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**ANNUAL REPORT ON COMPETITION POLICY DEVELOPMENTS IN KOREA**

-- 2010 --

*This report is submitted by Korea to the Competition Committee FOR DISCUSSION at its forthcoming meeting to be held on 19-20 October 2011.*

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## **1. Changes to Competition Laws and Policies, Proposed or Adopted**

1. In 2010 the Korea Fair Trade Commission (KFTC) revised various notifications and guidelines to make active response to the possible increase in anticompetitive schemes that might occur in the course of economic recovery. First, IPR-related guidelines were revised to control undue exercise of IPR in transactions between nations or large and small companies. Second, with the heightened importance of economic analysis in enforcement of competition law, systematic standards for submitting economic evidences were issued. Third, criteria for reviewing potential anticompetitive aspects of laws in the process of enactment or revision were established so that anticompetitive regulations are effectively prevented from being introduced or strengthened.

### ***1.1 Revision of Guidelines on Review of Unlawful Exercise of IPR (Mar. 31, 2010)***

2. The KFTC revised the 「Guidelines on Review of Unlawful Exercise of IPR」 to strengthen legal grounds for antitrust enforcement on IPR abuse in response to the continued calls for revision.

3. Major amendments of the guidelines are as follows:

4. First, the scope of application of the guidelines has been expanded to include foreign businesses. Since many of IPR contracts involve foreign businesses which own original technologies as a party to the contracts, the need for regulating unlawful IPR practices in an international contract had been growing. Based on such recognition, the amended guidelines make it clear that unlawful IPR conduct by a foreign business may be regulated under the guidelines if such conduct has adverse impact on competition in the domestic market.

5. Second, the revised guidelines make it clear that the rule of reason is basically applied for enforcement on undue exercise of IPR -- i.e. illegality of a concerned practice is assessed by balancing its anti-competitiveness against efficiency-enhancing effect. Moreover, when assessing efficiency-enhancing effect of a certain practice, the guidelines stipulate that dynamic factors on the relevant market condition, such as lower prices, higher quality and increased consumer choices resulting from technology innovation, as well as static factors are taken into consideration.

6. Moreover, the guidelines have enhanced predictability of law enforcement by providing major considerations taken into account when deciding on illegality of IPR practices and various examples of unlawful practices, going beyond simply categorizing the types of unlawful exercise of IPR.

7. The amended guidelines specify general principles of enforcement on unlawful IPR practices in a more comprehensive manner. It also provides clearer legal grounds for taking action against new forms of illegal practices involving patents such as patent abuse in the standard-setting process and reverse payment in the pharmaceutical industry. Therefore, it is expected that the guidelines could ensure consistency and predictability of enforcement on IPR abuse.

8. Furthermore, as the guidelines provide definitions of IPR-related terms and various case examples and are written in an explanatory manner, it could help enhance companies' understanding on IPR abuse and prevent the law violation. Furthermore, the guidelines can be used as legal grounds for domestic small and mid-sized companies (SMEs) with weak bargaining power in dealing with unfair request of large companies or multinationals when negotiating a contract for the use of IPR.

## **1.2 Establishment of Guidelines on Submission of Economic Analysis Evidence (Jul. 22, 2010)**

9. With increasingly complicated economic situations, economic analysis-- drawing a conclusion based on economic reasoning-- is becoming important in enforcement of competition law. In fact, the use of economic analysis is increasing in antitrust cases, as a growing number of respondent companies submit economic analysis for evidence and the KFTC, in response, conducts economic analysis proactively.

10. Following the changing trend, the KFTC issued the 「Guidelines on Submission of Economic Analysis Evidence」 that include general principles that need to be applied in producing economic evidences to ensure objectivity and reliability of economic analysis.

11. The general principles prescribed in the guidelines are about: ① constructing hypothesis; ② selecting data; ③ deciding analysis methodology; and ④ drawing a conclusion from analysis.

12. More specifically, first, a hypothesis used in economic analysis should be based on objective and reliable facts or data and verifiable. Second, data subject to analysis should be precise and objective since reliability of economic analysis results depends on credibility of the data used. Third, reasonable method should be chosen and appropriately applied to prove a hypothesis, and reasons for choosing the method, limitation and likelihood of an error of the method should be explained in the submitted economic evidence. Lastly, analysis results should be consistent with reasonable economic theories generally accepted in the academic community. If a conclusion from the analysis is incompatible with the generally accepted theories and biased to one party, it would be considered lacking credibility.

13. The guidelines also include procedural aspects such as attending a Committee hearing for testimony, chief commissioner's order of submitting relevant data and respondent's obligation to offer cooperation.

14. Clear and detailed standards of the guidelines could help prevent the submission of economic evidence that lacks objectivity and validity. And this will, in turn, enhance the decision making procedures of the KFTC and ensure reasonable and credible antitrust enforcement.

## **1.3 Establishment of the Guideline for Review of Anti-competitiveness**

15. On March 17, 2010, the KFTC established the Guideline for Review of Anti-competitiveness. The Guideline comes into play when the head of a competent administrative authority attempts to enact or revise any anti-competitive provisions of law or regulation. Under the Guideline, anticompetitive provisions are divided into the following four categories: provisions that restrict (i) the number or scope of businesses; (ii) the business' ability to compete; (iii) incentives for the business to compete; and (iv) consumer's choices or information. The description of each category is followed by illustrative cases.

16. In examining whether any provisions lessen competition in the relevant market, determination should be made based on an overall review of the existence of monopoly and entry barriers in the relevant market, the degree of overseas competition, and fluctuations of price and production, by reference to the description and illustrative cases given for the particular provisions. The Guideline not only serves as a uniform criterion for assessing anti-competitiveness but also prevents, effectively in the first place, the administrative authorities from drafting new or reinforced government regulations that unnecessarily lessen competition.

## **2. Enforcement of Competition Laws and Policies**

### **2.1 Enforcement against Abuse of Market dominance**

#### *2.1.1 Abuse of market dominance by two airlines (Mar. 10, 2010)*

17. On March 10, 2010, the KFTC concluded that Korean Air and Asiana Airlines abused their market dominance in the domestic and international air passenger markets by interfering with low-cost airlines in market entry and business and that Korean Air went further to restrict travel agencies from selling discounted air tickets of the budget airlines. A corrective order was issued with a surcharge in the total amount of KRW 11 billion.

