CPI's Asia Column Presents:

Overview of Competition Policy and Law of Korea in 2017

By LEE Hwang (Korea University School of Law)[1]

CPI COMPETITION POLICY INTERNATIONAL

October 2018

I. OVERVIEW

The 19th presidential election held on May 9, 2017, caused tremendous change to Korean society as the result of the so-called "Candlelight Revolution", an unprecedented event in Korean history. The radical change of political ideology from conservatism to progressivism called for a fundamental change of direction in Korean economic and social policies, faced with the structural difficulties of continually stagnating economic growth amid bipolarization. For this reason, the current administration selected so-called "economic democratization" as the larger objective and adopted a so-called "3-wheel growth theory" to support that goal. The 3-wheel growth theory consists of 3 major policies, which are 'income-led growth', 'growth by innovation', and 'realizing a fair economy'. Competition policy is not only exclusively responsible for realizing a fair economy but is also recognized as a major policy tool to promote growth by innovation, and therefore takes a more substantial role as an essential component of economic democratization. As competition policy stands out as a leading policy tool to achieve the policy direction of the current administration, which is considerably distinct from the former administrations, competition policy has attracted much more attention than the past, when it was relatively alienated. Moreover, the substance and direction of competition policy has changed significantly.

The previous edition of this report (published last year) commented on the 2016 competition policy carried out by the previous administration as follows:

As social and economic polarization has intensified and demands for due process and resolution of overall conflict have not been satisfied, it is regretful that competition policies have continuously been unable to reach expectations in most of its objectives, such as increasing efficiencies and consumer welfare, protecting economic inferior parties such as SMEs, and restricting economic polarization.[2]

Competition policies, which have been steadily evolving along with economic development to focus on economic efficiency based on market competition, have not been able to provide a new direction to raise market competition in the past ten (10) years. It is unfortunate that it has only been able to deal with incidental tasks to soothe economically inferior parties while growth-oriented economic policies relying on large corporations have been implemented.[3]

Then, the report forecasted the competition policy of the new government for the year of 2017 as follows.

2016 marked a period of seeking a new direction in the chaos of such competition policy as the administration was changed by the so-called "candle revolution". Whether to focus on enhancing economic efficiency by promoting market competition similar to policies prior to 2008 or to concentrate on the protection of economically inferior parties in self-reflection of former policies is a choice and task given to competition policies in 2017. In any case, it seems clear that fairness will be highlighted as much as economic efficiency pursued by traditional competition policies. However, considering the limited human and material resources of the KFTC, it may create an excessive burden if the KFTC tries to resolve issues of fairness in transactions among individuals.

The biggest challenges for the Korean economy concern issues of limited growth potential and polarization due to the decline of population and limitations of the existing industrial structure concentrated on large corporations. Against the backdrop of a difficult world economy and domestic circumstances, the question of how Korea's competition policies will utilize its limited resources to effectively solve complex and wide-ranging policy goals to achieve a balance between efficiency and fairness will need deep reflection on what the essence of competition policies is.[4]

It is difficult to evaluate that the competition policies taken by former administrations prior to 2017 achieved notable accomplishments in promoting market economy, maximizing economic efficiency or establishing fairness in transactions. There was a tendency to emphasize the protection of economically inferior parties to some extent, but it was not to the degree of giving the impression that

the policy was weighed toward the protection of economically inferior parties. This report forecasted that, considering the current economic and social situation, the task of competition policy after 2017 would be to pursue "efficiency and fairness" in a balanced way. On the other hand, this report pointed out that trying to exhaustively resolve the fairness in individual transactions is not viable and hardly effective. Efficiency and fairness can be conflicting goals at first glance. Moreover, with regards to fairness, it is difficult to establish standards of illegality and physically impossible for a small government agency to supervise fairness in individual transactions thoroughly. Therefore, it is a task that needs philosophical consideration pertaining to the role of the government and its relationship with the market.

