automobile and (then-bankrupt) Kia Automobile, their combined shares in truck market were close to 95 percent. The KFTC allowed the merger on the condition that the combined firm not raise domestic prices higher rates than export prices. KFTC Decision 99-43, Concerning violation by Hyundai Automobile of article on combination of enterprises (Apr. 1999).

44 In a 2000 merger between SK Telecom and Shinshegi Telecom, whose combined markets shares were 57 percent, the KFTC ordered that the combined firm reduce its market share to under 50 percent by June 2001. KFTC Decision 2000-76, Concerning violation by SK Telecom of article on combination of enterprises (May 2000).

The KFTC has also accepted the use of economic analysis in defining the relevant market and identifying anticompetitive effects. For example, its first enforcement in a non-horizontal, non-vertical merger case (Hite-Jinro, a 2006 merger between the largest beer company and the largest soju company) was based on the economic theory that they shared the same distribution channel and could engage in anticompetitive tying.[45]

One remarkable development is that the Korean courts preceded the KFTC in accepting some aspects of economic analysis. Specifically, in the 2004 *Muhak/Daesun* decision, the Seoul High Court applied the critical loss analysis based on the hypothetical monopolist test as a proper mechanism to define the relevant geographical market.[46] In its 2006 decision in *Hite/Jinro*, the KFTC followed suit and also used critical loss analysis to define the relevant geographical market. The KFTC is also currently revising its Merger Guidelines, including the possibility of replacing the C3 (the three-firm concentration ratio) with HHI (the Herfindahl-Hirschman Index that captures the pattern of concentration in a richer way than the C3 does) as a measure of concentration.[47]

For competition law and economics with regard to mergers, Korea raises two interesting and difficult challenges. First, many Korean firms operate both in the Korean market and in markets overseas. It is rarely the case that the merger between two Korean firms (or a Korean firm and a multinational firm that operates in Korea) creates competitive concerns in foreign markets, but it does so often in Korea. Frequently the merger is driven by the desire to realize economies of scale or scope to compete more effectively in overseas markets. The domestic Korean market is relatively small in size. In a standard approach, the competition authority would define two (or several) relevant geographical markets and weigh anticompetitive effects against efficiencies in each market.[48] Under this approach, in the foreign market the merger would be deemed to create few, if any anticompetitive concerns, but some efficiency gains. In the Korean market, however, the merger would create anticompetitive concerns, but the efficiency gains that the firms assert that they would gain in the overseas market do not directly translate into savings that can be passed through to domestic consumers.

45 The first author of the current paper (Yi) submitted an economic analysis paper that advanced this theory. (The second author of the current paper (Jung) represented Jinro.) Even though the KFTC accepted this theory, the remedy it imposed was weak, in that it simply ordered the combined company not to discriminate against other firms over distribution channels. KFTC Decision 2006-009, Concerning violation by Hite Beer of article on combination of enterprises (Jan. 2006).

46 Muhak v. KFTC, 2003 nu 2252 (Seoul High Ct. Oct. 2004). The first author of the current paper (Yi) submitted an economic analysis paper on behalf of Muhak, with a focus on the geographical market definition.

47 In fact, the KFTC staff routinely use HHI as a supplementary tool for measuring concentration.

48 This is the case unless the market is found to be worldwide.

In such a situation, the standard approach would call for divestiture in Korea that would preserve the competitiveness of the Korean market at the pre-merger level. But that could jeopardize the merger itself, depriving the companies of the opportunity to realize efficiencies in the foreign markets.[49] Such a scenario raises an interesting research (and policy) issue—whether it might be appropriate for a competition authority to use the total social welfare standard over all geographical markets combined (which recognizes fixed-cost savings and other gains in the foreign markets as efficiencies, and weighs them against anticompetitive effects in the domestic market) as opposed to the narrow consumer welfare standard in each geographical market concerned (which does not). That is, the Korean experience suggests that an export-oriented economy could consider the total social welfare standard over all geographical markets combined (which considers gains in the foreign markets as legitimate efficiencies to be weighed against anticompetitive losses in the domestic market) as the proper welfare standard in evaluating mergers.

