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ROUNDTABLE ON PROSECUTING CARTELS WITHOUT DIRECT EVIDENCE OF AGREEMENT

Contribution from Korea

-- Session II --

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**Korea's Written Contribution on
'Cartels without Direct Evidence of Agreement'**

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1. Introduction

1. Since the enactment of Monopoly Regulation and Fair Trade Act (MRFTA) in 1980, the KFTC has recognized cartels as ‘the biggest enemy to the market economy’ and worked aggressively to eradicate them.

2. Especially, last year, the KFTC imposed the largest amount in surcharge in history on telecom operators for forming a collusion and pulled off a remarkable achievement such as creating a cartel investigation team and successfully holding ICN Cartel Workshops.

3. However, the stricter the legal enforcement on cartels by the competition authorities get, the harder enterprisers try to conceal evidence of an agreement and conduct cartels in secret. Most of cartel cases dealt by the KFTC were those where an agreement was proven with circumstantial evidence without an explicit written agreement.

4. This contribution is to describe how the KFTC corrects cartels without direct evidence of an agreement through past cartel cases and provisions on cartel in Monopoly Regulation and Fair Trade Act (MRFTA).

2. Provisions on cartels in Monopoly Regulation and Fair Trade Act (MRFTA)

2.1 Definition of Cartel Agreement

5. Para.1 of Article 19 of the MRFTA prohibits the following improper concerted acts.

6. Article 19 Prohibition of Improper Concerted Acts

① No enterpriser shall agree with other enterprisers by contract, agreement, resolution, or any other means to jointly engage in an act, or let others do this kind of activities, falling under any of the following subparagraphs¹, that unfairly restricts competition (hereafter referred to as “unfair collaborative acts”)

7. That is, according to the provision above, an agreement where ① two or more enterprisers (parties to the agreement), ② through contract, agreement, resolution, or any other means (means of an agreement), ③ jointly determine, maintain, or change prices and conduct other activities stipulated in Para.1 of Article 19 of the MRFTA (subject of an agreement) is defined as a cartel and banned by the KFTC.

8. Moreover, such an agreement includes both an explicit agreement such as contracts and agreements and a tacit agreement such as mutual understanding among enterprisers.²

2.2 Circumstantial Evidence of Cartel Agreement

9. However, as cartel regulations are strengthened, enterprisers try to reach an agreement in secret and not to leave any explicit evidence, so it is not an easy task to prove the existence of an agreement. Therefore, when there is no direct evidence of an agreement, the KFTC proves a cartel case based on circumstantial evidence. The followings are examples of such circumstantial evidence listed in ‘Guidelines for Collaborative Acts,’ the KFTC’s internal guidelines.

10. When there is evidence of direct or indirect communications or information exchanges

- < Example 1> When suspected enterprisers' internal documents mention identical price increase, output reduction, etc.
- < Example 2> When suspected enterprisers show identical conduct after having secret meetings
- < Example 3> When suspected enterprisers agree to exchange information on price or output, or have regular meetings to this end.
- < Example 4> When a specific company implements price increase or output reduction after observing its competitors' responses to the company's announcement of such actions.

11. When a conduct is in the interest of actors only when acting jointly, while it would harm the interest of each actor when acting unilaterally

- <Example1> When actors increase their price identically despite oversupply or decline in demand and the absence of factors triggering cost increase.
- < Example 2> When there are simultaneous price increases despite mounting inventory.

12. When parallel behaviours of enterprisers in question cannot be explained by market forces

- <Example 1> When price is identical or remains rigid despite changes in supply & demand, differences among suppliers of raw materials, and geographic distance between suppliers and consumers.
- <Example 2> When price changes are identical even when production costs vary due to differences in raw material costs, production processes, wage increases, and bill discounting rates.
- <Example 3> When large price increases cannot occur in a short period of time without collaborative actions, given market conditions

13. When parallelism in actions among enterprisers is almost impossible without an agreement, considering structure of the industry in question

- <Example1> When prices of each enterpriser are identical, even with significant degrees of product differentiation.
- <Example2> When suppliers show identical actions, even when it is hard for them to do so. For example, in markets with few transactions or those for sophisticated customers.

2.3 *Presumption of Cartel Agreement*

14. The 'Presumption of an Agreement' system is stipulated in Para. 5, Article 19 of the Act, and, pursuant to the system, a cartel agreement can be presumed even with the absence of an explicit agreement if there is i) "conformity of outward conduct" and ii) "competition-restrictiveness."

Article 19 (Prohibition of Unfair Collaborative Acts) ⑤ Where two or more enterprisers are committing any acts listed in the subparagraphs of paragraph (1) that practically restrict competition in a particular business area, they shall be presumed to have committed an unfair collaborative act despite the absence of an explicit agreement to engage in such act.