2018 is an excellent time to review the performance of the new government's competition policy since it has been a year since the new government took office and the current chairman of the Korea Fair Trade Commission (KFTC) has put in efforts to change competition policy.[5] Looking at the whole picture, there is a consensus among most experts and the public that the current KFTC recognized the fairness in transactions as a far more important goal than the value of traditional competition policy such as consumer welfare, and have devoted much more resources to issues of fair trade. Of course, traditional competition law enforcement such as abuse of market dominant position, prohibition of cartel, control on the anticompetitive concentration of undertakings were not entirely neglected and the KFTC managed to achieve certain results as the following chapters will further describe. However, the major focus was on the protection of SMEs and the small business owners through prohibition on abuse of superior bargaining positions. This was complemented by regulation of large business groups and improving corporate governance to restrict economic concentration. It is hard to deny that as competition policy attracted more social attention, the enforcement resources of the KFTC (such as organization, manpower and budget) has increased considerably on the whole[6] and the result has been external expansion of competition policy. Nevertheless, it can be said that there is no great difficulty to see that policy is weighed toward fairness in transactions from the viewpoint of harmonizing efficiency and fairness. It is regrettable that among the 2 big challenges of the Korean economy, which are the aggravation of bipolarization and stagnation of economic growth, policy consideration was only given to the former. Moreover, it leaves room for questions concerning whether such policy efforts achieved the desired results.

The next section briefly overviews the contents of the Korean Monopoly Regulation and Fair Trade Act (MRFTA), then examines the regulation of large business group and the improvement of Gap-Eul relationship[7] which were the focus of the KFTC in 2017.

II. OVERVIEW OF COMPETITION LAWS

1. Introduction

The MRFTA was promulgated at the end of 1980. A notable characteristic of the MRTFA is that, unlike the experience of other countries, it was not the result of the influence by the foreign countries or international organizations, but it was introduced voluntarily in response to the domestic demand for stopping the tyranny of the chaebols and establishing free and fair market economy during the political and economic turmoil. It is comparable to the U.S experience that enacted the Antitrust law for the first time against the backdrop of the economic concentration by the small number of monopolists with the consequence of economic unrest and threat to the democracy.

The competition law institution of Korea has a constitutional foundation based on the Article 119(2) of the Korean Constitution law, so-called the economic democratization clause. While the MRFTA act as a general law, there are 4 special laws to protect economically inferiors such as SME, which consist of Fair Subcontract Transactions Act, Fair Franchise Transactions Act, Act on Fair Transactions in Large-Scale Distribution, Fair Agency Transactions Act.[8] The substance of the MRFTA falls into 3

categories. The first category is the area of the traditional competition law and seeks to protect and promote the free competition in the market. Abuse of market dominant position, prohibition of cartel, control on the anticompetitive concentration of undertakings belong to this category. The second category is the prohibition against unfair trade practices and purports to maintain fair trade between the transacting parties. 4 special laws including Fair Subcontract Transactions Act which purport to protect economically inferior in the vertical relation provides more detailed provisions by the specific industry or the type of conduct for the unfair trade practices, especially for the 'abuse of superior bargaining position', which refers to the situation in the transaction between parties where a stronger party holding the superior bargaining power improperly exercise its power against the other party. These laws were originally enacted in the form of the public notice of the KFTC regarding the abuse of superior bargaining position but were promoted to the special laws as public attention and their importance has increased. Still, those laws can be said to be parts of the competition law. The third category is the repression of economic concentration that was promulgated to repress or relieve the excessive economic concentration caused by the government-led export-oriented unbalanced economic development process since the 1960s. The regulation in this category had weakened after the mid-2000s and it came to be said to become a dead letter law except for the prohibition on the new circular-shareholding, the unfair assistance and the regulation on the unfair internal transaction. In 2017, as the economic environment and political landscape has changed significantly, the relevant policy in this category was expected to be strengthened considerably. However, 2017 had not seen a notably enhanced measure except for law enforcement against siphoning private benefits of control by family members of the head of large business groups and pressure to resolve cross-shareholding. These challenges were passed on to be resolved in 2018.

2. Brief Overview by Specific Area

(1) Abuse of Market Dominant Position

This provision applied primarily when an enterpriser with market power abuses its market power and its conduct raises a concern of restricting competition. In the past, there had been a long-standing debate regarding whether abuse of market dominant position covers unfair trade practices beyond its traditional domain. However, after the Supreme Court clarified its effect-based approach in the Posco case (2007) stipulating that to regulate the refusal to deal by a market dominant enterprise, anticompetitive effect needs to be proven. Since the Posco case, the debate seems to be resolved at least among practitioners. The MRFTA includes both exclusionary conduct and exploitative conduct by market dominant enterprises within its regulatory scope. However, there is a very limited enforcement record with regards to exploitative conduct because of narrow statutory ground and strict standards for illegality and a high burden of proof required by the Supreme Court. For exclusionary conduct, it is generally accepted that it is necessary to prove anticompetitive intent or objective and anticompetitive effect according to the Posco judgment.