Second, the dominance of chaebol over the Korean economy raises novel and difficult issues with regard to merger enforcement. Chaebol routinely acquire firms as a means of expanding into new businesses. Such conglomerate mergers do not raise anticompetitive concerns that arise in horizontal or vertical mergers. An interesting research topic would be to examine whether the moribund conglomerate merger doctrine could be resurrected in the Korean context. Of course, we are not advocating that the KFTC ban new conglomerate mergers or try to disband existing chaebol without sound economic theory and empirical demonstrations of anticompetitive harm. Nonetheless, it would be interesting to see if it is possible to formulate a coherent and sound antitrust doctrine regarding why and how conglomerate mergers might be anticompetitive, while recognizing the potential efficiency gains from such mergers.

VIII. Abuse of Market Dominance

As is the case with mergers, the KFTC's enforcement record on abuse of market dominance under Article 3-2 of MRFTA has been sparse at best. Instead, the KFTC has relied on the unfair trade practices provision (Article 23) of the MRFTA when the appearance of abuse of a dominant position in the market has arisen. This meager enforcement of the abuse of market dominance provision of

49 These issues surfaced in the aforementioned DC Chemical-Columbian Chemicals merger, where a Korean chemical company (DC Chemical) tried to acquire a global company (Columbian Chemicals) with operations in nine countries. The KFTC took issue with only the Korean market and ordered DC Chemical to sell one of its two Korean factories as a condition for acquiring Columbian Chemicals, over the DC Chemical's protest that doing so would deprive it of the economies of scale/scope from the merger, which were needed to compete with top multinational firms in the global market. The first author of the current paper (Yi) served as the economics expert witness for DC Chemical. The case is currently pending at the Seoul High Court. KFTC Decision 2006-173, Concerning violation by Columbian Chemicals Acquisition LLC of article on combination of enterprises (Aug. 2006)

the MRFTA has been rightly criticized, especially considering Korea's prevailing monopolistic market structure stemming from the longstanding legacy of past industrial policy. The disproportionate enforcement record on unfair trade practices has impeded sound development of a traditional area of competition law and policy.

THE DISPROPORTIONATE ENFORCEMENT RECORD ON UNFAIR TRADE PRACTICES HAS IMPEDED SOUND DEVELOPMENT OF A TRADITIONAL AREA OF COMPETITION LAW AND POLICY.

Article 23 of the MRFTA regulates unfair trade practices.[50] The provision was modeled after a similar provision in the Japanese Antimonopoly Law, which was, in turn, based on Section 5 of the U.S. Federal Trade Commission Act.[51] Article 23 of the MRFTA does not necessarily regulate trade practices that negatively affect competition. Rather, it regulates a broad range of unfair trade practices that are "likely to compromise fair transaction," which is different from "substantial diminution of competition" as set forth under cartel or merger regulations. Therefore, Article 23 regulates not only practices that would affect competition, such as refusal to deal, discrimination, and tying, but also practices that have to do with so-called unfairness of methods or the abuse of dominant position in contracting with other enterprises, which arguably do not create anticompetitive effects in the market. The comprehensiveness of Article 23, and administrative convenience, has made the regulation regarding unfair trade practices the key legal instrument for regulating various anticompetitive behaviors in Korea and has minimized the role of the abuse of market dominance provision.

