
21 November 2017

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
COMPETITION COMMITTEE**

Global Forum on Competition

JUDICIAL PERSPECTIVES ON COMPETITION LAW

Contribution from Korea

-- Session II --

7-8 December 2017

This contribution is submitted by Korea under Session II of the Global Forum on Competition to be held on 7-8 December 2017.

Please contact Ms. Lynn Robertson if you have any questions regarding this document [phone number: +33 1 45 24 18 77 -- E-mail address: lynn.robertson@oecd.org].

JT03423346

Judicial Perspectives on Competition Law

-- Korea --

1. Intro

1. The history of Korean competition law traces back to 1980 when the *Monopoly Regulation and Fair Trade Act* (hereinafter the “MRFTA”) was enacted. In spite of its relatively brief history, the Korea Fair Trade Commission (hereinafter the “KFTC”), which is the competition authority in Korea, has been selected by GCR (Global Competition Review), the global competition journal, as an elite enforcer in 2016, which illustrates the fact that Korea’s competition enforcement has greatly made a leap forward both quantitatively and qualitatively.

2. Such development of Korea’s competition enforcement is largely attributed to the litigation, i.e. the fierce legal battle between the antitrust agency and companies. In particular, entering into the 21st century, the number of litigations regarding competition law has skyrocketed. For 15 years between 1981 and 1996, as little as 42 lawsuits have been filed, whereas more than 40 cases of lawsuits have been filed annually since 1999 and more than whopping 90 cases have been filed annually since 2011 (as much as 160 lawsuits in 2014).

3. The distinguished feature of competition enforcement in Korea is that it is mostly carried out based on the disposition of the KFTC, namely the administrative measures. The administration tends to lead competition enforcement in that the relevant company appeals dissatisfaction after the competition authority imposes measures.

4. Nevertheless, a variety of legal discussions related to competition law are taking place in harmony with enforcement of the KFTC and judicial rulings therefrom. Just like other administrative sectors, the judiciary conducts ex post review whether the disposition by the competition authority is made in a fair manner, so as to play an important role that the authority’s measures are not arbitrary and excessive.

5. Thus, the competition authority and the judiciary are in a cooperative relationship with good will, which entails a little bit of tension at the same time.

6. In regards to the questions raised by the OECD, a considerable portion should be answered by the court. Nonetheless, litigation status of Korean competition law will be briefly illustrated below, and also answers to the questions asked by the Secretariat will be stated.

2. 2. Statistics on competition law litigations

2.1. Regulations and systems regarding litigation

7. As explained above, competition law in Korea is mostly enforced based on the measures taken by the KFTC, which is a central administrative agency under the Prime Minister’s Office. When the violation is recognized, the KFTC can impose measures necessary for the correction of the wrongdoing, impose surcharges or refer to the

prosecution. An enterprise that is dissatisfied with the KFTC's disposition can file an appeal to the KFTC or bring an administrative lawsuit with the court.

8. The article 55 of the MRFTA stipulates that the Seoul High Court has an exclusive jurisdiction over appeal of dissatisfaction against the measures imposed by the KFTC. The Seoul High Court has three courts in place that exclusively handle the competition cases (court 2, 6, and 7). Due to the characteristic of Korea's judicial system, where the Supreme Court only takes charge of trial on the law, questions of fact are reviewed only by the High Court, and questions of law are reviewed both by the High Court and the Supreme Court.

9. While general administrative litigations are facilitated by three-tiered system of an administrative court (district court), High Court and Supreme Court, the litigations related to competition law are operated by the two-tiered system of the High Court and the Supreme Court. The operation of such two-tiered system seems to be the result of the KFTC's expertise and its distinct feature as a quasi-judiciary agency. To be more specific, it is assumed that the reasons for adopting the two-tiered system are as below. First, whereas other administrative agencies adopt a single-judge system, the KFTC operates a committee system.¹ Thus, the system harmoniously ensures professionalism and fairness. Second, the KFTC acknowledges the party's procedural right to participate, which follows the procedure of the first instance of the court.² Third, the two-tiered system promptly confirms the legal relationship of the parties, etc., by streamlining the general court hierarchy system.³

10. Moreover, when consumers who suffered damages object to the decision by the KFTC that cleared suspicion, they cannot file administrative suits, but have to submit Constitutional petition with the Constitutional Court. Also, the companies or consumers who suffered harm due to the violation of the MRFTA can claim damages against the violators.⁴

2.2. Litigation statistics and effects

11. Between 2001 and 2016, of 9,254 KFTC administrative measures, lawsuits have been filed against 824 cases (8.9%). In particular, since 2010, lawsuits have been filed against from more than 10% to more than 20% of KFTC's administrative measures.