The KFTC, suffering from excessive caseloads, has been cautious to devote its limited resource to cases of abuse of market dominant position because the requisite elements of this conduct are hard to prove and often require detailed economic analysis. As a result, recent regulatory efforts tend to be limited to large-scale and important cases. Especially when dealing with multinational corporations, it seems that the KFTC refrains from applying unfair trade practices provisions as much as possible and tries to apply abuse of market dominant position provisions.

(2) Control on the Anticompetitive Concentration of Undertakings

In the Korean market where oligopolistic and monopolistic market structures have solidified, the regulation of anticompetitive merger has great significance, and there has been active enforcement since the 21st century. Active enforcement has not been limited to domestic mergers and there has

been active extraterritorial application against foreign mergers that affect the Korean market. Recently, many experts pointed out that KFTC has relied too heavily on behavioral remedy (which is often criticized for difficulty in ex-post monitoring of compliance) instead of structural remedy.

(3) Prohibition of Monopoly Agreement

Since the 2000s, as the KFTC defined cartels as the no. 1 public enemy of the market economy and enhanced law enforcement, there has been outstanding enforcement record and performance on this issue. The KFTC has imposed fines totaling about KRW 1 trillion every year, and about 70 % of those fines were imposed against cartels. Law enforcement against international cartels that affects the domestic market and international cooperation with foreign competition authorities have been active. The leniency program is thought to have contributed to the excellent cartel regulation performance of the KFTC which has limited investigatory power as an administrative agency. Recently, the Prosecutor's Office has taken a more aggressive stance toward cartel regulation. Therefore, criminal enforcement is expected to increase steadily.

(4) Prohibition against Unfair Trade Practice

The prohibition of the unfair trade practices which focuses on the unfairness, unlike the 3 conducts mentioned above which focus on the monopoly power and anticompetitive effect in the market, accounts for more than 50% of the 500-800 MRFTA violation cases the KFTC handles every year. This is because relieving economically inferior parties harmed by the unfair practices of other trading parties have been recognized as one of the main functions of competition law in Korea where the bipolarization phenomena due to the economic concentration and tyrannies of economically superior parties (such as large corporations) are regarded as serious problems. In recent years, the KFTC has made it a principle to encourage voluntary dispute resolution between parties through mediation or civil litigation when the case involves an alleged victim of unfair trade practices and is likely to be a simple economic dispute between trading parties, based on the decision to concentrate its enforcement resources on fields of traditional competition law to improve the efficiency of enforcement. However, after the inauguration of the new administration in 2017, the KFTC has been strengthening efforts to protect economically inferior parties. Accordingly, the KFTC takes a more aggressive enforcement stance than before focusing on abuse of the superior bargaining position among unfair trade practices provided in the MRFTA, as well as the Fair Subcontract Transactions Act and so-called 3 distribution laws concerning vertical restraints in the distribution industry. Unfair trade practices consist of 9 type of conducts and 29 sub-type of detailed conducts. The type of the conducts that is subject to regulation is very wide in scope while vertical restraints by a single firm take up the majority. In addition to single firm conduct, there are multilateral conducts such as collective refusal to deal, and consumer-protection-type conducts such as unfair inducement of customers, and repressing-economic-concentration-style conducts such as unfair assistance. In terms of the effect, the unfair trade practices include not only conduct that has anticompetitive effect, but also conduct that has anticompetitive effect in its incipiency and conduct that tends to impede fair trade order because of its method and substance. As a consequence, the unfair trading practice regulation is often subject to criticism because of the vague standard of illegality and excessively wide-range of regulatory scope. On the other hand, from very early on when the MRFTA was promulgated, the KFTC has shown a tendency to apply unfair trade practice provisions under which it is easier to prove illegality, instead of abuse of market dominant position provisions, to avoid the high burden of proof concerning anticompetitive effect, even when the conduct is likely to amount to anticompetitive conduct by market dominant firms. This tendency had been somewhat alleviated since the 2000s, but it has remained essentially the same until now. This has been criticized for its high likelihood of false positive and its possibility to undermine the efficiency of law enforcement by the competition authority.