15. However, to prevent enterprisers from being wrongfully accused, the KFTC presumes a cartel agreement if there is i) “uniformity of outward conduct” and ii) “competition-restrictiveness” and iii) circumstantial evidence listed in 「Guidelines for Collaborative Acts」 supports the suspected cartel case.

3. Cartel Cases without Direct Evidence of Agreement

16. The KFTC has dealt with many cartel cases without direct evidence of an agreement using circumstantial evidence.

17. The following two cases illustrate where the KFTC and courts stand regarding what circumstantial evidence suffices to presume a cartel agreement and in what cases such presumption can be rebutted when there is no direct evidence of an agreement for several parallel price adjustments among enterprisers in oligopoly markets that can't be readily explained by usual market forces.

3.1 Case where a cartel agreement was proven: Toilet Roll

3.1.1 Fact

18. Four toilet roll manufacturers accounted for 85% of the domestic market share. Originally, their producer sale prices were a bit different as a result of competition in the market.

19. In 1995, as price of raw material for toilet rolls declined dramatically, the government issued an administrative guidance to these companies to cut price. In according to this, in 1996, company A and B, the two biggest manufactures in the market, internally determined to set their producer sale prices at 8,261 and 8,448 won respectively after consulting with the government. After that, company C and company D, the third and fourth largest in the market, set their prices at 8,448 won. Then, on 1st, Jun, 1996, the four manufactures implemented the decreased price. (The first price reduction)

20. And nine months later, on 1st, Mar, 1997, company B increased its price to 8,668 won with launch of new products. Then, company C also increased the price of its existing products to 8,668 won and Company D also increased its price to 8,668 won after launching new products in May, 1997. (The first price increase)

21. Then, on 16th, Jul, 1996, Company A increased its price to 9,306 won and on 1st, Aug, 1997, the rest also increased their price to 9,306 won simultaneously. (The second price increase)

22. Four months later, on 28th, Nov, 1997, company A internally determined to set their price at 10,494 won and implemented this price increase on 24th, Dec, 1997. Then, the rest three companies also had their own deliberations on 15th and 16th, Dec, 1997 to raise their price to 10,494 won and implemented this price adjustments on 23rd, Dec, 1997. (The third price increase).

Table1. The four toilet roll manufactures' price increases

	Company A	Company B	Company C	Company D
Market share	27.5%	28.4%	17.3%	14.8%
Original Producer sale price	8,679	8,855	8,679	8,855
First price cut (Internal deliberation) Producer sale price	1996.6.1 (1996.5.14) 8,261	1996.6.1 (1996.5.21) 8,448	1996.6.1 (Product launch) (1996.5.17) 8,448	1996.6.1 (1996.5.21) 8,448
First price increase (Internal deliberation) Producer sale price	1996.1.1 (Product launch) (1996.12.13) 8,668	1997.3.1 (Product launch) (1997.2.13) 8,866	1997.5.1 (Price increase) (1997.4.8) 8,866	1997.5.10 (Product launch) (1997.4.28) 8,866
Second price increase (Internal deliberation) Producer sale price	1997.7.16 (1997.6.16) 9,306	1997.8.1 (1997.7.20) 9,306	1997.8.1 (1997.7.22) 9,306	1997.8.1. (1997.7.28) 9,306
Third price increase (Internal deliberation) Producer sale price	1997.12.24 (1997.11.28) 10,494	1997.12.23 (1997.12.15) 10,494	1997.12.23 (1997.12.16) 10,494	1997.12.23 (1997.12.16) 10,494

(Unit: won)

3.1.2 Resolution of the KFTC³

23. Based on i) “uniformity of outward conduct” and ii) “practical competition-restrictiveness,” iii) “circumstantial evidence”, the KFTC presumed a cartel agreement by company A, B and C in the first price reduction & increase. Furthermore, in the second & third increase, the KFTC presumed an agreement by four manufacturers. In this case, the KFTC imposed surcharges of a total of 1.8 billion won on the four toilet roll manufacturers for the cartel agreement.

24. Here is circumstantial evidence uncovered by the KFTC.

- The four manufactures increased their prices of their toilet rolls to the same price even though each company had different manufacturing costs and compositions of them, management status, marketing strategies, and pricing strategies.
- They increased standard prices to the same level by the same rate simultaneously or around the same time even though there was neither dramatic change in supply and demand in the toilet roll market nor any factor to trigger the identical price increase.
- They had the knowledge of and indirectly exchanged information on their competitors' future policies to increase prices as they notified such policies to retailers & wholesales orally or in a written form in advance.
- Executives of the four companies testified that there were discussions on reigning in excessive price competition in the market during meetings of “the Association for Trade Order in the Toilet Paper market” in Apr, Jun, and Nov, 1997.
- With the launch of the KFTC's investigation into the case in Jan, 1998, the four companies' producer sale price has diverged since Feb, 1998.

