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DAF/COMP/WD(2016)26

Organisation de Coopération et de Développement Économiques
Organisation for Economic Co-operation and Development

08-Jun-2016

English - Or. English

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

Cancels & replaces the same document of 23 May 2016

COMMITMENT DECISIONS IN ANTITRUST CASES

-- Note by Korea --

15-17 June 2016

This document reproduces a written contribution from Korea submitted for Item 9 of the 125th meeting of the OECD Competition Committee on 15-17 June 2016.

*More documents related to this discussion can be found at
www.oecd.org/daf/competition/commitment-decisions-in-antitrust-cases.htm*

JT03397678

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KOREA*

1. Introduction

1. A consent order refers to an agreement or settlement that promptly closes a case without confirming the illegality of the conduct if an enterpriser itself that is being investigated or deliberated by a competition authority for the alleged violation of law proposes remedies such as consumer damage relief or recovery, and if the Korea Fair Trade Commission (herein after referred to as the KFTC) recognizes the validity of its remedy proposal.

2. Even though a consent order is being called as a different name¹ in each country, it has been introduced in most major competition authorities and taken root as a global standard because it can quickly and effectively recover competition order and practically relieve consumers from damage.

3. Korea has reviewed introducing the consent order since 2005, and pre-announced the revision of the *Monopoly Regulation and Fair Trade Act* (Herein after referred to as the Act) for introducing a consent order in May 2007 through consultations with relevant ministries and a series of hearings. There was an on-going discussion at the National Assembly, and a consent order started to take effect after the revision had passed the National Assembly in the late 2011. Later in 2014, the consent order has been implemented to the Act on Fair Labeling and Advertising.

2. Contents and Procedure of consent order in Korea

2.1 *The significance of introducing a consent order to Korea's Fair Trade Act system*

4. Traditionally, measures against the violation of fair trade act were mainly taken in three ways; administrative sanctions such as remedies and penalty surcharges, civil remedy through a damage suit, and criminal sanctions. Among them, administrative sanctions are the main means of enforcing the law, and the utilization of civil remedy is relatively rare, and criminal punishment is complementarily used. However, there is a limit when it comes to recovering competition order and practically relieving consumers from damage if only imposing remedies and penalty surcharges, which are the traditional way of enforcing the law. In this situation, the KFTC was able to resolve the violation of the Fair Trade Act in a more flexible and fittingly manner by implementing a consent order as a new means of law enforcement.

2.2 *The subject of a consent order*

5. A consent order in Korea has been institutionalized to be operated in stricter conditions and scope than that of the other countries. First of all, a consent order is applied to the conduct that is allegedly in violation of the Fair Trade Act, but the cartels of the Article 19 and obvious and serious degree of violation cases are exempted.²

* Consent Order of Korea. Drafted by Dae Young Kim, Deputy Director.

¹ It is called consent order in the US, commitment decision in the EU, verpflichtungsansagen in Germany, engagement in France, and undertakings in Australia.

² The Act Article 51-2 (1)