(5) Repression of Economic Concentration

The 4 types of regulation described above are the so-called 4 pillars of Korean competition law. In addition, the MRFTA has a peculiar institution for repressing economic concentration. In a broad sense, this consists of regulations applicable to business groups subject to the limitation on cross-shareholding with assets totaling more than KRW 10 trillion, which include prohibition of new circular-shareholding, prohibition of cross-shareholding, restriction on debt guarantee, restriction on voting rights in finance and insurance companies; regulations applicable to business groups subject to obligation of public disclosure, such as the timely public disclosure of the status of the business group and other material matters; holding company regulation; and unfair assistance and siphoning private benefits of control by family members of the head of the business group. Repression of economic concentration can be distinguished from competition law regulation in that it consists of ex-ante regulations based on the size of the large business group except for provisions of unfair assistance and the siphoning private benefits of control by family members of the head of the business group. Among them, prohibition of the cross-shareholding and restriction on debt guarantee are not meaningful anymore in reality because their regulatory goals have already been achieved. Since the inauguration of the current administration, emerging issues under discussion are regulation of large business groups and the improvement of the holding company system and restriction on voting rights in finance and insurance companies in relation to the separation of finance and commerce, and the argument for strengthening various public disclosure obligations is attracting public support.

Among various regulations for repressing economic concentration, prohibition of new circular-shareholding as well as prohibition of the unfair assistance and unfair internal dealing are currently recognized as important tasks. With the 2013 revision to the MRFTA, existing circular-shareholdings were permitted to be maintained but new circular-shareholding was strictly prohibited. However, the current administration purports to gradually get rid of existing circular-shareholdings. The prohibition of unfair assistance was introduced to the MRFTA in 1996. By regulating tunneling activities between affiliates in a large business group, the prohibition of unfair assistance achieved outstanding performance in regulating the exercise of excessive and undue control with small equity ownership by the families of the head of the business group. Director's duty of care and duty of loyalty should be regulated by corporate and tax law, but because of the institutional limitation in Korea by which the rights of minority shareholders are not fully protected, the MRFTA has taken responsibility for a substantial portion of the role of those laws. However, this regulation was said to have a limits in preventing the expediential inheritance of chaebols by means of related party transactions because existing case law required a very high burden of proof with regard to finding illegality. As a consequence, the MRFTA was revised in 2013 and introduced the regulation for so-called 'siphoning private benefits of control by the family members of the head of the business group' and the KFTC applied it in 2 cases (Hyundai case and Korean Air case) in 2016 for the first time.

(6) Competition Advocacy

One of the main features of the MRFTA is the vigorous competition advocacy function that takes advantage of the KFTC's status as an administrative agency. The KFTC has continuously presented measures to promote competition and deregulate anticompetitive regulation to improve oligopolistic and monopolistic market structures. Every government agency is obliged to consult with the KFTC in advance when they promulgate or revise anticompetitive legislation. This turns out to be very effective for the KFTC to advocate competition policy interests through the chairman of the KFTC participating and commenting in cabinet meetings and presenting opinions during legislative consultation procedures. However, for nearly a decade prior to 2017, as the status of the KFTC in the government was relatively reduced, such competition advocacy functions have significantly weakened.

(7) Private Enforcement

Private enforcement such as damages lawsuits involving the violation of the MRFTA are increasing significantly. Like most jurisdictions (except the U.S.), competition law enforcement in Korea heavily depended on public enforcement by the KFTC. Beginning in the 21st century, damages lawsuits against cartel participants have been on the increase as detection of cartels, level of fines imposed by the KFTC and victims' awareness of their rights have increased. However, it is still difficult to say generally that private lawsuits are active enough because of the difficulty in collecting the evidence of illegal conducts and proving the concrete amount of the damages, as well as procedural difficulties such as the lack of a class action system.

