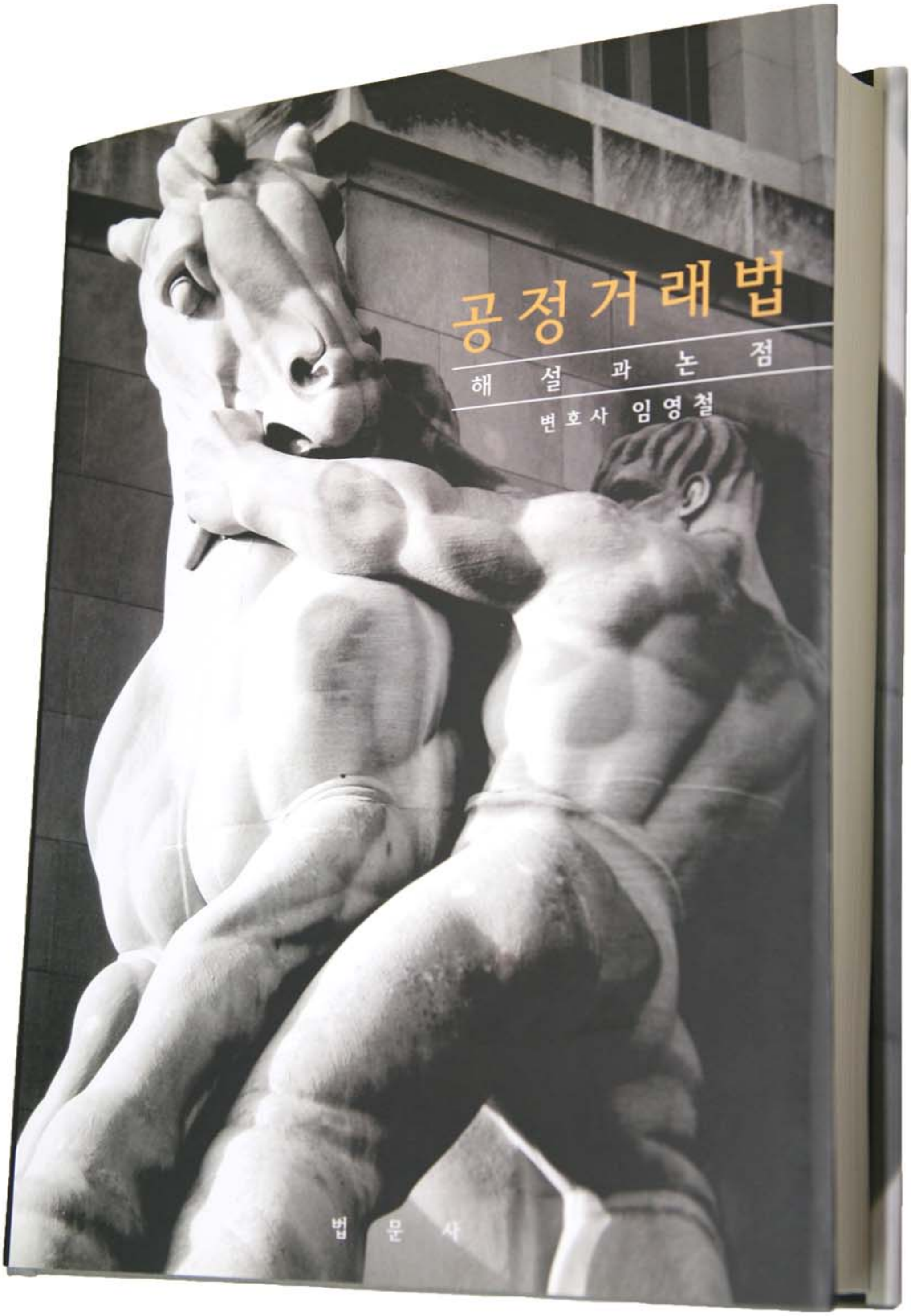
공정거래법
해 설 과 논 점
변호사 임영철
법 문 사

>> 약력

서울민사지방법원 판사
서울고등법원 판사
공정거래위원회
- 법무심의관
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- 정책국장
- 송무기획단장
- 하도급국장
- 직장협의회가 선정한
  '바람직한 公正人像'
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<u>FOREWORD</u>