18. Korean Air and Asiana Airlines restricted travel agencies' sale of tickets for budget airlines by threatening limited or unfavorable ticket supply for business seasons or popular routes and price assistance to them if they had transactions with low-cost airlines, etc. On the travel agencies' side, tickets in busy seasons and popular routes and price assistance are the key factors to attract travelers. By using these factors as a lever, the two large airlines attempted to block transactions between low-cost airlines and travel agencies.

19. As a result, the low-cost airlines had difficulty with selling tickets through travel agents for domestic flights (mostly to/from Jeju) and major international tourist flights to/from Japan, East Asia, Hawaii, etc. The major targets included Jeju Air, Hansung Airlines, Yeongnam Air and other low-cost airlines and some foreign airlines.

20. On the other hand, Korean Air provided some leading travel agencies (about 200 agencies as of 2009) in Korea with conditional rebates, or so-called 'volume incentives', to exclude its competitors from the market. Volume incentives were given to a travel agency upon the condition that the travel agency should attain a preset target share of Korean Air tickets sold, for the purpose of restraining the competitors' sales revenues from growing. Moreover, Korean Air did not allow volume incentives to be used as discounts on air tickets, thereby holding back the ticket price

21. If a new low-cost airline is blocked from the market, airfare will increase and consumer's welfare will decrease. Given that airfares offered by low-cost airlines are merely 70% to 80% of those offered by the existing airlines, exclusion of low-cost airlines from the market would lead to less opportunities to buy inexpensive air tickets and to use differentiated services to be provided by local airlines (including specialized discounts or services for local people and more international flights from local airports). Moreover, Korean Air's restriction on ticket discounts would in turn limit ticket discounts from a travel agency and put more burdens on consumers.

22. On the low-cost airlines' side, they will be deprived of opportunities to sell tickets through a travel agency and have their business affected in operation of domestic and international flights and their entry to new markets hampered. Given that an air service requires a gigantic scale of capital investment at the outset in securing aircrafts and other facilities, a failure to enter the market in a stable manner would highly likely lead to financial distress or insolvency.

23. From the travel agencies' perspectives, they will suffer from disadvantages in seat allocation and price by reason of their transactions with low-cost airlines, and their freedom to choose airlines will be infringed and their chance to cut down costs through transactions with low-cost airlines will be restricted. The measure taken in this case is of great significance in that it corrected anti-competitive practices by Korean Air and Asiana Airlines, two dominant operators in one of the deep-rooted monopolistic/oligopolistic markets in Korea. Excluding low-cost airlines from the market was directly in contravention to the government's policy to advance the air service market and promote competition

through lowered entry barriers and surely restricted ticket discounts offered by travel agencies thereby placing more burdens on consumers in using airline services. In this context the strict measure was called for.

24. The measure is expected to improve competition environments for independent low-cost airlines, revitalize competition in the air service market, and give more opportunities for consumers to use a variety of inexpensive air services. The KFTC will continue to monitor the air service market for any unfair trade practices and take stern measures against any violation detected.

*2.1.2 Exclusive dealing by open market operator (Jul.14, 2010)*

25. On September 14, 2010, the KFTC issued a corrective order and imposed a KRW 10 million surcharge on eBay Gmarket (“Gmarket”) and decided to refer the case to the prosecution for prohibiting its vendors from trading with a competitor open market “The 11th Street,” which the KFTC viewed as abuse of market dominance. In addition, Gmarket and its employees were imposed penalties of KRW 200 million and of KRW 50 million, respectively, for delaying access by investigating officials during KFTC’s on-site inspection and Gmarket employees’ deleting computer files despite the investigating officials’ request during the on-site inspection. The following is the findings of the case.

26. When the market share of its competitor The 11th Street increased thanks to consumer-favorable promotions, etc. Gmarket informed vendors of the plan to exclude the vendors from the main exposure promotion if they would have dealings with The 11th Street. This was implemented during the period from October 12, 2009 to December 3, 2009 when the KFTC began its on-site inspection on. During the said period, at least around 10 vendors in good standing in effect discontinued their dealings with The 11th Street. Gmarket’s practice was designed to eliminate its competitor, which constitutes an abuse of market dominance under the MRFTA.

27. Gmarket has a 90.8% share<sup>1</sup> of the relevant market, in this case the domestic ‘open market operator market’, which means that Gmarket is a market dominant business. Gmarket’s behavior in question was intended to maintain and strengthen its market dominant position, which is deemed unfair in that any coercion of Gmarket, de facto monopolist in the relevant market, would have huge influence on the vendors and that the coercion in effect blocked transactions with its competitor and considerably reduced The 11th Street’s possibilities to have a greater market share.

28. The surcharge was calculated by reference of commissions paid by Gmarket to the 10 or so vendors proved to have discontinued dealings with The 11th Street due to Gmarket’s behavior in question<sup>2</sup>. Further, given that Gmarket’s practice in question was actually a recurrence in less than 3 years after a corrective order was issued against a similar behavior, the KFTC decided to refer the case to the prosecution.

29. During KFTC’s on-site inspection on December 13, 2009, Gmarket’s employees deleted computer files despite the investigating officials’ repeated request to the contrary. This constitutes an interference with investigation. Moreover, on December 18, 2009, Gmarket delayed for about 50 minutes KFTC investigating officials’ access to the premises to carry out the on-site inspection without due cause and despite requests. This too constitutes an interference with investigation. These behaviors were intentional interference with KFTC’s lawful investigation, and strict measures should be taken against both Gmarket and its employees to secure efficient law enforcement.

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<sup>1</sup> This market share is calculated by adding the share of its affiliate, eBay Auction.

<sup>2</sup> Calculated in accordance with a Seoul High Court’s judgment in a similar case.

30. The corrective measure is expected to promote competition among operators of open market to attract good vendors and to solicit consumers to buy products offered by vendors. More competition among open market operators will ultimately help consumers buy quality products at lower prices. Besides, the KFTC will take strict measures against any interference with lawful investigation.

## **2.2 *Cartel enforcement***

### **2.2.1 *Soju price fixing***

31. Between late 2008 and early 2009, new reports raised suspicion of cartel in raising soju prices noting that the prices rose at similar timings and rates. Since soju products fall under one of the 5 areas subject to KFTC's intensive monitoring for 2009, the KFTC immediately started an ex-officio investigation.