However, since the Defense Acquisition Program Administration successfully won KRW 135.5 billion from oil refineries as a result of the Military Oil Rig-bidding damages litigation, the practice of the government agencies filing damages litigation after the KFTC or the prosecution detected a cartel violation has been established as a principle. This tendency has affected private companies. In fact, the Flour Cartel case is well known, in which bakeries filed damages lawsuits against cartel participants after the KFTC detected a wheat flour price cartel by 8 milling companies in 2006 and the Supreme Court ruled for KRW 1.2 billion in damages compensation. Stimulated by the 2 cases mentioned above, a significant increase in the number of the damages litigations has attracted attention. The government actively promotes such private enforcement in the form of the follow-on action after the KFTC's imposition of corrective measures because it can contribute to the deterrence of the cartel formation along with the public enforcement of the KFTC and the prosecution. The most crucial issue in a damages lawsuit is the calculation of damages. Recently, Korean courts have made significant progress in the detailed method of analysis considering that they had shown a tendency to adopt the before and after comparison method as a primary method.

III. REPRESSION OF ECONOMIC CONCENTRATION[9]

One of the main backgrounds behind the significant interest in repression of economic concentration of the current administration is that this issue was pointed out as one of the causes of the so-called "Candlelight Revolution" at the end of 2016. A renewed awareness was urged on the long-pending fact that overly concentrated economic power in a very small number of large business groups conspired with political power and harmed the democratic political system. At the same time, concern was raised against the so-called tunneling phenomenon, in which few family members of the head of the business group control the business group by distorted means and misappropriating corporate profit. Then corporate governance matters emerged as a serious competition policy issue along with general concentration issues. In response to these concerns, radical and powerful reform policies regarding large business groups were expected to be pursued in 2017, but the action taken fell short of expectations. The KFTC did not go further than urging voluntary improvement of the corporate governance structure for the time being, with reasoning that it will pursue so-called 'irreversible' reform without shocking the market. This approach is highly regarded to have resolved issues of circular shareholding structures, but it is also pointed out that the change in policy direction or law enforcement efforts were not evident. One of the main areas for voluntary resolution was the circular-shareholding structure which was alleged to enable the family members of the head of the business group to control the business group with small equity rights and unduly inherit corporate control rights. In fact, many large business groups strived to dissolve the complex web of tangled circular-shareholding structures by converting to a holding company. As a result, among 31 business groups subject to the limitation on cross-shareholding, all but 7 groups dissolved their circular-shareholding structure in entirety by the end of 2017. As to the fact that most of them converted to holding companies, there is some criticism that economic concentration by large business groups was

acquiesced under the cover-up of the holding company system. Anyway, for now, it is evaluated to have made progress in that opaque and distorted governance structures have become transparent.

In 2017, in relation to repression of economic concentration, the focus was placed on the effort to address siphoning private benefits of control by family members of the head of the business group. The MRFTA introduced prohibition against unfair assistance as a type of unfair trade practices at the end of 1996, and based on this provision, the KFTC successfully detected and corrected many unfair assistances involving affiliated companies of many large business groups. Unfair assistance was pointed out to be one of the reasons that caused the foreign exchange crisis in 1997. However, the so-called Samsung SDS case (in which the Supreme Court delivered a judgment in 2004) revealed a critical loophole. In this case, some family members of the head of the business group with special interests bought bonds with a warrant of Samsung SDS at a lower price and earned significant amounts of undue profit. The KFTC issued corrective measures for violating unfair assistance and imposed a fine totaling KRW 15.8 billion. Supreme Court annulled the KFTC decision based on the reasoning that the negative effect on the market competition such as the exclusion of the competitor should be proven even for a case in which a large business group is alleged to have unduly supported an individual.

Since then, as the number of cases in which the KFTC's decisions were annulled at court increased regarding unfair assistance by so-called 'related party transactions', and there was no viable way to prevent tunneling by family members of the head of the business group. In addition to the difficulty of regulating unfair assistance by new methods (such as assisting individuals who belong to the families of the business group head and related party transactions), the effectiveness of the regulation has been continuously weakened as the courts have continued to require high thresholds for proving illegality.[10]

As this became an issue during the presidential election in late 2012, the MRFTA was revised in 2013. In this amendment, the scope of the prohibition of the unfair assistance provision was expanded and prohibition of siphoning private benefits of control by family members of the head of the business group was newly added. This provision prohibits affiliated companies of the business group subject to the obligation of public disclosure with assets totaling more than KRW 5 trillion from providing affiliated companies in which the family members of the head of the business group have a significant stake with undue profits by means of related party transaction, etc.[11] This regulation can be distinguished from prohibition of the unfair assistance in that the target of the regulation is limited to large business groups with assets totaling more than KRW 5 trillion and does not require proving anticompetitive effect in principle.