In recent years, however, the KFTC has tried to aggressively apply the abuse of dominance provision (Article 3-2) in some selected areas. The first major case in which the KFTC applied Article 3-2 was its 2001 decision on refusal to deal. The KFTC ruled that the dominant steel company POSCO's decision not to supply hot coils to Hyundai Hysco violated the MRFTA. However, the KFTC's decision did not involve any extensive economic analysis of whether POSCO's refusal to deal actually restricted competition in the market.[52]

50 MRFTA, *supra* note 1, at art 23 ("Prohibition of Unfair Business Practices").

51 U.S. Federal Trade Commission Act, 15 U.S.C. § 45 (2006).

52 KFTC Decision 2001-068, Concerning Abuse of Market Dominant Position by POSCO (Apr. 2001). This decision is only ten pages long. In 2002, the Seoul High Court upheld the KFTC's decision, but did not conduct any proper economic analysis either. POSCO v. KFTC, 2001 nu 5307 (Seoul High Ct. Aug. 2002). In 2003, at the request of a study group at the Supreme Court, the first author of the current paper (Yi) wrote an economics analysis paper on this case. He argued that POSCO's refusal to deal did not create any significant anticompetitive effects, because Hysco could easily turn to Japanese steel producers (which it did) and operated at maximum capacity. For details, *see* Sang-Seung Yi, An Economic Analysis on the Refusal to Supply by POSCO (2003) (in Korean). At the time of the writing of the current article, the case is still pending at the Supreme Court.

One problem is that the KFTC's enforcement has been somewhat selective. In particular, the KFTC opted not to bring an enforcement action against a group boycott in May 2005 by the four broadcasting companies (which collectively accounted for over 90 percent of all broadcasting content in Korea) to withhold their content from TU Media, a satellite digital media broadcasting (DMB) service provider. The broadcasting companies were competing with TU Media to set up their own terrestrial DMB services. The group boycott appeared to be a naked refusal to deal without any pro-competitive or efficiency justifications and clear anticompetitive effects. Hence, it is puzzling that the KFTC has taken no action against it, but has taken action against a unilateral refusal to deal that did not have clear anticompetitive effects.

In the so-called new economy sector, however, the KFTC has been truly aggressive—indeed arguably more aggressive than any other competition authority in the world. In early 2006, after more than four years of investigation, the KFTC ruled that Microsoft had abused its dominant market position by tying its Windows Media Player (WMP) and Windows Messenger to its Windows PC operating system, and tying Windows Media Services to its Windows Server operating system.[53]

This landmark case involved many firsts for the KFTC. In April 2004, one month after the European Commission issued a similar decision against Microsoft's inclusion of Windows Media Player in the Windows PC operating system, the KFTC formed a three-member taskforce to expedite its investigation. While the case was originally initiated by Daum (a Korean portal site operator that featured its own instant messenger) in late 2001 with the release of Windows XP, after the KFTC expanded its investigation to cover digital media in 2004, U.S.-based Real Networks filed its own complaint before the KFTC.

In addition, the KFTC expanded due process quite significantly, giving Microsoft significant opportunities to review the Examiner's original evidence under its revised guideline on case handling and holding a total of seven hearings to conduct proper deliberation.[54]

Third, the KFTC proudly announced that it was the first competition agency in the world to address the tying of messenger programs and media servers. (The European Commission only addressed media players.) The KFTC's remedy on media players and messengers went beyond the Commission's. While the Commission only ordered Microsoft to release a version of Windows without

53 *Microsoft*, *supra* note 17.

54 In the *Microsoft* case, however, while Microsoft was given significant access to the Examiner's original evidence and chances to rebut it, it was not given any chance to review or rebut the Examiner's additional evidence (collected after Microsoft's rebuttal papers were submitted) or Real Networks' evidence before the KFTC made its decision. Its February 2006 decision cited these pieces of evidence, but Microsoft was not able to challenge them until after the KFTC decision was issued.

WMP (along with a full version), the KFTC additionally required Microsoft to include an icon on the program menu of the full version of Windows for "Media Players/Messenger Centers" with download links to competing media players and messengers if Microsoft provided the full version.