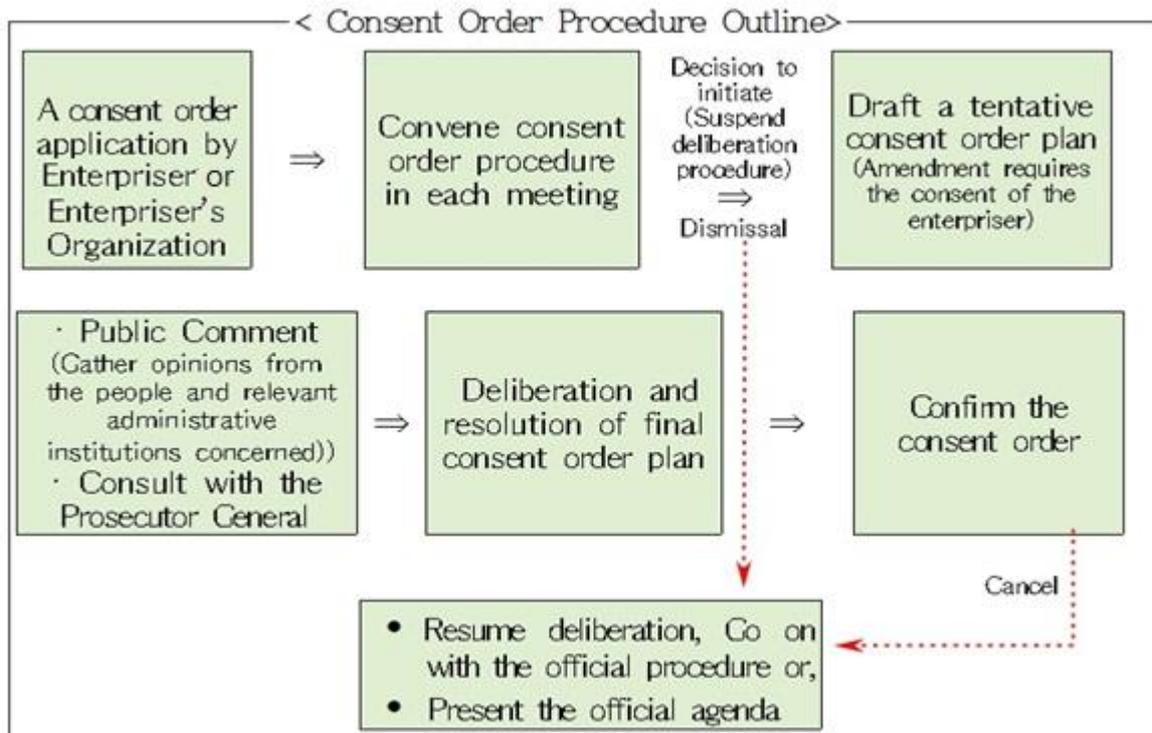
2.3 Consent order procedure

2.3.1 Outline of consent order procedure

6. A brief outline of consent order procedure is as follows. Firstly, when an enterpriser or enterpriser’s organization (herein after referred to as an applicant) applies for a consent order, the KFTC determines whether to initiate a consent order after reviewing various factors such as the validity of the case to be treated with a consent order, and the possibility of an abuse of a consent order with the purpose of delaying the procedure.

7. When an applicant requests for a consent order, a new procedure is then initiated for a consent order, and a deliberation procedure of the original case is suspended. If the remedy proposal is not valid or negotiation with the respondent fails or the respondent abuses a consent order with the purpose of delaying the procedure, the ceased deliberation procedure of the original case resumes.

8. The examiner drafts a consent order examination report with the remedy proposal after consulting with the applicant, and brings it in to the committee. The committee deliberates the report and decides a tentative consent order plan. Finally, the examiner confirms the final consent order plan after collecting opinions from the people and relevant administrative institutions concerned, and consulting with the Prosecutor General.



2.3.2 Commencement of the consent order procedure and deliberation procedure

9. Pursuant to the Act Article 51-2 (2), when an applicant files a consent order application to the examiner with legal requirements, the KFTC decides whether to initiate the consent order procedure. Also, the KFTC needs to take into consideration if the issue of the applicant can be resolved by a consent order such as whether the said remedy measures make a balance with the expected remedy and other sanctions when the conduct is determined to be a violation of law, and whether the remedy measures are appropriate for improving competition order or relieving consumers from damage.

10. When there is an application for the consent order before the investigation, the KFTC decides whether to convene the procedure after the investigation is over.

11. When the consent order procedure is initiated, the examiner drafts and submits a consent order examination report, and the committee decides a tentative consent order plan or resumes the ceased deliberation procedure of the original case after considering the necessity of the consent order and validity of remedy measures.

2.3.3 *Process for gathering opinions and deciding the consent order*

12. Once a tentative consent order plan is fixed, pursuant to the Act Article 51-3 (2), the KFTC needs to hear opinions from interested persons, etc. for more than 30 days and not more than 60 days. Such *Public Comment* is generally included in the consent order of other countries such as the US and the EU. However, Korea manages a stricter opinion gathering procedure in accordance with the Act Article 51 (3) 3, making the KFTC hear opinions from the relevant administrative institutions. Furthermore, the right of the third parties is guaranteed by allowing the interested persons such as complainants to state their opinions in an open deliberation process.

13. The unique consent order procedure that only exists in Korea is that the KFTC is obligated to consult with the Prosecution. This provision was added following the consultation with the Ministry of Justice in the process of introducing a consent order.

14. The committee decides a final consent order after considering the collected opinions and consultation with the Prosecutor General, drafts a consent order report and notifies it to the applicant and interested persons.

2.3.4 *Cancellation of a consent order*

15. The KFTC may cancel a consent order in any of the following cases pursuant to the Act Article 51-4: Where remedy measures become inappropriate due to significant changes, etc. of facts, such as market conditions, etc. which are the basis of the consent order; where the consent order is made based on an incomplete or inaccurate information provided by an applicant; where an applicant fails to implement the consent order without any justifiable ground. The cancellation procedure of the consent order is convened with the application or by authority, and the suspended original deliberation procedure is resumed once the consent order is cancelled.