The regulation on siphoning private benefits of control was enacted in 2015. The KFTC launched investigations in 2015 shortly after the new provision was enacted and imposed corrective measures against affiliated companies of Hyundai and Korean Air in July 2016. Among these, in the case regarding affiliated companies of Hyundai[12] (such as Hyundai Logistics), the KFTC decision was made final as is since Hyundai did not appeal. However, the Korean Air case, in which the affiliated companies of Korean Air provided inappropriate benefits to family members of the head of the business group, proceeded to appeal for annulment. On September 2017, the KFTC lost in the Seoul High Court appeal and the corrective measures and the fines were annulled.[13] The case is currently pending in the Supreme Court. The Korean Air case is regarded as a touchstone for the regulation of large business groups and has attracted a great deal of social attention.

IV. EFFORTS TO ADDRESS "GAP-EUL" RELATIONSHIP

To accomplish a 'fair economy', which is 1 wheel of the '3-wheel growth theory', the KFTC has focused on law enforcement to protect economically inferior parties such as SMEs and small businesses in

the field of the subcontract transactions and the distribution industry. This was in response to the demand that to correct the tendency of weakening the potential for economic growth in the era of bipolarization, it is necessary to remedy the exploitation of SMEs by large corporations and protect the creativeness and self-growth capability of SMEs. As a result, there is a current tendency to believe that these are the center of the competition policy.

Despite popular demand, several problems lie in these policy directions. First, the issues of how desirable it is to apply a wide range of regulations based on the external unfairness of the conduct and to what extent it is compatible with consumer welfare or economic development may be controversial, while serious consideration has not been made regarding economic efficiency of vertical trade. Actually, it seems that in 2017, too much enforcement resources have been devoted to prohibition of unfair trade practices, especially prohibition against abuse of superior bargaining position and the 4 special laws, while not directly serving the intrinsic mission of remedying market power issues and maximizing social welfare by enforcing the 3 pillars of the competition law (which are the abuse of market dominant position, the anticompetitive merger and the cartels). Considering that the fundamental problems of the Korea economy lie not only in the bipolarization but also the weakened potential for economic growth, it should be remembered that goals to promote economic efficiency are as significant as goals of protecting the economically inferior.

Second, it is fundamentally impossible for governments with limited capabilities to intervene in individual trading relationships between economic agents, even if they pursue the protection of economically inferior parties based on abuse of superior bargaining position provision. It is inevitable that measures taken in the name of so-called “wiping tears of Euls” reveal limitations that cannot satisfy public expectations because of the fundamental restriction that “it cannot wipe all the tears of fifty million people”. Although the unfairness problem in the individual trading relationship is serious, it is undeniable that the fundamental solution lies in the competitive pressure in the market and voluntary legal dispute resolutions between economic agents. It is true that for now the Korean law lacks the institutions necessary for a large number of victims with small damages to get relief through systems such as class actions and U.S. style discovery, while the court requires plaintiffs to meet very high burdens of proof regarding illegality and amount of damages. It is also true that even if the victim of an illegal ‘Gapjil’ relationship seeks legal relief despite these procedural deficits, they are very likely to be exposed to additional damage by retaliation. If serious and fundamental efforts to address these problems are not made, it is hard to expect that the problem will get better even if the KFTC reinforces regulation on unfair trading practices that are exposed externally.