The KFTC's decision in the *Microsoft* case has received a mixed review. While the European Commission expressed its strong support for the KFTC,[55] the Antitrust Division of the U.S. Department of Justice released a formal statement criticizing it as "ultimately harm[ing] innovation."[56] It remains to be seen how the Seoul High Court will sort out many of these complex legal, economic, and technical issues. The legal issues include whether Korean competition law requires a positive price for the tied good, as we discussed previously.[57] The key economic issue in the *Microsoft* case is whether Microsoft's integration of features forecloses competition. Microsoft emphasizes that the Internet is a highly efficient distribution mechanism for media players and messengers. This is particularly true in Korea, which led the world in broadband penetration from 2000 to 2006. Microsoft also points out that Korean media players and messengers are now the leading software programs in the Korean market, supplanting Microsoft's media player and messenger software. The KFTC responds that this fact alone does not prove that competition is not foreclosed and alleges that network effects magnify the anticompetitiveness of the media player/messenger tie. It remains to be seen how the Seoul High Court will evaluate these conflicting claims.

As expected, the *Microsoft* decision has propelled the KFTC into a major player in global antitrust enforcement. International companies have begun to take a closer look at the KFTC's enforcement policy. Following *Microsoft*, the KFTC

55 At the June 2006 annual meeting between the European Commission and the KFTC, Commissioner Neelie Kroes remarked to the reporters: "In the Microsoft case, KFTC sent a very strong signal that Korea will never be a safe haven for those who abuse dominant position. KFTC should be praised for that." (The first author of the current article (Yi) served as a discussant for Commissioner Kroes' speech on the European Commission's Discussion Paper on Article 82.)

56 J. Bruce McDonald, Statement of Deputy Assistant Attorney General J. Bruce McDonald Regarding Korean Fair Trade Commission's Decision in its Microsoft Case (Dec. 7, 2005), *available at* http://www.usdoj.gov/atr/public/press_releases/2005/213562.htm.

57 The relevant provision on unfair trade practices regarding illegal tying explicitly uses the word "purchase." In contrast, the provision on abuse of market dominance does not explicitly use the word "purchase." Therefore, to the extent that the provision on unfair trade practices applies, the "purchase' requirement appears to be at odds with the competition laws of the European Community and United States. The other equally thorny issue is that the provisions set forth under Article 3-2 of MRFTA do not squarely fit the definition of illegal tying. The KFTC found the applicable provision in "an act unfairly or unreasonably coercing a transaction or behavior that is disadvantageous to the transacting partner" which is a type of behavior that is enumerated in the Notification on Abuse of Market Dominance. This statutory Notification states that such act is "an act that unfairly or unreasonably hampers business of other enterprises" under Article 3-2 of MRFTA and its corresponding Presidential Decree. In addition, the KFTC also subsumed Microsoft's tying practices as "the act that is likely to appreciably diminish the interests of consumers" as set forth under Article 3-2. Microsoft challenges the legitimacy of the KFTC's interpretations. It remains to be seen how the reviewing court will decide on these issues.

commenced investigations into alleged abusive behavior by Intel and Qualcomm. In early September 2007, the KFTC sent an Examination Report (the rough equivalent of the European Commission's Statement of Objections) to Intel for alleged exclusionary abuses of its dominant market position. If the full Commission affirms the charges contained in the Examination Report, this case will be marked as another strong indication of the KFTC's aggressive enforcement against alleged abuses of market dominance.

The KFTC has also taken a more aggressive stance against alleged abuse of market dominance by major Korean companies. For instance, in 2007 the KFTC ruled that SK Telecom, the largest mobile carrier in Korea, restricted consumer choice and competition by adopting a digital rights management (DRM) software which is not interoperable with competing software.[58] In addition, the KFTC found Hyundai Motors, the largest automaker in Korea, liable for various acts that hampered business of its distributors.[59]