32. Before raising factory price of soju twice during the said period, the 11 soju producers, through presidents' meetings or others, communicated opinions and information, and discussed and consulted with each other on whether, when, and how much to raise prices. The agreements made in the process were performed in effect. Thereafter, they continued to discuss and consult on the timing and rate of price increase, and Jinro, the leading company, first raised prices with the rest following suit at a similar rate.

33. It is true that the National Tax Service reviewed and approved Jinro's request for price raise, but the examinees in fact 'made a separate agreement' among themselves before or after the fact by reason of National Tax Service's administrative guidance. The KFTC investigation found out that before Jinro's consultation with the National Tax Service, the soju producers held presidents' meetings to discuss and agreed on the price raise, which constitutes cartel regardless of National Tax Service's administrative guidance.

34. The soju producers further agreed to hold regular meetings to check whether to support events and promotion activities in the process of distribution, the scale of support, and adjustments thereto in advance among competitors, and to make sure of their compliance with what was agreed. This agreement itself constitutes collective decision-making on transactional terms and criteria for promotion activities, which should have been determined independently by the respective companies. It was not intended to avoid violation of liquor dealing order, but to sidestep competition among themselves.

35. The soju producers' behavior is in violation of Article 19(1)-1 (collective fixing, maintaining or changing of price), 19(1)-2 (determining terms and conditions for the transaction of goods or services), 19(1)-9 (interfering or restricting the activities or contents of business by other persons) of the MRFTA. The KFTC issued an order to stop the behavior and imposed a total of KRW 27.2 billion in surcharge on the 11 producers.

36. The case in question is meaningful that the long-term chronic cartel practice in the liquor business was abolished by detecting and correcting the cartel regarding factory price and transactional terms in the domestic soju market and is expected to promote competition in the market and enhance consumer welfare. The case is also meaningful, in particular, that it involves one of the daily necessities and the products closely related to low-income people, as in the LPG case and the beverage case.

37. By taking the strict measure against the soju cartel which was formed by reason of National Tax Service's individual administrative guidance, the case also reaffirms the determination not to tolerate any cartel on the pretext of the government authority's administrative guidance. The KFTC will continue to seamlessly monitor and strictly punish any cartel with respect to products closely related to low-income people's life and representing much of their living expenses.

### 2.2.2 *Air-conditioner and TV set cartels*

38. The KFTC discovered and corrected the agreement among three home appliance makers- Samsung Electronics, LG Electronics, and Carrier- of raising or maintaining unit prices of system air-conditioners and TV sets supplied to public institutions and decided to impose a total of KRW 19.1 billion in surcharges.

39. In entering into annual price agreements between 2007 and 2009, the three makers, as suppliers of system air-conditioners to public institutions, met at the lobby of the Office of Supply in Daejeon, the exhibition hall of Samsung Electronics Nambu Terminal shop in Seoul and other places to agree to raise or maintain the prices for the relevant year and performed the agreement.

40. Between January 2008 and April 2009, Samsung Electronics and LG Electronics, prior to price negotiation with the Office of Supply, agreed on a total of 6 occasions on models to be marked down, the range of such markdown, and price of new models, and performed the agreement. To this end, the two makers met, exchanged information and discussed at the lobby of the Office of Supply in Daejeon, the nearby fried chicken shop, a Japanese restaurant in Seoul and other places.

41. The examinees' price fixing constitutes collective fixing, maintaining or changing of price within the meaning of Article 19(1)-1 of the MRFTA. Accordingly, the KFTC ordered to stop the violation and imposed a total of KRW 19.1 billion in surcharges on the two makers.<sup>3</sup>

42. It is meaningful that the KFTC detected and corrected cartel in the government procurement market against the leading companies, such as Samsung Electronics, with respect to system air-conditioners, TV sets and other products closely related to the life of working class people. Those products are supplied through the government's procurement system mainly to elementary, middle and high schools, universities, offices of education, and other education authorities. The 3 makers' cartel aimed to raise or maintain the prices of products above or at a competitive price, resulting in government budget being wasted.

43. Since the long-lasting practice of cartel was eradicated and competition becomes lively in the government procurement market, the government is expected to save budgets. The KFTC will seamlessly monitor and sternly punish any cartel with respect to those products closely related to the life of working class people.

### 2.2.3 *Air cargo cartel*

44. From statements made by cartel participants under the Leniency Program in December 2005, the KFTC became aware of and initiated an investigation into possible international air cargo cartel. On February 14, 2006, the KFTC and their counterparts in the US and EU simultaneously conducted on-site inspections throughout the world.

45. In the late 1990's, airlines throughout the world had attempted to apply fuel surcharges all at once with the aim to raising air cargo freights, just in vain. This time, they pursued cartel for respective regional air routes. Worldwide routes from and to Korea were no exception.

46. In around June 2002, Korean Air and Lufthansa first agreed to apply fuel surcharges. Then, between January 2003 and April 2003, 17 airlines including the two held a meeting of the Board of Airline Representatives (BAR) and agreed to charge fuel surcharges of KRW 120/kg effective from April 16,

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<sup>3</sup> LG Electronics applied for the Leniency Program with the first priority and was exempt from surcharges in full.



2003. They went on to agree to raise fuel surcharges in October 2004, July 2005 and November 2005, which agreements were all performed.

47. On January 14, 2000, 7 airlines held meetings of BAR Cargo Session to agree to charge fuel surcharges of HKD 0.50/kg effective from February 1, 2000 and subsequently agreed on and implemented fuel surcharge increases on a continuous basis whenever the oil price rose.

48. Between December 1999 and February 2000, 8 airlines, at interline meetings (so-called 'coffee meetings') of the airlines in Germany or through individual communications, agreed to apply fuel surcharges of 10 Euro cents/kg effective from February 1, 2000. More airlines subsequently joined, agreed on and implemented fuel surcharge raise on a continuous basis whenever the oil price rose.

49. Between September 2002 and October 2002, 5 airlines held meetings of Interline Cargo Sales Association of Japan (ICAJ) to agree to apply fuel surcharges of JPY 12/kg effective from October 16, 2002. Subsequently until October 2005, they agreed on and implemented fuel surcharge raise on a continuous basis.

50. Meetings with competitors, required for transportation links as an essential part of air cargo transportation, were indeed used as channel for cartel. More specifically, meetings of airlines organized by flag carries in each country were utilized for cartel, and the seemingly alliance meetings for efficient conduct of business served as channel of price fixing with competitors in effect. In Korea, Hong Kong and Japan, where an approval was required regarding air fare by the aviation authority, they made thorough arrangements in advance to obtain such approval.