3.1.3 *Decision of the Courts*

3.1.3.1 Decision of the High Court

25. Against the resolution of the KFTC, the four manufacturers appealed to the High Court arguing that the parallel pricing of company C and D were little more than unilateral acts pursuing best response to price increases or reductions by company A and B that had price leadership in the market.

26. The High Court ruled that the four parallel price adjustments of those enterprisers were presumed to be the result of a cartel agreement considering that price adjustments were implemented simultaneously or around the same time, that it would have been impossible for Company B, C and D to maintain the same price for 20 months without a collusion in advance, and that manufacturers had discussion on the restraint of excessive price competition. The Court merely pointed out some problems with the KFTC's calculation of the surcharges on these companies.⁴

3.1.3.2 Decision of the Supreme Court

27. The defendants again appealed the decision to the Supreme Court, and it issued a ruling a bit different from decisions by the KFTC and the High Court. That is, in this case, for "the first price increase" and "the first price reduction," the presumption of an agreement is overturned. More specifically speaking, the Supreme Court ruled that presumption of an agreement can be overturned in the following situations.

28. "The presumption of an agreement stipulated in Para. 5 of Article 19 is overturned if a market dominant company with a large market share in oligopoly market structure determines price based on its own judgment and other companies adjust their price according to the leader's new price, then, as long as there are no special situations such as the market leader determining its price having predicted that, considering market conditions and existing practices, other companies would adjust their price accordingly.

29. Pursuant to this, the Court ruled that the "first price reduction" was the result of a unilateral price imitation, not a collusive agreement, because, even though the three companies' prices were identical, market leaders company A and B internally set their prices at 8,261won and 8,448 won respectively after consultations with the government in response to the government's administrative guidance to cut price and, then, company C and D just imitated the two market leaders' price.

30. The Court said that the presumption of an agreement is rebutted in the "first price increase" as well, because company C and D seemed to have increased their prices unilaterally two months after the price hike of market leader company B.

31. However, it found that price adjustments in the "second price increase" and "third increase" were not likely the result of unilateral price imitation as the three companies showed signs of more serious price synchronization than they did in the first price cut & increase, such as having internal deliberations on price hikes around the same time and implementing the new price on the same date⁵.

3.1.4 *Significance of the Case*

32. Regarding several cases of parallel price hikes or reductions among enterprisers without direct evidence of an agreement, the KFTC presumed an agreement based on various economic evidence and communications evidence, and it was successful in proving an agreement in the second and third price hikes. However, the presumption of an agreement was rebutted for the first price cut & increase as the Court found the weaker firms just set their price imitating the market leaders unilaterally.

33. However, there still remains room for discussions about whether it is possible, in oligopoly markets, to clearly distinguish unilateral price imitation from parallel price increases & reductions where market dominant firms first implement price increases or reductions predicting that the rest would follow suit and then the rest actually did. Furthermore, if such distinction is possible, it is still debatable what criteria would be considered valid.

3.2 Case where a cartel agreement was proven: Coffee

3.2.1 Fact

34. Company A and B shared the domestic coffee market. The price of two makers' products was originally a bit different. But, from 1st, Jul, 1997, company B continued increasing its product price to the same product price of company A as shown in the Table 2.

Table2. The two coffee makers' price increase for instant coffee products

(Unit: won)

	Prior to increase	97.6.2	97.7.1	97.8.18	97.10.7	97.12.15	97.12.19	98.1.12
Company A	5,181	5,445		5,720		6,446		7,150
Company B		5,258	5,445		5,720		6,446	7,150

3.2.2 Resolution of the KFTC

35. In this case, there is no direct evidence of an agreement. But, the KFTC presumed an agreement based on i) uniformity of outward conduct, ii) practical competition restrictiveness, and iii) the circumstantial evidence, and it imposed surcharges of about 3 billion won on the concerned enterprisers.

36. Here is circumstantial evidence uncovered by authority.

- The two coffee manufacturers adopted the same price starting from 1st, Jul, 1997 despite differences in the two major price increase-triggering factors - foreign exchange rates and coffee bean prices they applied – and the composition of costs.
- They also exchanged information about its own plan of price increase.
 - On 9th, Jan, 1998, the branch office of company A faxed the plan of price increase on 12th, Jan, 1998 to the branch of company B on 9th, Jan, 1998, and then the latter faxed it to their main office.
 - The two examinees notified scheduled price increase to each other prior to actual price increases. For example, on 12th, Aug, 1997, the very next day of company A's price increase, company B's branch offices notified company B's scheduled price hike to company A's branch offices.
- Their sales and operating profit rates increased significantly after the price hikes in 1997 as compared with the previous year.