You swerve your car to park it alongside a curb. You notice a parking sign that reads "2 HOUR PARKING FROM 8:30 AM TO 5:30 PM." You quickly glance at your watch: it is 6 p.m. Can you legally park your car at such hour of the day and, if so, for how long? Many of our fellow Korean citizens, rooted in the culture where all is prohibited that is not expressly permitted, would typically answer in the negative believing that no parking is permitted at all after the permitted 2-hour parking time. In fact, that was a common response from the Korean diplomatic officials who spent years in the United States. Interestingly, however, many of American counterparts, raised in the culture where all is permitted unless prohibited, would respond that not only is the parking permitted but also 2-hour limit does not apply because it is past 5:30 p.m. One can imagine how such chasmic difference in views would set apart the citizens of two societies in their freedom and dynamism.

A social regime under the "positive system" – a social system of a tight government control over all aspects of the society – is rarely conducive to the freedom and creative ingenuity of its citizens. Such has been the impetus behind the current consensus that the Korean social regime must discard the "positive system" in favor of the "negative system." Following the Asian financial crisis, Booz Allen & Hamilton advised that Korea should abolish all governmental agencies that implement regulatory or promotional policies in its economy, save for its competition agency whose authority and power should be bolstered. As a competition practitioner concurring with that view, I have always felt honor-bound to make a tangible contribution to Korea's competition law regime.

My full-fledged experience in the competition law started in 1996 when I resigned the judgeship of the Seoul High Court to join the Korea Fair Trade Commission – the sole competition authority in Korea – as the Director General of Legal Affairs. My six years with the Korea Fair Trade Commission, during which I had the honor and privilege of serving as the first General Counsel and the Director General of the Competition Policy Bureau as well as the Subcontract Bureau, was the period in which I have constantly surrounded myself with a myriad of questions about the roles of the competition law and the competition agency in search for the answers.

At the time, Korea's competition regime was not well-established. It was still in its incipient stage with a history shorter than two decades. Moreover, the Korean competition regime was the product of a modified adoption of the Japanese competition regime which, in turn, was the product of a modified adoption of the U.S. antitrust regime. Needless to say, such two-step process of modified adoption often led to complications in the enforcement practice. There was also much room for improvement in the procedural aspect of case handling of the Korea Fair Trade Commission considering its monumental responsibility as the sole competition authority in Korea.

My endeavours to change Korea's competition regime started during my service as the General Counsel of the Korea Fair Trade Commission when I first engaged my team of officials to research the substantive and procedural aspects of the foreign competition regimes. These collaborative efforts have produced various comparative legal studies on the foreign competition laws, including the translations of foreign legal books such as "*Comparative*

Legal Commentaries on Japanese and U.S. Antimonopoly Laws", "*Introduction to Holding Companies*", "*Commentaries on Antimonopoly Law*" and "*Lecture on Antimonopoly Law*", as well as some of the officers' practice guides such as "*Selected 100 Cases Under Japanese Antimonopoly Law*", "*Collection of Cases from Japanese Fair Trade Commission*" and "*U.S. Antitrust Law Explained*."

While the efforts were not in vain, we soon realized the need for further practical insights into the case proceedings of the U.S. antitrust authorities. Hence, we solicited expertise of Mr. Se-Hoon Jung, a U.S. attorney with experience in the U.S. Federal Trade Commission, for a comprehensive research on the case proceedings and practices of the U.S. Federal Trade Commission and the U.S. Department of Justice. Mr. Jung's assistance has enabled us to gain valuable practical insights into the actual case proceedings of the U.S. antitrust authorities and to translate the U.S. Federal Trade Commission's Rules of Practice, Operating Manual and Antitrust Handbook, all of which proved to be immensely resourceful.