51. The examinees' price fixing constitutes collective fixing, maintaining or changing of price within the meaning of Article 19(1)-1 of the MRFTA. Accordingly, the KFTC ordered a total of 21 airlines to stop the behavior in question and imposed a total of KRW 119.5 billion in surcharges on the first 19 airlines and issued warnings to the remaining 2 airlines.

52. The measures taken against the international air cargo cartel was the first case in the world where all examinees in the international air cargo cartel currently under investigation were punished at the same time through formal proceedings. It is also the biggest international cartel case handled by the KFTC in terms of the number of cartel participants, the number of foreign interviewees, the amount of relevant sales revenues, and the amount of surcharges imposed.

53. By rooting out the long-lasting international air cargo cartel, the measures taken by the KFTC are expected to protect domestic consumers and help domestic industries increase their export competitiveness. A series of strict punishments of international cartels, including this case, will effectively restrain foreign businesses from pursuing cartel targeted to the Korean market.

## **2.3 M&A Enforcement**

### *2.3.1 Iron ore manufacturers (Rio Tinto/BHPB) case*

54. BHP Billiton and Rio Tinto entered into an agreement to incorporate a joint venture producer and filed a M&A report with the KFTC on December 28, 2009. Under the agreement of December 5, 2009, the joint venture company was to be incorporated on a 50 to 50 shareholding proportion to combine the two

companies' production facilities in Pilbara, West Australia, including iron ore mines, railways and harbors.<sup>4</sup>

55. Considering that an attempted stock acquisition between the two companies was baffled by the competition authorities in 2008, the proposed M&A was merely an evasion of anti-competitive concerns by cleverly incorporating a JVC of production sections only with the sales sections being separately operated.<sup>5</sup>

56. The global iron ore supply market is an oligopolistic market dominated by 3 big producers, Vale (Brazil), Rio Tinto, and BHP Billiton<sup>6</sup> (with their aggregate market share of 73%). The two companies, if combined, would become the world's largest iron ore supplier (with a 37% market share).

57. Amid continuous excess demand since 2000, now that the 'spot market' price is reflected subsequent to the recent change of price negotiation to take place quarterly instead of yearly on the suppliers' initiative, the iron ore price for the second quarter (from April to June) of this year increased approximately 90% from the previous year, quite a steep rise. In Korea, iron ore requirements are all imported. For instance, POSCO imports approximately 30 million tons (equal to about KRW 3 trillion) each year from the two producers, which represent more than 67% of the total requirements. Moreover, the proposed business combination has a great influence not only upon steel makers, the direct users of iron ore, but also a wide range of industries using steel products such as automobile, ship building, and construction.

58. The product market is defined to be separate markets for seaborne fines, lumps, and pellets, due to differences in use and price and there is little demand or supply substitutability between product types. Given that the iron ore supplied through inland transportation is of low quality and the difficulties with [seaborne] transportation due to the lack of railways and harbors, the seaborne iron ore markets alone were reviewed. The geographical market is defined to be global market considering that iron ore price negotiations take place worldwide and the iron ore price fluctuates in a similar way across the world (including West Europe and East Asia).

59. Anti-competitiveness analysis Although the proposed M&A takes a form of joint venture solely of production sections, it would have the same effects as a full merger in substance. Joint production would result in the same costs and quality between the two companies, which would structurally extinguish incentives and ability to compete. Moreover, the joint venture substantially under the control of its parent company would eventually pull down a firewall blocking exchange of information between the two sales sections.

60. The share in the lumps market after the proposed M&A would amount to 55%, the biggest share with such a greater gap with the second biggest (10%) that would lessen competition. The share in the fines market would remain at 38%, which is not presumed to be anti-competitive but still the biggest share, which raises anti-competitive concerns. The share in the pellets market would remain low (at 13%), which is not anti-competitive.

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<sup>4</sup> This KRW 130 trillion (or USD 116 billion) deal was the largest scale ever in business combination history in Australia.

<sup>5</sup> A business combination between foreign companies is required to be reported if it involves a certain scale of assets (of KRW 200 billion each for the reporting company and the counterparty) and a domestic sales revenue of KRW 20 billion or more. The two companies filed reports with the competition authorities in Japan (January 20, 2010), EU (January 25, 2010), China, Germany, and Australia, as well.

<sup>6</sup> Global market shares in 2008: Vale (35.2%), Rio Tinto (22.5%), BHP Billiton (14.8%).

61. There are concerns about price rise due to production reduction (in the short term) or reduction of plan to expand production capacity (in the long term). The proposed incorporation of JVC would reduce the number of big suppliers to 2 and result in interlocking shareholding, which would have higher likelihood of cartel.

62. Recognition of exception: possible effect of increasing efficiency The reporting company argues that the proposed business combination would increase efficiency of approximately USD 15 billion through increase of production and reduction of capital costs and operation costs. This argument is not acceptable, though. There seem to be more incentives for production reduction than for production increase and the effect of cost reduction cannot be regarded merger specific and is unlikely to be passed on to users. Based on the foregoing, the proposed business combination is deemed anti-competitive.

63. To make the corrective measure more enforceable, the KFTC actively pursued international cooperation with its counterparts in Japan, EU and China, right from the beginning of the review.

64. First of all, the KFTC closely collaborated with its counterpart in Japan, the country that has the most similar market conditions to the Korean market. Working-level officials exchanged emails, and a directors meeting was held on July 13 to start discussion on a full scale. At the 18th meeting of Korea-Japan Competition Policy Council held in Seoul on July 22, Chairman Ho-Yul Chung and Chairman Takeshima discussed the level and timing of measures, etc.

65. At the 7th meeting of Korea-EU Competition Policy Council held in Seoul on September 14, Chairman Ho-Yul Chung and Director Italianer of EU competition authority had in-depth discussions on collaboration in dealing with the case. Besides, the KFTC established a discussion channel and exchanged information from time to time with the Anti-Monopoly Bureau of the Ministry of Commerce, which is responsible for review of M&A in China.

66. This was the first case ever in which the provisions regarding anti-competitive M&A in Article 7 of the MRFTA are applied to a M&A occurring overseas. Although the case failed to be submitted for deliberation at plenary session, the two companies were compelled to withdraw their plan, which is the same effect as prohibition measure has. In addition, this is the first case ever in which the KFTC proactively led international collaboration in a M&A review.

