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REMEDIES AND COMMITMENTS IN ABUSE CASES – Contribution from Korea

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Remedies and Commitments in Abuse Cases

- Contribution from Korea –

1. Introduction

1. When a market dominant business has been detected abusing its power, it is necessary to stop the violation and prevent a recurrence. The Korea Fair Trade Commission (hereinafter referred to as the “KFTC”) rectifies the violations to restore the competitive order of the market in two ways: remedies and commitments.

2. In this report, we first look into remedies. The report explains (1) procedures and the status of remedies, (2) principles to follow when imposing remedies, (3) whether structural remedies are possible as remedies in abuse cases, and (4) recent cases.

3. Next, we look at Korea’s system for enforcing commitment decisions. This report introduces (1) the requirements for applying for commitments and the content to include in the application, (2) the decision to accept or reject proposed commitments, (3) commitment procedures, (4) the possibility of a lawsuit over commitment decision, and (5) the use of the commitment decision system.

2. Remedies

2.1. Remedy procedures and status

4. The KFTC conducts reviews under the Monopoly Regulation and Fair Trade Act (hereinafter referred to as the “MRFTA”) in a quasi-judicial procedure, but the legal nature of a remedy imposed by a commitment is an administrative disposition.¹ The KFTC’s review begins by commencing an investigation in the KFTC’s Secretariat through a complaint or ex-officio. Then, the examiners in the Secretariat conduct fact checks, economic analyses, and legal reviews. If it is judged to be a violation of the law, the examiners submit an examination report containing their opinions on what remedy is desirable to KFTC Commissioners. This process is called agenda submission. When proposing the agenda, the examination report is also sent to the examinee and the examinee sends the opinion of the report in the form of a letter to the KFTC.

5. The KFTC deliberates on the agenda at a plenary meeting or a small meeting, with the examinee confronting the examiner and both having the chance to speak, and the Commissioners go through the process of hearing the case from the examiner, the examinee, and other stakeholders, including competitors. The Commissioners make a final decision after discussion and deliberation based on the examination report, the opinions of the examinee, and the hearing in the tribunal. When the KFTC determines that there is a violation, it decides whether to file a complaint with the prosecution to impose remedies, fines, and criminal sanctions.

¹ Accordingly, an appeal against the KFTC’s remedies has characteristics of administrative litigation. However, under the MRFTA, those dissatisfied with the KFTC’s disposition can file an appeal against the high court, which means that the KFTC’s decision is similar to the decision at first instance.

6. Often, fines are imposed along with remedies in abuse cases. Over the past ten years since 2012, the KFTC has imposed remedies for a total of 18 violations. Among them, only remedies were imposed in three cases, both remedies and fines were imposed in 12 cases, and both remedies and fines were imposed along with accusations in the remaining three cases. And a total of 15 lawsuits were filed by the examinees, and the KFTC won four cases, secured a partial victory in one case, and lost three cases. Currently, there are hearings taking place in the court for seven cases.

Table 1. Remedies since 2012

Year	Examinee	High Court	Supreme Court
2012	Zespri Group	Waiver of lawsuit	-
2013	GC Biopharma	Win	Waiver of appeal
2015	KT&G	Waiver of lawsuit	-
	Kia	Waiver of lawsuit	-
	LG U+	Lose	Win
	KT	Lose	Win
	Lotte Shopping	Lose	Lose
	CJ CGV, CJ E&M	Lose	Lose
	2017	Zoetis Korea	Win
2017	Valvet	Lose	Lose
	Qualcomm	Partial victory	Partial victory
2018	Siemens	Partial victory	On going
2019	Korean Reinsurance Company	Partial victory	On going
	KOREAVACCINE	On going	-
2020	Gaztransport & Technigaz SA	On going	-
2021	Google	On going	-
	Naver (shopping)	On going	-
	Naver (real estate)	On going	-