The officials in the Office of the General Counsel were responsible for addressing the inquiries from the working level officials of other divisions and bureaus within the Korea Fair Trade Commission. Those inquiries concerned legal interpretations of various substantive and procedural aspects of competition law issues related to the actual case handlings. While the responsibility often involved similar issues repeatedly arising in the enforcement practice, however, the accumulation of knowledge was not happening due to poor management of the work products and the turnover frequency in the office. This often caused the administrative inefficiency for the officials who had to re-examine same inquiries from the scratch. To resolve this problem, we implemented an internal office policy of designating a serial number for each incoming inquiry, indicating the name of the responsible official on each response as well as the date of such response. The copies of our responses were then circulated to the respective inquiring bureaus for their record-keeping. The compilations of these responses later led to two sequential editions of "*Competition Law Practitioner's Guides*," which were then used for the internal use of the Korea Fair Trade Commission. The fact that their names appear on their responses to inquiries promoted the officials' sense of responsibility in their work products.

The contentious nature of the case proceedings also required revisions to afford the defendants their due process rights. These changes had to occur in ways that can elevate the accountability and competence of the reviewing Commissioners and guarantee the defendants' rights to adequate defense. Accordingly, various amendments were made to the internal procedural rules to ensure that each case will be reviewed under the accountability system of designating the Commissioner-in-charge for the case, that each reviewing Commissioner will be given adequate staff support in deciding each case, and that defendants will have guaranteed opportunity to present their defense directly to the reviewing Commissioners without having to resort to the case examiner's assistance. I reminisce this time of my life as being replete with passion and emotional rewards.

It was in 2002 when I finally decided that it was the time to leave the Korea Fair Trade Commission to make a career shift to become a competition defense lawyer. The experience of counseling the defendants has helped me to gain real world perspectives on various competition law issues and their practical implications and also has allowed me to see the issues in ways that I would not have seen from a regulator's perspective. It also helped me to realize the areas where further researches and studies are much needed. Without a doubt, it once again ignited my desire to make further contributions to Korea's competition law practice.

It was my professional devotion and responsibility to the field of competition law that has motivated me to write this book. This book is a compilation of my past experiences and the answers to my own inquiries during the past decade of my experiences as an officer of the Korea Fair Trade Commission and a competition defense lawyer. While this book may not exhaustively discuss all possible aspects and issues under Korea's competition law, I have designed this book to be accessible by a wide range of readers – whether they may be practicing lawyers in the competition law or others who are simply intrigued by it. The commentaries you find in various parts of this book will address those critical areas of Korea's competition law that are plagued by legislative shortcomings and also shed light on how the problems can be remedied by examining the competition regimes of certain other countries where the antitrust law and its enforcement have enjoyed longer history.

The competition regime – or perhaps more specifically, the competition enforcement practice – is unlike any other regulatory areas that are commonly driven by policy motives and concerns. It is the fiercest multidisciplinary battleground where competing theories and arguments are pitted against one another under the overriding principle of promoting market competition, which the competition authorities themselves, including the Korea Fair Trade Commission, have the duty to pursue in their enforcement practices. It is a regulatory field where policy propaganda has no place. My next ambition is to publish the revised and expanded edition of this book by more thoroughly exploring and organizing the theoretical and academic aspects of all critical antitrust issues.

There are many individuals to whom I am indebted for their contributions to this book. In particular, I owe special gratitude to Mr. Sung Kuk Cho, a professor of law at Chungang University College of Law, whose encouragement and assistance has expedited the publication of this book. I also extend my personal gratitude to Mr. Joo Young Park, a Senior Deputy Director of the Korea Fair Trade Commission, whose outstanding expertise and collaborative efforts has made a solid contribution to this book. There are also many other research fellows whose priceless contributions have made the publication of the book possible. I consider it the greatest fortune of my life to meet and collaborate with all such outstanding individuals and I would be very happy if they feel the same way.

January 2007
Young Chul Yim

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