The KFTC's increasingly aggressive enforcement activities with regard to abuse of market dominance raise thorny issues. A worrisome trend of the KFTC is that it interprets the provision on abuse of market dominance (Article 3-2) in a manner that is similar to its interpretation of the prohibition against unfair trade practices (Article 23). Arguably, the KFTC concentrates on behavioral irregularities rather than on detailed market analysis to discern illegal acts that adversely affect the relevant market. Ascertaining the behavioral irregularities is only the first step in evaluating the legitimacy of the alleged abusive act by the dominant company. The KFTC frequently refers to "an act that unfairly or unreasonably hampers business of other enterprises" under Article 3-2 of the MRFTA and its related provisions stipulated in the Notification on Abuse of Market Dominance.[60] For example, in the *Microsoft* and *SK Telecom* cases, the KFTC predicated the statutory basis of its enforcement upon this provision. The KFTC has yet to utilize rigorous market analysis in its evaluations, instead of focusing on behavioral irregularities.

IX. Enforcement

A. PRIVATE ENFORCEMENT

As explained above, the KFTC is entrusted with the primary responsibility for enforcing Korean competition law. Private parties rarely bring suit against

58 KFTC Case Decision No. 2007-044, Concerning abuse of market dominant positions, etc. by SK Telecom (Feb. 2007)

59 KFTC Case Decision No. 2007-281, Concerning abuse of market dominant positions, etc. by Hyundai Automobile (May 2007).

60 Korea Fair Trade Commission, Examination Guidelines for Abuse of Market Dominant Positions (Jun. 2006) (in Korean).

antitrust lawbreakers. Since antitrust violations essentially relate to tort law, in a broad sense, private parties could file a suit based on general tort liability provisions under the Korean Civil Code. However, in the absence of extensive U.S.-style discovery, it is often prohibitively difficult for the plaintiff to show the basic elements such as intent, negligence, or causality required for a typical damages claim under the Korean Civil Code. For this reason, the number of damages suits based on antitrust violations has been dismally low, if not non-existent.

We propose two changes to the MRFTA in order to facilitate private enforcement actions. First, the law should allow class action lawsuits to recover damages. Given concerns about excessive litigation, Korea could begin with a high threshold for the standing requirement or allow private class actions only after the KFTC has found liability. Second, private parties should be allowed to file lawsuits to enjoin suspected competition law violations. To the extent practicably possible, the scope of the current document production order under Korea's Civil Procedure Act should be expanded to aid private plaintiffs. We examine these two issues in more detail in the following paragraphs.

Prior to the 2004 amendment, the MFRTA contained a special provision that provided for strict liability in damages suits in connection with antitrust violations. However, plaintiffs could invoke this provision only after the KFTC's corrective measures with regard to the antitrust violation at hand had been finalized. Therefore, a plaintiff had to rely on general tort causes of action under the Korean Civil Code to bring suit prior to the finality of the KFTC's corrective measure. As a result, one could argue that private antitrust damages actions were disfavored in Korea.

The 2004 amendment aimed to encourage private damages litigation. The amendment abolished the requirement that the KFTC's corrective measure must be finalized if a plaintiff wishes to bring suit for antitrust damages under the MRFTA. However, it allowed the defendant to invoke a defense that no intent or negligence exists with respect to the alleged wrongdoings. Prior to this amendment, the defendant was subject to strict liability, which did not allow the defendant to invoke any defense in the civil damages court proceedings. Furthermore, the amendment introduced a provision that alleviates the plaintiff's burden of showing the amount of damages that arise out of the antitrust violation. The provision stipulates that if it is extremely difficult to prove the necessary facts to verify the precise amounts of damages, then the court shall estimate damages based on the result of evidentiary investigation and the intent of overall pleadings.[61] Given that it is always a challenge to ascertain the precise amount of damages arising out of an antitrust violation, this provision is a welcome change.

