Korean antitrust regime: Key trends and developments

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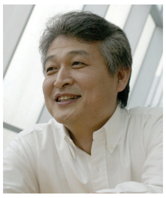

The nation's competition law, the Monopoly Regulation and Fair Trade Act (the "MRFTA"), was enacted on December 31, 1980, followed by the establishment on April 30, 1981 of the Korea Fair Trade Commission, the sole competition agency empowered to enforce the MRFTA (the "KFTC"). The KFTC has the power to investigate suspected anticompetitive behaviours on its own initiative or based on a complaint.

Tougher stance

Since 2010, there has been a growing public consciousness of the "economic democratisation", and the KFTC's enforcement stance in part reflected that trend. In recent years, the KFTC's enforcement has been active, which culminated in the record surcharge amount of W900bn in 2012. While the KFTC is still expected to continue with its time-old enforcement priority on cartels, the KFTC is also expected to pay more attention to "unfair supports" among affiliates in conglomerates.

Cartels

Significant cases

In announcing the "Top 10 KFTC News for 2012", the KFTC has selected the cartel among cup noodle vendors as the representative cartel case of direct consumer impact. The cartel involved a price-fixing among the four oligopolists with brand powers in the sales of cup noodles allegedly perpetrated via information exchanges. The KFTC imposed surcharges in the total amount of W135.4bn, in addition to cease-and-desist orders.

Trends, developments and strategies

Since its establishment in 1981, cartel regulation has been one of the continuing primary objectives of the KFTC. Recent years have seen a trend toward further intensification of this regulatory objective. For example, an amendment was made in 2005 to raise the ceiling on the surcharge on cartels from 5% of the relevant revenue to 10%. Cartels are the largest source of surcharges for the KFTC: the surcharges imposed for cartels alone comprised 84.8% of the total surcharge collection from 971 condemned enterprises between 2008 and 2011.

The leniency programme of the KFTC was adopted in 1997 and today, a cartel participant who is first to "report" the scheme to the KFTC prior to the commencement of the investigation to proffer evidences to establish a case against the scheme, cooperate diligently throughout the investigation and cease its participation in the scheme may be entitled to a full exemption from both of correctional order and surcharge.

On the other hand, the first to "aid" the KFTC after the commencement of the investigation, may receive full exemption from surcharge and a partial reduction or full exemption from correctional order.

The second participant to "report" or "aid" the investigation may be entitled to 50% reduction in the surcharge (an increase from 30% reduction). Also under the modified leniency programme, the hardcore participant(s) who coerced the scheme upon other participants enjoys no exemption. Lastly, the participant who aids the investigation must do so "with diligence".

Also under the KFTC's amnesty plus programme, a company already condemned for participating in a cartel will be entitled to reduction or exemption in the surcharge and also may enjoy reduction in the degree of correctional order for the first cartel if it confesses its involvement in another cartel. However, such a confession must satisfy all requirements applicable to the first participant to "report" or the first participant to "aid".

Outlook

The economic globalisation means more cases of cartels crossing national boundaries and the need to regulate them. Especially in the global economic downturn, temptations might be greater on global corporate players to engage in cartels. The KFTC has announced its plan to devote more enforcement resources to toughen its monitoring and regulatory activities.

Dominance

Significant cases: Posco's abuse of dominance[1]

The judgment of the Korean Supreme Court in Posco (November 2007) is illustrative of the concept of "unreasonableness" as a required element in dominance abuse cases. The Court stated that the analysis of "unreasonableness" should focus on the competitive harm as opposed to the unfairness to trading counterparties. Furthermore, this injury to competition should be assessed by examining both whether the dominant enterpriser had the subjective intent to injure competition, and whether the conduct has harmed or is capable of harming competition as evidenced by price increase, output restriction, stifled innovation, reduction in number of competitors, and reduction in diversity of products or services.

These elements all have to be shown by the KFTC. Posco has been commented as imposing greater burden of proof on the KFTC in a dominance abuse case.

Trends, developments and strategies

Although the government-led economic growth in Korea has been immensely successful, the downside of the strategy has been that many of the industries have become oligopolistic or monopolistic. Despite this reality, until recent years, the dominance abuse provision of the MRFTA has rarely been used in the KFTC's enforcement practice.

Outlook

The dominance abuse chapter is not the only part in the MRFTA on single firm conducts. Article 23 of the MRFTA, a proscriptive provision on unfair business practices, prohibits *inter alia* refusal to deal, discriminatory practices, exclusionary conduct, exclusive dealing, unreasonable customer inducement, abuse of trading position, business interference, discrimination favouring affiliates, tie-in sale and unfair support.