67. In the face of objection from the KFTC and its counterparts, BHP Billiton and Rio Tinto decided to revoke the joint venture agreement of their own accord, and the attempt to have a stronger supplier power was frustrated in the already oligopolistic iron ore market dominated by 3 big suppliers. This is expected to stop the rise of iron ore prices and prices of steel related products, which have been recently soaring.

### 2.3.2 *Acquisition by CJ O Shopping of OnMedia*

68. CJ O Shopping Co., Ltd. ("CJ") entered into an agreement to acquire 55.2% of all stocks in OnMedia Co., Ltd. ("OnMedia") in the amount of KRW 434.5 billion on December 24, 2009 and filed a M&A report on January 14, 2010.<sup>7</sup> This M&A between MSPs (MSO + MPP)<sup>8</sup> involves a horizontal combination between Program Providers (PPs) and a mixed combination between System Operators (SOs). The review focused on anti-competitiveness in the PP market, which may in turn impair competition in the contents supply market.

<sup>7</sup> In the PP market, CJ is in the first place (20.8%), OnMedia in the second (11.1%), while in the SO market CJ is in the second place (19.4%) and OnMedia in the eighth (2.6%).

<sup>8</sup> MSO refers to Multiple System Operator, while MPP refers to Multiple Program Provider.

69. The review began with examination of market concentration and changes therein that the proposed business combination would bring about throughout the PP market. In light of substitutability between buyers (including SOs, satellite broadcasting companies, and IPTVs) and vendors (PPs), market concentration and anti-competitiveness were examined separately with respect to certain genres (channels) that can be subdivided to some extent. Since PPs provided service nation-wide, the geographical market is defined to be the national market.

70. Decision on anti-competitiveness CJ, subsequent to the proposed combination, would have a 31.9% share (the largest) in the PP market based on sales revenues for 2008. Although this figure fails to meet the requirements for presumption of anti-competitiveness under the MRFTA, CJ appears to have a substantial control over the entire PP market.

71. Given the low similarity between categories of contents supplied by CJ (movies, cartoons, living, woman, etc.) and its major competitors, terrestrial PPs (dramas, sports, etc.), there seems to exist no particular reason to see that the proposed M&A increases the likelihood of cartel. In the PP market, a new entry is not difficult in that it does not require an approval, but in effect there has been few impressive entry for the last years due to a huge amount of costs to produce or buy popular contents and uncertain prospects for the PP market itself.

72. The KFTC approved the proposed M&A upon the conditions that CJ should take the following behavioral corrective measures: (i) to provide equal access to contents (or channels) for multi-channel pay-TV operators (including IPTV among others) competing with its affiliate SO in the absence of any due cause; and (ii) continue to supply contents (or channels) to such multi-channel pay-TV operators (including SOs, satellite broadcasting companies, and IPTV) in the existing transaction upon the same terms and conditions in the absence of any due cause.

73. With a resulting 31.9% share in the entire PP market, the proposed M&A would likely lessen competition in the market in effect and result in monopoly in some channels (being a downstream market) in light of a big gap with its competitors and its gradually growing market share. The corrective measures taken are meaningful in that such mishaps can be prevented in advance.

74. In particular, banning refusal or discontinuation of supply of contents to IPTVs at their inception in the absence of due cause would activate the IPTV market and help IPTV operators effectively compete with CATV operators and satellite broadcasting companies, thereby giving a broader range of view choices of multi-channel paid-TVs and contributing much to enhancement of consumer welfare. Moreover, the business combination between large-size PPs would lead to greater investment and to economies of scale, which is forecast to further galvanize the domestic PP market.

## **2.4 Enforcement against Unfair Trade Practices**

### **2.4.1 Confectionery companies' lessening price competition**

75. The KFTC discovered that 4 confectionery companies, namely Lotte Confectionery Co., Ltd., Orion Corp., Haitai Confectionery & Foods Co., Ltd., and Crown Confectionery Co., Ltd., restricted selling price, territory, or counterparties in distribution and issued a corrective order.

76. Of the 4 confectionery companies, Lotte Confectionery Co., Ltd. and Orion Corp. set minimum prices for their snack, candy, chocolate and other confectionery products and compelled their distributors and wholesalers to sell those products at or above the minimum prices. Moreover, Lotte Confectionery Co., Ltd. preset consumer discount prices for mom and pop stores and retailers (other than large discount stores) and thoroughly checked and ensured the compliance with the preset prices. The 4 confectionery companies compelled their distributors (and in some cases even wholesalers) to have transactions with pre-determined counterparties within a pre-determined territory.

77. These restrictions on selling price, territory, and counterparties in distribution lessened price competition at every stage of distribution (between distributors and wholesalers, between distributors or wholesalers and another channel of sale; and in the case of Lotte Confectionery Co., Ltd., even among retailers) and ultimately arbitrarily deprived customers of chances to buy confectionery products at lower prices.

78. The examinees' behaviors in question are in violation of Article 29(1) (Restrictions on Resale Price Maintenance) and Subparagraph (1)-5 (Trade under Binding Conditions) of Article 23 (Prohibition of Unfair Trade Practices) of the MRFTA. Accordingly, the KFTC issued corrective order to the 4 confectionery companies for their resale price maintenance and restrictions on territory and counterparties.

79. The corrective measures taken against the confectionery companies are expected to promote competition in the confectionery market and help to achieve stable prices for confectionery products which are popular among teenagers and children. An active competition at each stage of distribution will bring greater price benefits to consumers.

## 2.5 *Statistics on Case-handling Performance and Lawsuits Regarding KFTC Decisions*

### 2.5.1 *Case-handling performance in 2010*

80. The number of cases dealt with by the KFTC in 2010 was 3,505, which was 34% down from 4,664 in 2009. Among the total, 2,125 cases were found in violation of the law and given warnings and more severe corrective measures in 2010. This was a decrease of 31% from 3,084 of the year before [Table 1].