However, private damages actions are still not actively filed in Korea. Punitive damages and treble damages are not available to successful plaintiffs, class actions

61 MRFTA, *supra* note 1, at art. 57 ("Limitations on Claims for Damages and Related Matters").

are not allowed, and discovery is very limited. We believe that these measures should be introduced in order to further facilitate private damage suits, especially against hard-core cartels. For example, Korea could begin by allowing class actions against hard-core cartels after liability is established by the KFTC. Currently, end-user consumers have little incentive to file damages suits even if the KFTC finds liability and the courts affirm it.

Turning to private suits for injunctive relief, it is unfortunate that the MRFTA has no provision for such actions. In the *Microsoft* case, Daum filed an action for injunction in late 2001 against the introduction of the Windows XP operating system (and filed a complaint with the KFTC as well). But a Korean court dismissed the lawsuit in 2003, largely on the grounds that the MRFTA has no provision allowing private parties to bring suits for injunction in antitrust cases.[62] We strongly urge the KFTC to amend the MRFTA to allow private suits for injunction against suspected competition law violations. The KFTC needs to practice what it preaches and introduce competition in competition law enforcement.

THE KFTC NEEDS TO PRACTICE WHAT IT PREACHES AND INTRODUCE COMPETITION IN COMPETITION LAW ENFORCEMENT.

All in all, despite the latest legislative effort to encourage private antitrust enforcement, we are unlikely to see robust private enforcement of Korean competition law in the near future without more sweeping legislative reforms such as the introduction of U.S.-style discovery rules. However, introducing such discovery rules would present a significant challenge to the Korean judicial system. Following the tradition of the European civil law system, Korean judges are entrusted with the primary responsibility for gathering evidence, which is a stark contrast to U.S. civil procedure.

As of now, class actions only take place in Korea in a limited form in securities cases. There is a fear in the business community that class actions will lead to the development of a more litigious society that will, in turn, raise costs for businesses. The plethora of private litigation is not always well-regarded even in the United States. For instance, Judge Posner of the U.S. Court of Appeals for the Seventh Circuit warns that private litigation is a stumbling block to sound development of antitrust law and policy.[63] In the absence of a U.S.-style jury system, Judge Posner's concern might be alleviated because, in Korea, professional judges take the place of laymen juries and may be better able to screen out frivolous and unfounded private litigations.[64] We believe that the benefits from

62 Daum v. Microsoft, 2001 gahap 60373 (Seoul Central Dist. Ct. Aug. 2003).

63 RICHARD A. POSNER, ANTITRUST LAW 275 (2nd ed. 2001) ("The influence of the private action on the development of antitrust doctrine has been on the whole a pernicious one.").

64 It is true that summary judgment is a safeguard against frivolous lawsuits in the United States, but oftentimes the judges simply refer the matters to jury trial.

expanding private litigation clearly outweigh any potential costs, and thus call for a revision of the MRFTA to facilitate private antitrust suits.

B. CRIMINAL ENFORCEMENT

In recent years, criminal enforcement against Korean members of hard-core cartels has become tougher. Earlier this year, a Korean court handed down a prison sentence (sentenced for one year and suspended for two years) for cartel participants for the first time. Korean executives have also been subject to criminal enforcement by foreign authorities such as the U.S. Department of Justice.[65] Because no other sanction is more effective in deterring participation in cartels than criminal sanctions against the individuals involved, we welcome these tougher punishments.

We also believe that the KFTC should be given stronger enforcement tools against hard-core cartels under close cooperation with the Prosecutor's Office. Because the Prosecutor's Office may not prosecute antitrust violators without a referral from the KFTC, the Prosecutor's Office has so far played a minimal role in enforcing Korean competition law. In the past, the KFTC rarely referred the matter to the Prosecutor's Office, even in cases involving cartels. The Prosecutor's Office frequently took issue with the KFTC's dominance in enforcement of Korean competition law. Indeed, the Prosecutor's Office has recently displayed a strong interest in preserving its prosecutorial authority and has created some tension between itself and the KFTC.