Third, in this reality where the dominant strategy for vertically-integrated large corporations is to secure profit by exploiting downstream companies, simple efforts to behaviorally improve the Gap-Eul Relationship while turning away from improving oligopolistic and monopolistic markets and restructuring industries are unlikely to make a difference. The economic concentration phenomena in Korea is getting aggravated and has reached a severe level, according to the most economic indicia such as general concentration, ownership concentration and industry concentration.[14] However, it is difficult to deny that one of the essential factors of the Gap-Eul relationship syndrome is the intensification of various concentration including market monopoly and oligopoly in Korean industries which have grown based on vertical integration by a small number of large business groups. In the past development alliance era, at least minimal market entries and exits took place even though they were carried out by the inefficient method of mandatory industry restructuring by the government. However, after democratization, some cases (such as the shipbuilding industry) revealed that as the multi-market domination by a small number of large business group got intensified, the industry restricting became more inactive. These situations can be attributed to the major reason that to secure votes to seize power, political parties concentrated on short-term stimulus such as construction rather than establishing a competitive market from a mid-to-long term perspective. In addition, in the face of the apparent limitation of the input-driven growth model of the development

alliance era, the liquidation of marginal firms was artificially delayed, incumbent large corporations failed to develop new innovation-driven business models and the innovative businesses increasingly got frustrated in the market entry. In this situation, large corporations seem to tend to seek to maintain and create profitability through cost reduction and indiscriminate scale expansion. In an industry structure where monopoly (or oligopoly) and vertical-integration are prevalent, as such a business strategy boiled down to exploit downstream firms, Gap-Eul relationship is not just a matter between the large enterprises and SMEs, but also a hierarchical issue among large corporations, medium enterprises, micro-enterprises and self-employed. At the same time, as the level of transaction gets lower, the number of related companies and employees increases exponentially, but the profitability gets much worse. Under this circumstance, it is a reality that every economic agent manages to survive by taking advantage of its bargaining power against the downstream firm with inferior economic position compared to itself if possible, and by exploiting downstream firms.

While regulatory authorities including the KFTC failed to achieve the intended effect in their effort to detect and remedy illegal exploitation due to the limitation of the resource and capability, upstream firms became aware of the fact that expected profit by illegally forcing the downstream firms to excessively reduce cost exceed the expected expense from the penalty to be imposed when detected. Thus, it is not hard to understand that in an environment where the economic incentive to exploit downstream firms still exist, the naive effort to regulate the 'Gapjil' has clear limitations.

The situation where competition policy does not make a significant contribution to the growth by innovation, being 1 wheel among the '3-wheel growth theory', can be explained likewise. Without proper restructuring corresponding to economic development, companies have often failed to enhance their own innovative capability while faced with deteriorating profitability. On the other hand, recognizing market penetration or attempts to enter the market by new innovative companies as a threat, large incumbent companies increasingly interfere with their soft landing on the market or even take their innovative capabilities by misappropriating or imitating the technology and idea of the venture companies. In-house venture companies, which are popular recently, seem to suffer from similar problems. While the government did not present a creative alternative regarding the proper sharing of functional roles between the innovative companies and large companies, and while regulatory attempt against the illegal conduct have not been successful, crying out for 'growth by innovation' in the name of complementing economic democratization and income-led growth may give a sense of emptiness.

Ⅴ. CONCLUSION

In 2017, competition policy faced both more significant opportunities and challenges than ever before. In the era of the bipolarization crisis, the KFTC assumed much social expectation as a government agency dedicated to fair economy goals. In the meantime, the general assessment is that the KFTC took a 'soft' stance approach in its effort to ameliorate the corporate governance structure of the large business groups in 2017 while focusing on improving Gap-Eul relationship.

With regard to large business group policy, NGOs which expected a more aggressive reform over the problems revealed during the so-called candlelight revolution are quite critical. Nevertheless, it is not easy to succeed in regulating large business groups in a challenging economic environment, within the framework of the rule of law and with limited resources. It will be interesting to see to what extent the KFTC can offer effective ways to reform beyond the self-improvement by the business groups.

On the other hand, it seems to be generally accepted that the KFTC made some progress in addressing Gap-Eul relationship. But despite the enthusiasm and efforts of the KFTC, there is a concern that there will be inherent limitations to the current approach. In a situation where there exist structural and intrinsic incentives to engage in so-called the 'Gapjil,' focusing on external

problems and strengthening behavioral remedies are highly likely to turn the problems into latent matters rather than solving them. Considering that the essential cause of the Gap-Eul relationship lies in economic incentives, the top priority is to improve the economic incentive structure by aggressively restructuring the oligopolistic and monopolistic market, executing competition promotion policies and exerting efforts to actively enforce competition law. It is also urgently necessary for companies to break away from the old business model of cost reduction and to recognize the need for growth by innovation and to realize the value of SMEs as their business partners.