**Table1. Case-handling performance by type of corrective measures**  
(subject to warning or graver measures) (Unit: Case)

Type /Year	'00	'01	'02	'03	'04	'05	'06	'07	'08	'09	'10
Reference to Prosecution (Surcharge)	22 (3)	23 (9)	11 (1)	18 (4)	22 (2)	12 (2)	47 (3)	48 (11)	33 (9)	43 (8)	19 (3)
Corrective Order (Surcharge)	441 (46)	347 (72)	497 (90)	449 (33)	478 (89)	756 (272)	644 (154)	928 (315)	737 (132)	487 (70)	277 (63)
Corrective Recommendation (Request for Correction)	35 (-)	88 (4)	115 (5)	104 (2)	101 (1)	163 (-)	179 (1)	124 (-)	77 (1)	85 (-)	66 (-)
Warning <sup>1</sup>	520	3,475	2,013	2,133	2,388	2,419	2,515	2,124	2,223	2,469	1,763
Warning or Above	1,018	3,933	2,636	2,704	2,989	3,350	3,385	3,224	3,070	<b>3,084</b>	<b>2,125</b>
Other Measures	652	735	711	385	957	949	1,052	1,256	1,486	1,580	1,380
Total	1,670	4,668	3,347	3,539	3,946	4,299	4,437	4,480	4,556	<b>4,664</b>	<b>3,505</b>

Note 1: Including mediation and administrative fines imposed.

81. The number of cases handled for violation of MRFTA stood at 1,023 in 2010, accounting for 29.2% of the total. In 491 cases of them, illegality was found and warning or graver measures were taken. [Table 2]

82. Among the cases which resulted in corrective order or recommendation or warning or graver measures, the number of cases involving market dominance abuse increased by 250% from 2 to 7 year on year, and cases on economic power concentration stood at 27, down 35% from the previous year. This is a result of KFTC's policy shift on large business group from direct regulation toward the use of market's monitoring function to reduce burden of the business while strictly controlling anticompetitive monopolists.

83. In addition, the number of merger and cartel cases was 21 and 58 respectively, showing no significant change compared to the previous year.

**Table 2. Enforcement performance of MRFTA violations**  
(subject to warning or graver measures) (Unit: Cases)

Type/Year	'00	'01	'02	'03	'04	'05	'06	'07	'08	'09	'10
Market Dominance Abuse	0	4	0	1	0	0	2	38	5	2	7
M&A Rules Violation	48	45	46	43	36	17	60	53	27	23	21
Economic Power Concentration	19	16	80	29	149	108	24	44	116	41	27
Undue Concerted Acts	47	43	47	23	35	46	45	44	65	63	58
Prohibited Acts of Enterprisers Organization	117	88	100	91	62	57	58	58	98	107	42
Unfair Trade Acts	121	169	210	123	298	481	370	715	565	446	336
Subtotal	352	365	483	310	580	709	559	952	876	682	491
<b>Total Cases Handled</b>	<b>685</b>	<b>706</b>	<b>772</b>	<b>673</b>	<b>948</b>	<b>1,064</b>	<b>1,036</b>	<b>1,648</b>	<b>1,546</b>	<b>1,240</b>	<b>1,023</b>

84. The total amount of surcharge imposed in 2010 for violation of the MRFTA was KRW 608.1 billion, a dramatic increase from KRW 366.1 billion in 2009. The significant increase in the surcharge was mainly attributable to cases resulting in imposition of a large amount of surcharge such as LPG price fixing by 6 suppliers (KRW 404.9 billion), air cargo cartel by 26 air carriers (KRW 84.3 billion) and bid rigging for apartment construction (KRW 33 billion). [Table 3]

**Table 3. Surcharge imposition performance by type of MRFTA violations**  
(Unit: Cases, KRW million)

	Market Dominance Abuse		Economic Power Concentration		Undue Concerted Acts		Prohibited Acts of Enterprisers Organizations		Unfair Trade Acts		Total	
	Case	Surcharge	Case	Surcharge	Case	Surcharge	Case	Surcharge	Case	Surcharge	Case	Surcharge
2000	0	0	5	690	12	198,812	7	102	21	25,861	45	225,465
2001	2	5,663	2	302	7	27,704	25	6,384	45	121,601	81	161,654
2002	0	0	14	8,906	14	53,109	19	276	35	20,507	82	82,798
2003	0	0	4	1,612	9	109,838	10	1,028	8	37,141	31	149,619
2004	0	0	1	739	12	29,184	14	330	62	5,586	89	35,839
2005	0	0	4	3,671	21	249,329	10	947	229	4,979	264	258,926
2006	1	32,490	2	552	27	110,544	5	806	111	11,548	146	155,940
2007	25	24,176	0	0	24	307,042	7	273	260	89,221	316	420,712
2008	1	26,616	0	0	43	205,743	16	709	40	21,557	100	254,625
2009	2	288,225	2	303	21	52,903	9	492	27	24,247	61	366,170
2010	4	11,104	1	290	26	585,822	7	177	18	9,721	56	607,114
Total	40	391,558	63	30,048	280	2,018,233	151	12,655	1,062	575,954	1,596	3,028,448
Percentage	2.5%	12.9%	3.9%	1.0%	17.5%	66.6%	9.5%	0.4%	66.5%	19.0%	100%	100%

### 2.5.2 *Lawsuits regarding KFTC decisions in 2010*

85. The number of cases which were referred to the appellate court was 32 in 2010, down by 3 cases from the previous year. But the ratio of cases where respondents were dissatisfied with the KFTC decisions went up from 15.77% to 17.02% year on year. Dissatisfaction rate rose despite KFTC's institutional effort toward stronger respondents' defense rights and reasonable and transparent case handling, which is attributed to companies appealing against decisions for fear of financial burden from surcharge payment, damaged public reputation and resulting civil/criminal lawsuits filed against them. Higher dissatisfaction rate, however, does not have to be seen negatively given that it shows companies' heightened awareness of their rights and strengthened constitutional rights to claim.

**Table 4. MRFTA violation cases referred to the appellate court for the last 5 years**  
(Unit: Cases)

	2005	2006	2007	2008	2009	2009
MRFTA violations	411	309	680	407	222	188
Decisions appealed to court	17	22	38	38	35	32
% of cases referred to court	4.14%	7.12%	5.59%	9.37%	15.77%	17.02%

Note: It was calculated based on the date of issuance of KFTC decision. To avoid double counting, a case involving multiple respondents was regarded as a single case.