¹ The KFTC consists of 9 commissioners including one chairperson and one vice-chairperson. Committees are categorized into a full-committee comprised of the whole members of the commissioners, and sub-committee comprised of 3 commissioners.

² Ruling of Seoul High Court, 2003ru156 2. 4. 2004.

³ With reference to page 455 of Monopoly Regulation Act written by Hoyoung Lee and published by Hongmunsa in 2013.

⁴ The article 56 of the MRFTA stipulates that a violator shall be liable for compensation of damage to the person who has suffered such damage. Also, the article 57 stipulates that where it is recognized that damage is caused by the violation, but it is extremely difficult to verify the fact that is necessary to determine the amount of such damage in light of the character of the fact, the court may recognize a reasonable amount of damage based on the gist of entire arguments and the outcome of investigating evidence.

12. With regard to the 605 cases of litigations that are confirmed during the same period, 406 cases (67.1%) were fully upheld, 106 cases (17.5%) were partially supported, and 93 cases (15.4%) were rejected by the court. The winning rate does not sharply fluctuate every year and ranges from 60% to 70%. Compared to the total winning rate of all the ministries combined (47.3%, as of 2015), the KFTC's winning rate is considerably high.

13. The Court conducts an ex post review on the measures taken by the KFTC, and when it decides it is unlawful, it can vacate and remand the relevant measures. Such decision by the Court does not only annul or alter KFTC's disposition, but also can bring about changes to the system. If the Court makes a decision on the matter that has no precedents, the KFTC can enforce reflecting the decision, and when necessary, amends laws, public notifications or guidelines. A considerable portion of a number of public notifications or guidelines that the KFTC is currently operating such as *Public notification for the imposition of penalty surcharges*, *Guidelines for review of the abuse of market dominant position*, *Guidelines for Cartel Review* and *Guidelines for Review of Unfair Trade Practices* reflect the decisions by the Court.

2.3. Major ruling cases

2.3.1. POSCO's abuse of market dominance case (Supreme Court sentencing 11.22.2007, ruling 2003du8626)

14. This is well known as a landmark Supreme Court case that crystallized the elements of the offence of a dominance abuse. POSCO is the sole domestic supplier of hot rolled steel coils, which is a necessary raw material for cold steel plates. It has refused to provide the hot coils to its rival in the cold steel plates market, Hyundai Hysco. Against this backdrop, there has been a dispute with regard to whether the conduct perpetrated by POSCO constitutes unfair refusal to deal in the context of unreasonable interference with the business activities of other enterprises pursuant to the article 3-2(1) of the MRFTA. The KFTC and the Seoul High Court regarded such conduct by POSCO in violation of the MRFTA. However, the Supreme Court reversed and remanded the Seoul High Court's ruling. The disparity of opinions between the two resulted from how the two construed the existence of "unfairness" that is enumerated in the article 3 (2) of the MRFTA. The Seoul High Court decided that POSCO, which is a market dominating firm, perpetrated the conduct intentionally to interfere with the business activities of the rival enterprise in the cold steel plates market and maintain its dominant position. This is not only against the purpose of the competition law, but also causing obstacles for other enterprises to the extent that they cannot fully function as competitors. For example, competitors have to bear additional burden such as shipping cost, tariff, unloading charges, etc., due to the import of hot rolled steel coils. Also, they have instability of transactions such as difficulty in securing the volume, suffer decreased in productivity due to mixed usage of raw materials, have difficulty in promptly adapting to the market changes due to excessive transport period, and have exchange risks, etc. As a result, the KFTC decided that this can harm competition.⁵

⁵ Seoul High Court sentencing 8.27.2002, ruling 2001nu5370.

15. On the other hand, the Supreme Court interpreted the elements of “unfairness” prescribed in the article 3 (2) of the MRFTA rather more strictly. In other words, the Supreme Court ruled that unfairness of a refusal to deal cannot be acknowledged only based on business or economic disadvantage, either in possibility or in actuality, faced by competitors arising from the refusal by a market dominant enterprise with undue intent and purpose against competitors. Out of such undue practices, unfairness can be acknowledged when there is a clear intent or purpose either to maintain or consolidate monopoly, namely to artificially manipulate the market order by limiting free competition in the market, and when objective concerns exist over anticompetitive effects of the refusal. (Finally, the Supreme Court decided that there is lack of proof that competition restraining effects such as production decrease or price increase were likely to occur due to a transaction refusal act by POSCO. Therefore, the KFTC decided that the conduct could not be considered unfair refusal to deal just based on the fact that POSCO’s competitors suffered economic disadvantage.