It is very hard to expect that these tasks can be completed only by the efforts of government agencies. Also necessary are more competitive pressures from the civil sector and creating judicial institutions to warrant the successful private seeking of remedy. In particular, it should be emphasized that these tasks cannot be accomplished solely by efforts of the KFTC or the competition policy. Not to speak of the close cooperation between relevant government agencies, national capabilities should be gathered including politics to complete the judicial process structure to enable the economic agents to solve problems autonomously in the market.

With a generally accepted regret and criticism that the Korean economy has entered a crucial turning point, it will be difficult to neglect the situation that the economy as a whole is dominated by the 'large corporation zoo' which consists of downstream companies subordinate to the vertically-integrated large corporation. Excessive economic concentration may go beyond the matter of economic risk management and reach a degree that raises concern over the threat to the democracy. Considering that the most important objective under any circumstance is to increase the social welfare and potential for the sustainable economic development, it will not be desirable if the efforts to repress the economic concentration and to address the Gap-Eul relationship result in neglecting the benefit of consumers. I expect that in 2018 the basic principle is remembered and faithfully followed, which is that the competition policy fosters a competitive market and active competition promotion and law enforcement is warranted to enhance the economic efficiency and consumer welfare. Accomplishing these basic tasks will be the shortcut ensuring the efforts to repress the economic concentration and to address the Gap-Eul relationship achieve the desired results and building a system in which large corporations and the SMEs can establish a win-win cooperation.

---

[1]. Professor, Korea University School of Law; Secretary Commissioner, MRLC; Director, ICR Law Center.

[2]. China-Korea IP & Competition Law Annual Report 2016 Vol. I, p.164.

[3]. *Id.,* at 174.

[4]. *Id.*

[5]. ICR Center at the Korea University held a two-days seminar titled "The First Year Achievements and Challenges in Competition Policy of the Current Administration" in June 2018. In this seminar, experts pointed out that the issue of traditional competition policy enforcement was relatively underappreciated. The contents of the seminar and the resource book can be found on the ICR Center homepage (www.icr.re.kr) through the following link. https://goo.gl/cvQZZN.

[6]. A representative example was the establishment of the "business group bureau" in September 2017 dedicated to large business group policy with 60 new officials added. It is an exceptional occasion for Korean central administrative agency to see a new bureau established and 60 officials increased.

[7]. "Gap-Eul" Relationship is a Korean buzzword that refers to relationship between economically superior (Gap) and economically inferior (Eul) in a relative sense. Gapjil refers to the abuse of the superior position of a Gap.

[8]. The KFTC is also the competent authority for consumer policy. It seeks to create a synergy effect by closely combining the competition policy and consumer policy.

[9]. As the repression of economic concentration is not addressed separately in this, the issue will be described here in detail.

[10]. Seoul High Court Judgment in Case No. 2017Nu1490 delivered on September 1, 2017.

[11]. When the provision was promulgated in 2013 the target was business groups subject to limitation on cross-shareholding with assets valued at more than KRW 10 trillion, but after the 2017 revision of the MRFTA, the regulatory scope was expanded as the main text describes.

[12]. KFTC Decision in Case No. 2016-189(2014Seogam1689) delivered on July 7.

[13]. Seoul High Court Judgment in Case No. 2017Nu1490 delivered on September 1, 2017.

14. For more details, see Lee Jae Hyung et al., Report on the 2017 Market Structure Survey, Korea Development Institute (2017).Text available at http://www.prism.go.kr/homepage/origin/retrieveOriginDetail.do?pageIndex=1&research_id=1130000-201700016&cond_organ_id=1130000&leftMenuLevel=120&cond_research_name=%EC%8B%9C%EC%9E%A5%EA%B5%AC%EC%A1%B0%EC%A1%B0%EC%82%AC&cond_research_start_date=&cond_research_end_date=&pageUnit=10&cond_order=3; Wi Pyoung Ryang, Economic Concentration Toward Chaebol: Its Dynamic Change and Policy Implication, Economic Reform Report 2018-02, Economic Reform Research Institute, 2018. 2. 19,. Text available at http://www.erri.or.kr/bbs/board.php?bo_table=B11&wr_id=317.