### 3. **The Role of Competition Authorities in the Formation and Implementation of Other Policies, e. g. Regulatory Reform, Trade and Industrial Policies**

#### 3.1 *Improvement of anti-competitive entry regulations Project of Overhauling Entry Regulations*

86. The KFTC recognized that if Korea is to take off to a truly advanced market economy, most urgent is to overhaul various entry regulations to shift its economy into a more pro-competitive structure. Based on this recognition, it embarked upon a project in 2009 to improve entry regulations in phases. Entry regulations often serve as barriers to economic vitalization and job creation efforts because they safeguard monopoly and oligopoly of existing dominant firms, lessen competition, undermine consumer welfare and deprive from the outset innovative companies of opportunities to realize their potential. This is supported by many researches conducted by the Korea Development Institute ("KDI"), the Korea Institute for Industrial Economics and Trade ("KIET") and other government-sponsored institutions that show that if entry regulations are cut in half, growth potential would increase 0.5% point and that a 10% reduction of entry regulations would create 75,000 new jobs.

87. The entry regulation improvement efforts were made during the 1st and 2nd stages of the project between 2009 and 2010. They began with the selection of tasks at expert meetings, which were then outsourced to the KDI, the KIET, the Korea Society for Regulatory Studies ("KSRS"), the Korea Academic Society of Industrial Organization ("KASIO") and other research institutes. Subsequently, improvement measures were proposed after open forums and informal gatherings for discussion to collect stakeholders' opinions, discussions among the relevant ministries, and settlement of disagreements by the Office of Prime Minister and the Presidential Council on National Competitiveness.

88. As a result, in September 2009 during the 1st stage of entry regulation improvement efforts, they came up with improvement measures, more specifically of 26 tasks in the areas that had public monopoly or had to be immediately addressed due to deep-rooted monopoly. The 2nd stage started in April 2010 when improvement measures were finalized for 20 other tasks, which include, among others, more lenient entry regulations for service sectors and opening of monopolistic public sectors to private operators. Meanwhile, the 3rd stage of the project is now underway on those tasks selected in the later half of 2010

and centered on health care, culture and tourism and other areas closely related to people's lives. The stage is scheduled to be finalized in the first half of 2011. The key improvements made during the 1st and 2nd stages are as follows.

89. First of all, the KFTC endeavored to lower entry barriers in the areas where there exists public monopoly or private participation is restricted. For instance, the KFTC allowed private city gas providers to participate in the LNG station business that had been monopolized by Korea Gas Corporation. This promoted competition among LNG stations, making them lower LNG price and enhance service quality and induced private investment in building LNG stations to cope with a rapidly growing number of LNG trucks.

90. Also, the KFTC enabled private delivery service providers to enter the credit card delivery market previously monopolized by post offices. Card companies can use private delivery services at lower prices and save 6 to 10 billion won in delivery costs. More than 10 small or medium size private delivery companies now conduct their business in a lawful manner.

91. Precision safety inspection service, currently provided exclusively by Korea Infrastructure Safety and Technology Corporation with respect to a total of 212 Group 1 public facilities, is to be open to private companies in phases, and until 2015 up to a total of 60 public facilities will be made accessible. This will enable the private sector to develop its knowledge and technology in precision safety diagnosis and eventually reduce diagnosis costs.

92. The KFTC also detected and rectified long-sustained exclusivity and unreasonable entry regulations in service sectors. For instance, as viewed from the perspectives of securing tax revenues and protecting national health and juveniles, the liquor industry has been subject to many government regulations throughout the whole process from procurement of raw materials to manufacture, import, and distribution. In particular, beer is produced by only two beer companies, The Hite and Oriental Brewery Company (OB), due to the excessively high minimum production requirements of 1,850kl (or 3,700,000 bottles), which in effect blocked small or medium size producers from entering the market and rendered it impossible to produce various beer products. The KFTC's improvement lowered the minimum requirements sharply from 1,850kl (or 3,700,000 bottles) to 100kl (or 200,000 bottles), which enables new participants to enter the market. Next, the KFTC relaxed the registration requirements for LPG or oil importers, allowing storage facilities to be shared among suppliers and the state-owned storage facilities to be used by the private sector. The KFTC also abolished the territorial restriction, under which LPG in steel containers widely used by working class and the self-employed residing in the areas with no access to urban gas had been sold only in such City or Do where they got a sales permission. Lastly, considering that the key to airlines' competitiveness is to get customer's preferred takeoff and landing slots, new low cost carriers are now allowed to participate in a scheduling meeting where slots are assigned.

### ***3.2 Introduction and consolidation of competition assessment system & Reinforcement of legislation consultation***

93. Since January 2009, when the KFTC was named as responsible authority for competition assessment system that assesses the effect of a regulation on market competition and consumer welfare, the competition assessment system has come into play with respect of almost all new or reinforced regulations proposed by the government authorities.

94. The competition assessment is carried out at two stages: preliminary assessment and in-depth assessment. A check list is used first to assess the effect in four different areas: suppliers' entry, ability to compete, incentives to compete and consumer's choices. Then, the in-depth and overall analysis of impact



on competition helps find an alternative to minimize any adverse impact on competition and achieve policy purposes effectively.

95. Bills for new acts or amendments received between 2009 and 2010 (330 bills in 2009 and 277 bills in 2010) underwent competition assessment, and improvement opinions were presented on 35 and 36 bills respectively, and 68.6% and 54.8% of which were reflected. In the process, site visits, informal gatherings for discussion, collection of opinions from the relevant industries followed to assess practical effects of regulations and present alternatives. This user-oriented assessment made regulations more market-friendly.

96. Examples of proposed regulations that were withdrawn through the competition assessment system are as follows: When a proposal was made (in May 2009) to prohibit new post-partum care centers from being built on the third floor or higher of a building after a fire on a crowded multi-purpose facility caused casualties, the KFTC assessed that the proposal is anti-competitive in that it would restrict new entries to the market and increase post-partum care service fees and suggested instead strengthened facility requirements for the care centers. This is a representative case where the KFTC put the breaks on crafting regulations amid social agitation after the tragic accident without rational analysis and consideration of market competition and social cost benefits. In October 2010, the KFTC made a presentation on the operation of competition assessment system and assessment cases to OECD's Competition Committee for the first time in the world, playing the world's leading role in operating the system

97. In addition, the KFTC has reinforced the requirement for legislation consultation to prevent new anti-competitive regulations from being established. In 2010, a total of 2,096 accounts of legislation went through prior consultation with the KFTC, and the KFTC expressed improvement opinions on 131 accounts of them, 77% up from the same period of the previous year. Quarterly monitoring was conducted over subordinate legal provisions, including notifications and directives, established by the respective government authorities. Improvement opinions on a total of 25 anti-competitive provisions were presented to the relevant authorities, which include the 'restriction on financial institutions issuing a certificate of capital amount for the information and communication construction business' and 'restrictions on qualified sellers of medicine at special spaces.