7. In 2015, the KFTC imposed remedies on Lotte Shopping and CJ CGV, but the Korean Supreme Court ruled against the KFTC in 2017. Both cases involve preferential treatment. The two theater companies, CJ CGV and Lotte Shopping discriminatorily increased the number of screens, extended the screening period, and promoted the movies that were distributed by themselves or their own affiliates. In response, the KFTC issued a ban, determining that these companies' films were treated significantly more favorably than those of other distributors. However, the High Court ruled against the KFTC, citing that it is difficult to see that these businesses engaged in significant discriminatory acts without reasonable grounds and that these are based on high-level management decisions for the success and profits of the movies. And the Supreme Court affirmed the ruling of the High Court, revoking the KFTC's sanctions.

In 2015, the KFTC imposed remedies on KT and LG U+ and the Supreme Court ruled in favor of the KFTC in 2021. Both cases involve a margin squeeze. The KFTC issued a ban on the telecommunications companies and ordered them to separate accounting and report their transactions, judging that they impeded market competition of the enterprise

messaging service market and excluded competitors by selling enterprise messaging services at a price lower than the fee for wireless networks that must be used to produce enterprise messaging services. However, the Seoul High Court annulled the disposition, reasoning that the businesses enhanced consumer welfare by facilitating price competition and that there was no possibility of profit withdrawal. But the Supreme Court reversed the decision of the lower court by reasoning that if the wholesale price is higher than the retail price resulting from the margin squeeze, the conduct itself can be assumed to have an anti-competitive intent and purpose.

2.2. Principle of remedies

8. The MRFTA does not prescribe principles for remedies. But the Commission established the "KFTC's Guidelines for Imposing Remedies" in order to enhance the effectiveness and ensure the consistency of remedies and the guidelines stipulate the principles for imposing remedies.

9. The guidelines stipulate that the purpose of the remedy is to stop the violation of the law, prevent and deter the recurrence of similar acts, restore the distorted competitive order, and promote competition. To achieve this purpose, there are five specific principles to follow when imposing a remedy: the principles of effectiveness (effectively correct the violation), relevance (relate to the determination of the illegality of the violation), clarity and concreteness (clearly and concretely state the remedy and what is to be reviewed), feasibility (practically and legally possible to be implemented), and proportionality (proportional to the violation and its degree).

2.3. Possibility of structural remedies in abuse cases

10. The "KFTC's Guidelines for Imposing Remedies" divide remedies into acts of commission and omission. And a stock disposal order is one of the acts of commission, allowing structural remedies possible. However, under the MRFTA, there are conflicting views of the interpretation of the law as to whether structural remedies can be imposed in abuse cases. The MRFTA allows stock disposal or business transfer orders as an explicit remedy for business mergers. But for abuse cases, the Act allows "price reduction, prohibition of the conduct, announcement of the remedy, and other necessary measures." Here, there are conflicting opinions as to whether "other necessary measures" should be interpreted as including structural remedies.

11. According to one view, if structural remedies such as separation of business units are necessary to correct the abuse, structural remedies can be imposed as they are necessary measures according to the legal text. By contrast, other views interpret "other necessary measures" as other remedies similar to the behavioral remedies exemplified above and see that structural remedies cannot be imposed unless written in law as they are more disadvantageous than behavioral remedies.

12. So far, the KFTC has not imposed structural remedies in abuse cases. But it has not been determined whether the reason is that structural remedies are not allowed under the law, not to mention that there are no related precedents yet.

2.4. Recent case regarding structural remedies

In 2021, self-preferencing of Naver Shopping was deliberated and resolved by the KFTC, and it was the first case in which a question—whether structural remedies should be imposed—was discussed during the deliberation and resolution. In this case, Naver—which has market dominance in comparison shopping service market—preferred its own

open market platform, Naver Shopping, to competing platforms, which is similar to EU's Google Shopping case. The KFTC imposed remedies and a fine of KRW 26.6 billion on Naver. Naver appealed to a higher court, and the process is currently underway.