3. Effects of a consent order

16. A consent order by the KFTC does not necessarily mean that the KFTC admits the conduct is illegal, and no one can insist that the conduct is in violation of the *Fair Trade Act* just based on the fact that a consent order is received.

17. Once a consent order is decided finally, the consent order is considered one of the administrative measures of the KFTC, and accordingly, the enterpriser has an obligation to follow the consent order. Also, the examiner has to check whether the enterpriser implements the consent order. In the case where the consent order is not executed without justifiable reasons, the consent order shall be cancelled or an enforcement fine that does not exceed 2 million won per day will be levied.

4. Expected effects

18. In most traditional law enforcement cases, remedies and penalty surcharges were imposed after going through a very complicated procedure of case handling and checking the violation of law. Therefore, for a person to be relieved from damage by the conduct, he/she had to go through a separate procedure such as the *Fair Trade Act* or a civil damage suit. Moreover, there was a limitation to the swift and voluntary recovery of competition order since the invasion of private autonomy and

market distortion may happen if public administrative measures such as remedies excessively intervene the private sector, and the legal principles such as the principle of proportionality has to be obeyed.

19. However, the KFTC was able to come up with various remedies through consultations with enterprisers after the consent order had been introduced for consumer damage relief and active improvement of transaction order, which were difficult to achieve by previous remedies. In other words, a prompt and actual damage relief was made possible for consumers, and also a swift and effective recovery of the market order was made possible by designing the most appropriate measure in the market through the consultation with the enterprisers or interested persons who are well aware of the market situation.

20. For businesses, the time and cost to handle the case is reduced by addressing the case in a swift manner, and the corporate reputation is not negatively affected by the alleged violation of law since the illegality is not determined. It is also expected that the KFTC will be able to reduce administrative cost that is being spent in the illegality determining process and judicial procedure.

5. Application of a consent order in Korea

5.1 Progress of a consent order application in Korea

21. Since the consent order has been introduced in the late 2011, the first case where a consent order was applied was ‘Naver and Daum’s³ abuse of market dominance case’.

22. After that, there were other consent order applications⁴ for ‘SAP Korea’s abuse of superior bargaining position case’⁵, ‘CJ CGV and Lotte Cinema(the film business)’s abuse of market dominance case⁶, ‘MS-Nokia merger case’⁷ and ‘Three mobile operators’⁸ unfair advertisement case’.

23. A final consent order was confirmed on the application of SAP Korea and Microsoft, and as for the CJ CGV and Lotte Cinema, the case was handled by an official deliberation process after the consent order application was overruled⁹. A consent order procedure is under progress for the unfair advertisements of three mobile operators.

³ Naver Corp., Naver Business Platform Corp., Daum Communications Corp.

⁴ ‘MS-Nokia merger case’ and ‘Three mobile operators’ unfair advertising case’ are categorized into merger and *Act on Fair Labeling and Advertising* respectively, which will not be discussed further in this report.

⁵ SAP Korea (A Korean branch of a multinational company headquartered in Germany) with 49.7% and 46% market share in Korea’s business software ERP (Enterprise Resource Planning) and SRM (Supplier Relationship Management) respectively had banned on partial cancellation regarding software maintenance and repair, which led to a consent order application in Nov. 6. 2013. Final consent order was approved in Oct. 1. 2014.

⁶ The case where CJ CGV and Lotte Cinema discriminatorily increased the number of screens and extended screening period for the movies that were distributed by themselves or their own affiliates.

⁷ Microsoft filed for a consent order, which was confirmed on Aug. 2015. However, Nokia didn’t apply for a consent order, and as a consent order was confirmed for MS, the deliberation procedure for Nokia case has been terminated.

⁸ The case where three Korean major mobile operators (SK Telecom, KT, LGU+) used the word ‘unlimited’ for data, calls or text messages when advertising a certain calling plan.

⁹ The KFTC imposed remedies and penalty surcharges of 5.5 billion won on CJ CGV and Lotte Cinema, and referred the case to the prosecutor on Dec. 17. 2014.

24. Below is the description of Naver-Daum case, which is a major example of an anti-trust case where a consent order has been applied in Korea.

5.2 *A consent order case for portals such as Naver and Daum*

5.2.1 *Case outline*

25. Naver and Daum are the portal service providers¹⁰ that provide not only search service, but also communication service (email and messenger, etc.), community service (blogs and forum), various contents service (sports, finance, news, games, etc.) and e-commerce service (online shopping, etc.) to online users. Naver and Daum are market dominant enterprisers in Korea's Internet search market and online advertising market¹¹.