### **3.3 *Improvement anti-competitive provisions of local governments' ordinances and rules***

98. It was noted that identical or similar regulations to any anti-competitive provisions in the central government's act, regulation, established rule or notification that had been removed did often reappear as those in ordinances or rules of a local government, rendering the whole regulatory reform less effective. In response, the KFTC has since 2007 made its efforts to address those anti-competitive provisions existing in legislation of local governments.

99. In 2010, the KFTC built a business assistance scheme together with the MOPAS, whereby improvement-related agenda should be submitted to a meeting of deputy mayor or governor for administrative affairs at City and Do governments organized by the MOPAS and KFTC representatives should attend regulatory reform meetings to seek cooperation from the managers responsible for regulatory reform at City and Do governments across the country in relation to the improvement efforts. As a result, the KFTC improved 643 out of 976 anti-competitive provisions of ordinances and rules of local governments as previously agreed upon.. These improvement efforts contributed to more competition in local markets, revitalizing market economy and growing consumer welfare.

100. To this end, in 2009, the KFTC reviewed ordinances and rules of 230 local governments and reached an agreement to improve 847 provisions like the restriction on business by outside towing companies.

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#### 4. Resources of Competition Authorities (annual budget, number of employees)

102. As of late 2010, the number of employees of the KFTC is 493, and annual budget KRW 71.0 billion (about \$66 million). The budget has been on the steady rise since 2006, which is mainly due to the KFTC taking over the operation of the Korea Consumer Agency from the Ministry of Strategy and Finance in 2007.

**Table 6. Number of Employees & Annual Budget (as of Dec. 31 2009)**

	<b>Employees</b>	<b>Budget (KRW hundred million)</b>
2010	493	710
2009	493	729
2008	493	677
2007	504	547
2006	486	387
2005	484	348
2004	469	288
2003	416	264
2002	416	246
2001	416	220

103. As of Aug., 2011, Here is how KFTC employees are organized by the type of work.

**Table 7. Employee organization by type of work (as of Aug. 2011)**

<b>Type of work</b>	<b>Employee</b>	<b>Type of Work</b>	<b>Employee</b>
<b>Senior staff, etc.</b>	16	<b>Total number</b>	97
		<b>(M&amp;A)</b>	8
<b>Administrative work</b>	99	<b>MRFTA (Market dominance abuse &amp; Unfair trade practices)</b>	35
		<b>(Cartel)</b>	37
<b>Committee proceeding &amp; litigation matters</b>	39	<b>Consumer protection</b>	52
<b>Advocacy efforts</b>	17	<b>Subcontract transaction &amp; Franchise business</b>	46

#### 5. Summaries of or references to new reports and studies on competition policy issues

##### 5.1 *Competition Policy Report on Alcoholic Beverage Industry*

104. The KFTC has been publishing Competition Policy Report in series, an annual report that analyzes competition policy on major industries. The report provides in-depth analysis on market structure, competition condition, anticompetitive rules, anticompetitive business practices, consumer complaints and

cases of consumer harm, etc. in a certain industry, and explores implications of such findings on competition law. This report is used as reference documents for establishing sound competition policies in the future. The 2010 report examined competition policies on the alcoholic beverage industry. It was distributed to relevant government agencies and companies and also publicized through the KFTC website.

## Summary

### 1. Need for relaxing entry regulations in alcoholic beverage industry

The alcoholic beverage industry was subject to intensive government regulation throughout the whole process of operation – from the purchasing of raw materials to manufacturing, import and distribution- for the purposes of ensuring stable tax revenues and protecting the public health and juveniles. But currently the environment surrounding the industry is changing. For example, the share of liquor tax of the total tax revenue showed a sharp decrease (from around 10 % in the 1960s to 1.7% in 2009). In fact, deregulation of the alcoholic beverage industry in foreign countries have boosted the industrial competitiveness of those countries, and, as a result, 6 major alcoholic beverage companies (AB InBev, Kirin, SAB Miller, Asahi, Diageo, Carlsberg) listed their names in the top 20 food manufacturers. Therefore, now there is a need to recognize the alcoholic beverage manufacturing as a “business sector” and overhaul regulations of the alcoholic beverage industry to strengthen competitiveness and broaden consumer choices for further development of the industry.

Nevertheless, regulations on the retail distribution need to be maintained or strengthened for protection of the public health and juveniles. In advanced countries like the U.S, Canada and UK, regulation of the industry is focused on retail distribution by imposing a limit on the place or time of selling alcohol products, rather than the manufacturing itself, to prevent alcohol abuse or underage drinking.

### 2. Major issues ① : Entry regulation

Facility standards for alcohol beverage manufacturing need to be relaxed. Strict facility standards currently required for obtaining manufacturing license has made it practically impossible for small alcoholic beverage manufactures to enter the market. In this aspect, there is a need to significantly relax facility requirements, or regulate the minimum production quantity instead without facility standards as in Japan.

In addition, there is a need to relax requirements for wholesale license and the limit on the number of wholesale license issued. Currently, National Tax Service issues wholesale license based on the quota imposed by regions. It was found that the wholesale license quota served as a major barrier to market entry, and thus needed to be removed.

### 3. Major issues ② : Restriction of business activities

Limits on the use of additives in alcoholic beverage should be reduced. Under the current law, ingredients and additives permitted for alcoholic beverage are designated and the use of non-designated ingredients is strictly controlled. Such regulation could inhibit the development of various products that meet consumer needs and enhancement of product quality. To address this problem, there is a need to expand the list of permissible additives in alcoholic beverages.

Moreover, there needs to be an improvement in the price declaration system. Alcoholic beverage manufacturers are required to declare their factory prices and sales prices to the National Tax Service and, in doing so, submit their manufacturing cost statements and review results they received from alcoholic beverage business association on the factory prices. Having a business association assess the adequacy of prices could have the effect of substantially lessening price competition among manufacturers.

Moreover, the system of designating ingredients and production quota of alcoholic beverage also needs improvement. Ingredients and production quota are currently decided in consultation between the government and business. Such allocation system, however, could limit core business activities and competition among companies. Therefore, it was conclude that the allocation system should be abolished in stages.