A significant source of the recent tension is the success of the leniency program. Under current guidelines, the KFTC used to not refer leniency applicants to the Prosecutor's Office except in special circumstances. This means the Prosecutor's Office is effectively barred from exercising its prosecutorial discretion and authority. Earlier this year, the KFTC and the Prosecutor's Office reportedly reached an understanding that the KFTC should refer to the Prosecutor's Office the third and subsequent filers. As a result, the KFTC started to refer an increasing number of cartel cases to Prosecutor's Office.[66]

An important issue in criminal enforcement against hard-core cartels concerns the KFTC's investigative power. Currently, it lacks compulsory investigative

65 For example, in 2006 Korean executives of the U.S. subsidiaries of Samsung Electronics and Hynix Semiconductor received prison sentences ranging from five to eight months in the DRAM collusion case. Press Release, U.S. Department of Justice, Samsung Executive Agrees to Plead Guilty, Serve Jail Time for Participating In DRAM Price-Fixing Conspiracy (Sep. 21, 2006), *available at* http://www.usdoj.gov/atr/public/press_releases/2006/218462.htm.

66 So far, the Prosecutor's Office has not exercised its criminal investigative power to the fullest extent. However, in a case involving collusion on apartment prices by construction companies, a local Prosecutor's Office initiated a criminal investigation on its own initiative and arrested several employees of the companies concerned. This case is notable because the KFTC investigated the case and decided not to refer the matter to the Prosecutor's Office while levying an administrative surcharge.

power such as search and seizure. Instead, KFTC investigations rely on voluntary cooperation from the alleged wrongdoers. The penalty for disobeying the KFTC's request for cooperation is not particularly burdensome. The maximum financial penalty for non-compliance is approximately US$100,000 to US$200,000 for the company and US$10,000 to US$50,000 for an individual depending on the reasons for non-compliance.

As the KFTC's enforcement intensifies, frequently there is increased friction between the investigators and the alleged wrongdoers under investigation. Nevertheless, it is rare that those under investigation persist in failing to cooperate with the investigation. This is the case because the enterprises under investigation often fear that failing to cooperate likely invites heavier penalties after the investigation is completed. Therefore, enterprises usually cooperate voluntarily with the KFTC's investigations.

Having said that, however, it becomes more complicated when the KFTC carries out an on-the-spot investigation at the premises of an enterprise under investigation. The investigators are frequently challenged (though not met with physical resistance) by the companies concerned regarding the extent to which the KFTC can review and seize emails and documents under the MRFTA. The KFTC's recent attempt to acquire stronger investigative tools, such as the power to seal the evidence at the site of the investigation target, failed in the National Assembly due to objections from the Prosecutor's Office. We urge the KFTC and the Prosecutor's Office to sit down and find a mutually agreeable compromise.

Currently the KFTC's expansive investigative power for enforcing chaebol regulations (especially its power to demand sensitive data from financial institutions regarding inter-affiliate transactions) is under heavy criticism from the business community. These concerns have led the business community to oppose increasing the KFTC's investigative power in any area, including hard-core cartel enforcement. However, given the pervasive collusive culture among Korean businesses, we believe that the KFTC should be given proper investigative tools in close cooperation with the Prosecutor's Office. Armed with compulsory process the KFTC would be able to more effectively gather the evidence necessary to prove collusive behaviors. Turning *voluntary* investigative power into *compulsory* investigative power, at least with respect to cartel investigation, also has the benefit of placing the KFTC's investigation under appropriate judicial control.

X. Problematic Amalgamation of Investigation and Adjudication

One of the key problems with the KFTC's current structure is that the agency is responsible for both investigation and adjudication. The KFTC has an investigative arm called the Secretary General's Office. Among the various responsibilities of this office, the Secretary General takes the responsibility of overseeing all

investigations. Once the Examiners who report to the Secretary General finish their investigations into alleged antitrust violations, they prepare Examination Reports (a rough equivalent of the European Commission's Statement of Objections). The Secretary General then refers the Examination Report to the KFTC, which is composed of five standing Commissioners (including a Chairman and Vice-Chairman) and four non-standing Commissioners. One of three standing Commissioners who is neither Chairman nor Vice-Chairman assumes the primary responsibility of reviewing any given case. Commissioners, especially each of the above three standing Commissioners, are assisted by the Office of the General Counsel.