13. The lead case handler submitted the opinion to the Committee (composed of Chair and Commissioners) that structural remedies are needed for the first time, but the Committee did not accept it. The case handler argued that the Naver's comparison shopping service and open market service—which one department has managed—should be independently run by two different departments based on commercial reasonableness—e.g., no information exchange between the two departments. However, the Committee concluded behavioral remedies that prohibit self-preferencing were enough to prevent recidivism and issued an injunction in accordance with the principle of proportionality—i.e., the damage should be minimized.

14. Structural remedies are available for the KFTC by principle, but they require more careful consideration as they can bring about unexpected impact on businesses and markets. The general consensus is that structural remedies are only appropriate when behavioral remedies are not enough to ensure effect and implementation of remedies, or behavioral remedies place even bigger burden on businesses than structural ones.

15. In the digital economy, however, leveraging has become an issue. There is a cycle in which a dominant platform leverages its market dominance in one market into another adjacent market, and the leveraged dominance further strengthens the platform's position. Such cycle makes it increasingly difficult for new competitors that can challenge incumbents to enter the market, and it also undermines the incentive for innovation. In addition, due to market changes driven by digital platforms, a question is being raised over the effectiveness and limitations of traditional approaches to define a relevant market as well as behavioral remedies. Against this backdrop, the KFTC thinks deeply about new measures and approaches such as structural remedies, which are unprecedented.

3. Commitments

16. The KFTC usually imposes remedies and, if necessary, fines for a violation, but it may accept commitments requested by examinees.

3.1. Application for commitments

17. A business entity or trade association under investigation or deliberation of the KFTC may apply for commitments. The MRFTA does not prescribe certain time limit for submitting commitments, and an examinee can file an application at any point during the investigation or deliberation.

18. When seeking commitments, an examinee is required to submit a written application to the KFTC that states facts specifying its violation, measures to remedy the wrongful situation and measures to compensate for the harm done by the violation. Along with this, the KFTC also requires an applicant to submit any information to ensure effectiveness of the measures, according to the rules on procedural steps of commitments. The submissions, written in clear language, are supposed to include various details: evidence that the measures can be implemented by the applicant for itself, or if not, the applicant can be assisted by a third party; evidence that the measures can immediately and effectively restore or strengthen competition; details regarding compensation for damage; implementation plans.

3.2. Decision to accept or reject proposed commitments

19. The MRFTA prescribes two requirements for proposed commitments; first, commitments are proportionate to remedies and sanctions that would otherwise be imposed by the KFTC in case of competition law violations; second, commitments are appropriate to restore fair and free competition and protect consumers and other businesses. When meeting the requirements, the KFTC may accept the proposed commitments.

20. On the other hand, the KFTC does not accept commitments in certain cases where the relevant conduct constitutes illegal cartel or meets the requirements for filing a criminal charge.² In other words, proposed commitments are unlikely to be accepted in a case where the severity of the violation, the amount of illegal gains and the damage are severe and substantial.

3.3. Commitment procedures

21. When the KFTC decides to accept commitments, the lead case handler submits a provisional resolution—drafted in consultation with the applicant—to Chairperson within 30 days, and the resolution is also shared with the applicant. The resolution should state information about the applicant, overview of the case, structure and current state of relevant market, law provisions applicable when the conduct is deemed illegal and details and implement plans of measures to remedy the conduct.

22. After deciding to resolve a case with commitments, the KFTC shall provide the interested parties an opportunity to present opinions either by giving written notice or by posting them on the Official Gazettee or its website during 30 to 60 days. By reviewing collected opinions, the Commission adopts a final draft.