16. The Court continues to make decisions for the elements of abuse of market dominance based on this ruling, thus, assuming that the POSCO case will remain as one of the very important cases in the history of Korean competition law.

2.3.2. Cartel case of 16 life insurance companies (Supreme Court sentencing 7.24.2014, ruling 2013du16951)

17. This Supreme Court decision is noteworthy because it clarifies the strict criteria for determining whether exchanging price information to fix prices is a “concerted practice” and falls under the category of a cartel that is prohibited by the MRFTA.

18. The KFTC regarded the conduct for colluding to set interest rates after exchanging information on expected interest rates between the businesses as evidence of cartel. However, the decision was reversed at both the Seoul High Court and the Supreme Court. In particular, the Court held that even though exchanging information on major competitive elements such as price, etc., can serve as substantial evidence of a cartel since it can be a means of facilitating a cartel by eradicating uncertainty on decision-making such as pricing, it cannot be confirmed that exchange of information constitutes an anti-competitive agreement. Also, the Supreme Court ruled that information exchange should be evaluated considering the overall circumstances of the case. These include the structure and characteristic of the relevant market, contents of the exchanged information, the agent, timing and method of exchange, purpose and intent of the exchange, degree of parallelism that followed the exchange, each company’s actual decision-making, in addition to other factors affect the market.

19. This decision by the Supreme Court is acknowledged as the ruling that greatly influenced the enforcement against cartels by the KFTC. Since the Court held that the law requires not just an exchange of price information but additional evidence of an actual agreement, the KFTC now conducts all the more in-depth analysis on the market situation and patterns of exchange from the beginning of the investigation. Just like POSCO case, the Court continues to make decisions based on the same criteria for the 16 insurance companies’ case, which makes this ruling as a precedent for information exchange and cartel.

3. Remarks to the Secretariat's questions

3.1. Evidence in competition law case

20. A competition law case follows the process of administrative litigation, and basically standards for admissibility of evidence are determined based on Civil Procedure Act.

21. In other words, the Court decides whether the insistence of facts is true based on free evaluation of evidence by considering the gist of the defense as a whole and the outcome of evidence investigation.⁶

22. Generally, the written resolution published by the KFTC is a primary means of understanding the factual relations, which serves as an important evidence. Although it may vary by the types of violations, internal documents of a company or testimony of its staff, or the expert opinion letter or deposition can be used as convincing evidence. Also, economic analysis reports can be substantial evidence for cases where whether or not there is anti-competitiveness is important such as abuse of market dominance or mergers.

3.2. Interaction between the Court and competition authority

23. Korean courts and the KFTC are within the judiciary and executive branch respectively. Therefore, they do not hold regular meetings or run businesses. However, both parties are in cooperative relations in terms of competition law development, and the KFTC has been enforcing in accordance with the gist of the court's decision.

24. Nevertheless, the two parties have to make different approaches given the purpose of their existence. The competition authority proactively and actively enforces law against violations of new types or in new sectors in terms of enhancing consumer welfare, enabling a leading enforcement in new sectors or after the enactment. On the other hand, the Court tends to rather strictly decide the legitimacy of the disposition in order to promote judicial order. This is a reasonable relationship between the executive branch and judiciary following the principle of check and balance, which is also manifested in the competition law sector.

25. The KFTC and the Court also promote mutual understanding through exchanging staff.

26. For the past several years, staff of the KFTC has been regularly dispatched to the Supreme Court, proposing opinions related to the competition cases. Also, there was a case where the Court had dispatched a judge to the KFTC as a legal advisor, providing legal advice in the past. Besides, both parties interact and exchange opinions through seminars, etc.

⁶ Article 202 of the Civil Procedure Act.

4. Conclusion

27. The KFTC and Courts are playing their given roles accordingly. In Korea where civil lawsuits are not actively filed, active enforcement by the KFTC will provide fertile ground for competition law to further develop. Moreover, ex post control by the Courts can bring about legal development as well as enabling a more sophisticated enforcement of law.

28. The KFTC will continue to cooperate with the Courts for the development of the KFTC and Korean competition law. The KFTC will also endeavor for a more refined enforcement through case analysis in order for the KFTC disposition to be acknowledged of its legitimacy.