While the formal structure of the KFTC that we have described might suggest that the Secretary General's Office and the General Counsel's Office are run independently, in practice, the separation of investigation from adjudication is blurred. Occasionally one hears complaints that the examiner charged with the investigation in any given case routinely contacts the General Counsel's Office ex parte and, in some cases, may also have such contact with the responsible Commissioner. Since the Commission's adjudication process is given the status of a court of first instance, the whole process of the Commission should ensure that the defendant receives due process rights for asserting and maintaining its defense. The adjudication process should be as impartial as possible and the Examiners should be just another party as are the defendants.

Unfortunately, the KFTC's long-standing personnel policy, stemming from its days as an arm of the (now-defunct) Economic Planning Board, does not maintain a separation between employees of the Secretary General's Office and those in the Office of the General Counsel. They are constantly rotating between offices without any distinction. Hierarchy governs not only within the Secretary General's Office, but also between the Secretary General's Office and the General Counsel's Office.

The KFTC is aware of this problem and has been considering the establishment of an independent professional adjudicator's office, similar to the office of Administrative Law Judge in the United States or the Hearing Officer in Japan. The benefit of introducing an independent adjudicator is not only that it establishes independence from the influence of the Secretary General, but also makes possible an overhaul of the hearing process by applying more rigorous evidentiary rules that modify the court process to reflect the nature of administrative process. We welcome the KFTC's efforts in this area, but urge it to move much faster to implement such reforms and find suitable institutional mechanisms to accelerate the transformation of the KFTC into a fully functioning, quasi-judicial body.

XI. Conclusion

For a young agency with only a quarter-century history, the KFTC has achieved some remarkable success in cartel enforcement and the promotion of competition. However, its track records in enforcing merger control and abuse of dominance leave much to be desired. While its recent attempts to embrace economic analysis and ensure due process are certainly laudable, the KFTC needs to accelerate its efforts to transform itself so as to become a leading agency in global antitrust enforcement. In particular, it needs to relinquish its near monopoly over competition law enforcement and to fundamentally rethink its regulation of chaebol.

Ultimately, it is up to the Korean courts as well as the KFTC as to whether or not Korea succeeds in making another leap forward in competition law enforcement. We are encouraged by the ability of Korean judges to digest complex economic analysis, as exemplified by the recent decisions on collusion damages and market definition. An increase in private litigations will provide the court with more opportunities to fashion jurisprudence to which the KFTC should look for guidance. Unless they are subject to review by the courts, competition agencies will also pursue their own agendas and cling to power over law enforcement. Of course, we are mindful that judges trained as generalists could show huge variations in their ability to grasp complex economic issues and render sensible decisions. Nevertheless, it should be the job of competition authorities, practitioners, and economists to explain, in plain language, the complex economic issues so that judges can come to reasonable decisions.

Ultimately, it is up to the Korean courts as well as the KFTC as to whether or not Korea succeeds in making another leap forward in competition law enforcement.

In other words, competition law agencies should be exposed to competition, as they advocate and indeed, mandate, in other areas. In order to achieve its aspiration to be recognized as a leading force in global antitrust—for which it has already made significant progress—the KFTC should embrace competition and allow private parties to seek injunctions of anticompetitive behavior, strengthen its economic analysis unit, fundamentally overhaul its chaebol regulation, establish a "Chinese wall" between its investigative and adjudicative offices and personnel, and increase its efforts to guarantee proper procedural rights to competition law defendants. In taking these steps, the KFTC can grow from its current new kid on the block status to a leader in global antitrust.