3.4. Possibility of lawsuit over commitment decision

23. The decision to commence the commitment procedures is internally made by the KFTC, an administrative agency. Also, it is unlikely that the rejection of proposed commitments affects the applicant's legal status.³ If there is a third party whose legal interests are affected by the commitment, the third party may pursue a lawsuit.⁴

24. However, regarding a suit for cancellation of commitments, there is no precedent or previous case that can provide guidance on the scope of legal interests and criteria for judgement.

² The MRFTA states that law violation may be subject to criminal sanctions of not more than three years of imprisonment or not more than KRW 200 billion fine, and only public officials may file a criminal charge with the Prosecution. Before bringing a criminal charge, the KFTC considers various aspects of the illegal conduct according to a rating scale—the severity of the conduct and the damage, the amount of illegal gains, relevant market share and sales and the scope of the affected area. Not only a business entity but also its executive officers and employees may face a criminal charge. When the KFTC brings a criminal charge against an individual, various factors are taken into account—such as whether the individual led the decision making; whether the individual was aware of the violation, the degree and length of their involvement.

³ The Study on the legal character of consent order.” Seoul Law Review 22, no.3 (February 2015): 398

⁴ The study on the normative legitimacy and effectiveness of commitments,” Korea Fair Trade Mediation Agency

3.5. Current status of commitment system

25. The system was first introduced in 2011 along with the signing of the KOR-US FTA. The KFTC's decisions of accepting or rejecting proposed commitments up to date are illustrated in the following table. Out of total 14 applications since 2011, the number of acceptance and rejection is seven and six respectively, and the Commission's review is underway for one application.

Table 2. Use of Commitment in MRFTA Violation Case

Year of Application	Applicant	Result	Illegal Conduct
2014	Naver, Naver Business Platform, Daum Communications	Accepted	Abuse of market dominant position, Unfair trade practice
	SAP Korea Ltd.	Accepted	Unfair trade practice
	Microsoft Korea	Accepted	Infringement of merger restriction
	Lotte Shopping	Rejected	Abuse of market dominant position
	CJ CGV, CJ E&M	Rejected	Abuse of market dominant position
2016	Qualcomm	Rejected	Abuse of market dominant position
2017	Hyundai Mobis	Rejected	Unfair trade practice
2018	LS Corp.	Rejected	Concentration of economic power
2019	GOLFZON	Rejected	Unfair trade practice
2020	Namyang Dairy Products	Accepted	Unfair trade practice
	Apple Korea	Accepted	Unfair trade practice
2021	Samsung Group	Accepted	Concentration of economic power
2022	Starfield Hanam	Accepted	Unfair trade practice
	Broadcom Corporation	Review Underway	Unfair trade practice

26. Among total four cases involving abuse of market dominant position, one was accepted and three were rejected. For the last five years, there was no proposed commitments regarding abuse of market dominant position.

4. Conclusion

27. Compared to remedies imposed by the Commission, the commitment system has merits in a sense that it enables facilitated resolution and direct compensation for those who suffered. Particularly, remedies for an abuse of market dominance often goes through long legal proceedings. Viable commitments can help restore market competition in a faster manner.

28. Commitments have demerits as well. There have been continuously raised concerns that commitments may blur the responsibility of a business when it turns out the commitments' effectiveness or the compliance level is low. In addition, unlike the remedies that the KFTC imposed on a business, it takes longer period of time to design commitments, as consultation and agreement among stakeholders are required. They also require more

attention than remedies, usually injunctions, in terms of implementation management. For these reasons, the MRFTA was revised in 2020 to strengthen the monitoring of commitment implementation and compliance by putting the Korea Fair Trade Mediation Agency in charge of the monitoring.

29. Remedies should be designed considering effectiveness, relevance, clarity, feasibility and proportionality. Commitments should be proportionate to remedies and sanctions and appropriate to protect victims. However, when the severity of the violation, the amount of illegal gains and the damage are severe and substantial, the KFTC shall resolve the case through administrative measures such as remedies and penalties in principle. As remedies and commitments have their own merits and demerits, balanced approach between the two is essential.