26. Naver and Daum provided search results to Internet users by integrating search results and keyword advertisements of shopping, real estate, movies, books and music that they offer with search results of general contents. Also, Naver signed an unfair contract regarding keyword advertisements with the media vendors such as G-market, Auction and Donga.com, which gives Naver the primary right¹², and Daum signed an unfair contract with advertising agencies that sell keyword advertisements¹³.

27. The KFTC conducted an ex officio investigation in May 2013 whether Naver and Daum's such conducts are in violation of the *Fair Trade Act*, and drafted an examination report based on the investigation results on October, and submitted it to the investigated.

28. Later in November, Naver and Daum filed for a consent order for these cases, and the KFTC accepted the application and decided to initiate the consent order procedure in the same month. In December, a tentative consent order plan was approved, and the final consent order was confirmed in Mar. 12, 2014 after gathering opinions from interested persons for 40 days.

5.2.2 *Whether it meets the requirements of a consent order*

- Negative requirements

First of all, the conducts are related to the violation of alleged abuse of market dominance (the Act Article3-2) or unfair trade activities (the Act Article 23), which are not applicable to the violated acts of the Article 19 (Prohibition of Unfair Collaborative Acts) (1), and secondly, the level of the conducts are not considered to be obvious and significant as to substantially undermine competition order, which are not applicable to the Act Article 71 (Filing a complaint) (2). Therefore, the conducts meet the negative requirements.

¹⁰ There are three requirements to be called as an Internet portal. First, it needs to have enough traffic (no. of users or frequency) by offering service to attract users. Second, it needs to realize a profitable business model such as advertisements, paid games and e-commerce based on secured users. Third, it needs to provide at least the so-called '1S-4C', which stand for search service, contents, communication, community and e-commerce.

¹¹ Naver and Daum have a market share of 70% and 20% respectively in Korea's Internet search service market and portal online advertising market as of 2013.

¹² Naver signed network keyword advertising contracts with 22 media vendors including G-market, giving the right of first negotiation or the right of first use to Naver in case the media vendor provides a new service (advertising sector), resulting in securing more advertisements by exerting the right of first negotiation.

¹³ Daum signed contracts with advertising agencies that sell and manage keyword advertisements and set the limit on transfer for clients, and did not permit the transfer in case the amount exceeds the limit.

- Affirmative requirements

The remedies that Naver and Daum proposed are as follows: a) remedies to recover the competition order, b) Relief measures to actively improve transaction order and enhance consumer welfare (herein after referred to as damage relief measures for consumers, etc).

The remedies for recovering competition order are mainly about ceasing violation of law and actively promoting conducts for correction, and damage relief measures for consumers, etc. are about contributing to conduct businesses for establishing non-profit foundations and imposing remedies, which meet the affirmative requirements.

29. Below is a detailed description of remedies.

5.2.3 *How Naver and Daum implemented the consent order*

- Remedies to recover competition order

Naver and Daum clearly indicated paid services and changed the display in order to eliminate the possibility of confusion that might have arisen when Naver and Daum's paid services and keyword advertisements had not been clearly distinguishable from the general search results.

Furthermore, Naver and Daum notified the fact that they are changing the way they show paid services and advertisements according to the consent order.

Also, Naver and Daum deleted the provision related to the right of first negotiation, which has an issue of unfairness, and decided to lift the limit on transfer for clients of advertising agencies.

- Damage relief measures for consumers, etc.

Apart from remedies, Naver established non-profit foundations for dispute settlements related to Internet search industry and supported 100 billion won project by directly managing a mutual-growth support project. Daum came up with damage relief measures such as supporting about 4 billion won project by contributing damage relief funds and supporting online ecosystem so that actual benefits could be shared among consumers and relevant small-and-medium-sized enterprises.

- Monitoring of execution and imposed sanctions when not executed

The KFTC decided to monitor the execution of such consent order on a regular basis, and cancel the consent order or impose an enforcement fine of 2 million won per day in case the consent order is not executed without justifiable reasons.

5.2.4 *Implications*

30. This was the first case where the KFTC applied the consent order, thereby coming up with the damage relief measures for consumers and small-and-medium-sized enterprises in order to improve competition order through the consent order. This case served as a stepping stone for the consent order to be improved to relieve damage for consumers, etc. and to promptly recover the competition order in fair trade cases in innovative markets such as the Internet search market in the future.