This regulatory overlap created confusion in how and which of those provisions are to apply to specific market behaviors. The dominant view is that when a conduct falls under both provisions, the dominance abuse provision applies first. A legislative solution is still required.

Mergers and acquisitions

Significant cases: Google's acquisition of Motorola Mobility Holdings

On June 20, 2012, the KFTC issued an unconditional clearance on the proposed acquisition by Google Inc. of Motorola Mobility Holdings Inc. During the early stage of the KFTC review, there were concerns expressed about the acquisition deal as being between the Android developer and a prominent maker of Android-based smartphones and the potential exclusionary harm that the consummation of the deal might bring onto the Korean makers of Android-based handsets, such as Samsung and LG. In the end, the KFTC concluded that the concerns initially expressed were not likely to happen.

Trends, developments and strategies

Business combination report. A combination between a company whose total asset or turnover (including affiliates) meets or exceeds W200bn and a company whose total asset or turnover (including affiliates) meets or exceeds W20bn is reportable. Unlike the US and EU who adopted only a pre-closing filing, Korea has adopted both pre- and post-closing filing. A combination involving a company whose total asset or turnover meets or exceeds W2 trillion is reportable pre-closing.

In addition, the extraterritorial combinations are reportable if the combining parties meet the reporting thresholds generally applicable (i.e., the reporting party has total asset or turnover satisfying or exceeding W200bn, and the other party has total asset or turnover satisfying or exceeding W20bn) and, additionally, each of the combining parties has Korean turnover of W20bn.

Business combination review. Reviews are on potential market impact. If the combination is horizontal, the KFTC looks into the level of concentration in the market to find the structure of that market and then assesses the combination's potential market impact by considering the possibility of each combining party's unilateral conduct to restrict competition, the possibility of joint conduct among competitors, the level of competition flowing from outside Korea and the relevant international trend, the possibility of new entrants, and the existence of similar products and adjacent market, etc.

If the combination is vertical, the KFTC looks into whether the combination might foreclose the market to new entries. If the combination is conglomerate, the KFTC considers whether it might restrict potential competition. Other factors listed in the KFTC's guidelines include the foreclosure of competitors and the increase in the entry barrier.

Sanctions on violations. Once a proposed business combination is found to be anticompetitive and therefore violates or will likely violate the MRFTA, the KFTC will issue either of structural remedy (e.g., sale of acquired shares, transfer of acquired business, termination of director) or behavioural remedy (e.g., order to cease and desist from the conduct in question, publication of violation, restriction on method or scope of business).

Outlook

So far, some of large-scale business combinations posing anticompetitive concerns received clearances subject to behavioural remedies, mostly consisting of restrictions on pricing or market shares often criticised as inappropriate and ineffective. Noting that problem, the KFTC newly enacted its guidelines in 2011 to provide for structural remedies as the primary tools while behavioural remedies are to be allowed only exceptionally. It is necessary to be watchful of whether the new guidelines will actually make a long-term change in the KFTC's enforcement.

Conclusions

With a growing public consciousness of the "economic democratisation" in Korea, the KFTC's enforcement has in part reflected that trend, spending significant enforcement resources on insider trading within conglomerates and the policies for protecting small-scale merchants.

Note:

[1] Korean Supreme Court (judgment on November 22, 2007; Case No. 2002 Du 8626 decision).

About the authors:

- Young Chul Yim is a senior partner and heads Shin & Kim's antitrust group. Mr. Yim brought to the firm his many years of experience as a judge and multiple years of stellar career at the Korea Fair Trade Commission (the "KFTC") as the KFTC's General Counsel, and the Director General of the Commission's Competition Policy Bureau and Subcontract Bureau. For his exemplary services at the KFTC, Mr. Yim received the "role model officer" award by overwhelming votes among his colleagues within the KFTC. This award earned him a reputation from the media that started referencing Mr. Yim as "Mr. KFTC" or "Mr. Competition Law". Among his notable achievements at the KFTC, Mr. Yim revised the hearing procedural rules within the KFTC that enhanced the due process rights for defendants. While at the KFTC, Mr. Yim also prepared the antitrust practitioners' guide for the KFTC officers covering both substantive and procedural issues that often arise in the law enforcement. During his post-KFTC career, Mr. Yim was selected as the "Best Antitrust Lawyer" by a leading Korean newspaper publisher that surveyed the managing partners of top 20 law firms in Korea. Mr. Yim is widely regarded as the most influential figure in the Korean antitrust community.

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Drawing upon the best capabilities of its experienced veterans, Shin & Kim serves each of its clients with the most committed client service marked by the highest level of pragmatism and vigorous representation of client's interests.

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