3.2.3 *Decision of the Courts*

3.2.3.1 Decision of the High Court

37. Against the resolution of the KFTC, the two coffee manufacturers appealed to the High Court arguing that the parallel price adjustments of company A and B was just the result of company B's imitating the price change of company A, not a collusive agreement between them.

38. The High Court ruled that the four times of parallel pricing of the two companies were presumed to be the result of a price agreement, considering that they adopted the same price despite differences in the costs, that company B failed to present internal documents and other evidences to prove that its price changes were just unilateral actions, and that the two companies frequently exchanged their price information through branch offices. And then, the Court merely pointed out some problems with the KFTC's calculation of surcharges imposed on these two companies.

3.2.3.2 Decision of the Supreme Court

39. However, the Supreme Court issued a ruling that overturned the decisions of the High Court and the KFTC rebutting the presumption of an agreement for the following reasons.

- In oligopoly markets, similar or same price of each company's product alone is not sufficient proof of a cartel agreement. Enterprisers can independently change their prices without an explicit agreement or a tacit one among them as the result of independent decision-making that imitating competitors' prices are in their interest. .
- Company B seems to have imitated Company A's price increase given the peculiar circumstances of the
- domestic coffee market at that time where cheap products was considered as low-grade products and did not sell well.
- Though sales representatives of two companies' branch offices faxed to each other documents containing information on price increases,
 - enterprisers had decided on the price increase at different period, and those documents were written for the purpose of notifying such price changes to their distributors, not exchanging information prior to a price collusion.
 - It is not natural to believe that the enterprisers ordered employees at their branch offices, not employees at the headquarters, to exchange information to form a price collusion.

3.2.4 *Significance of the case*

40. This case is very alike to the case of toiler roll, in that, in oligopoly market, the concerned enterprisers adjusted their prices to the same price several times at the same or similar time. Also, in these two cases, the timing of price adjustments became similar and similar over time, and that, finally, they adjusted price on the same date.

41. However, the conclusions for the two cases are different due to peculiar circumstances of the domestic coffee market where expensive products sell better than cheap ones. In case of toilet roll, the

parallel pricing by enterprisers – the second and third price hikes – were judged collusive action under significant degrees of price synchronization. On the whole, in case of coffee, a series of parallel pricing by manufacturers was judged unilateral price imitation.

42. But, there still remains a question whether circumstantial evidence such as the peculiar circumstances of the coffee market alone is valid and sufficient enough to judge the above series of parallel pricing purely price imitation. Also we can consider the way to equate price information exchange between branch offices with that between the headquarters, as branch offices are also part of a company.

4. Conclusion

43. Cartel is little more than stealing cash from consumers' pockets.

44. Therefore, the current MRFTA stipulates that, regardless of existence of direct evidence of an agreement, cartels can be subject to surcharges of up to 10 % of related sales and that concerned parties can be prosecuted and subject to either three year's prison term or fines of not exceeding 200 million won. Such sanctions are stronger than those against abuse of market dominance or unfair trade activities that impose surcharges of 3% and 2% of related sales respectively.

45. However, cartels are often formed in secret without direct evidence of an agreement, in reality, it is not easy to identify them. Therefore, what matters most in regulating cartels whose direct evidence of an agreement is not found or does not exist is determining what amount and quality of circumstantial evidence is sufficient to prove an agreement. On this, the KFTC has proved an agreement by employing communications between suspected cartel operators, market conditions, market structure, etc.

46. Cartels continue to be forthcoming among enterprisers who want to avoid competition despite strong sanctions against cartels. To better respond to this and prove a cartel agreement successfully, competition law enforcers need to thoroughly analyze evidence of communications and economic evidence to aggressively present circumstantial evidence of an agreement.

NOTES

1.
 1. An act fixing, maintaining, or changing prices;
 2. An act determining terms and conditions for transactions of goods or services, or payment of prices thereof;
 3. An act restricting production, delivery, transportation, or transaction of goods or services;
 4. An act limiting the territory of trade or customers;
 5. An act preventing or restricting the establishment or extension of facilities or the installation of equipment necessary for the production of goods or the rendering of services;
 6. An act restricting the types or specifications of goods or services in producing or transacting goods or services;
 7. An act of jointly carrying out and managing the main parts of a business, or establishing a company, etc. to jointly carry out and manage the main parts of a business; or
 8. Any practice that substantially lessens competition on a particular business area by means, other than those under Subparagraph 1 to 7, of interfering with or restricting the activities or contents of business.

2. The KFTC's 「Guidelines for Improper Concerted Acts

3. The KFTC's resolution 98-63, 1998. 4. 10.

4. The Seoul High Court decision of 1.20. 2000, 98 nu 10822

5. The Korean Supreme Court decision of 5.28.2002, 2000 du 1386