
21 November 2017

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

**Roundtable on Safe Harbours and Legal Presumptions in Competition Law - Note
from Korea**

5 December 2017

This document reproduces a written contribution by Korea submitted for Item 5 of the 128th OECD Competition committee meeting on 5-6 December 2017.

More documents related to this discussion can be found at www.oecd.org/daf/competition/safe-harbours-and-legal-presumptions-in-competition-law.htm

Please contact Mr. Antonio Capobianco if you have any questions about this document
[E-mail: Antonio.Capobianco@oecd.org]

JT03423360

Korea

1. Introduction

1. While enforcing the competition law, competition authorities are having difficulties proving a market dominant position of an enterprise engaged in an act of abuse of market dominance or agreements for cartel. Accordingly, the Monopoly Regulation and Fair Trade Act (hereinafter referred to as the "MRFTA") stipulates legal presumptions in order to reduce the burden of proof for the Korea Fair Trade Commission (hereinafter referred to as the "KFTC") and effectively restrain anti-competitive conducts. It also stipulates provisions for safe harbours to ensure the legal stability and predictability for business operators.

2. To be specific, the MRFTA stipulates three legal presumptions, including presumption of market-dominating enterprises, presumption of anti-competitiveness of M&A, and presumption of cartel agreement. On the other hand, safe harbours are prescribed in a form of notifications and guidelines such as Guidelines for M&A Review, Guidelines for Cartel Review, and Guidelines for Review of Unfair Trade Practices.

3. On one hand, legal presumptions and safe harbours enable enforcing competition law effectively, easing the burden of proof for competition authorities and reducing enforcement costs. In addition, they increase legal predictability for business operators allowing them more active business activities. On the other hand, there are concerns over over-enforcement errors (False Positive, Type I Error) or under-enforcement errors (False Negative, Type II Error). Therefore, it is necessary to carefully review in setting standards for legal presumptions and safe harbours after taking into account concerns over negative impacts caused by excessive enforcement or the creation of monopolistic or oligopolistic markets caused by under enforcement.

4. In the following, major issues will be discussed by reviewing provisions and regulations regarding legal presumptions and safe harbours in the MRFTA and actual cases.

2. Presumption of Market-Dominating Enterprises

2.1. Provisions for presumption of market-dominating enterprises

5. Market-dominating enterprises are those who are in a position to have a dominating influence on a determination of prices or quantity of goods or services, or terms and conditions of transactions in a given market. And abuse of dominant position is being regulated since it deteriorates market structures, distorts markets by impeding business activities of competitors, and infringes on consumer benefits through the pursuit of monopolistic profits.

6. Article 4 of the MRFTA stipulates that, in a particular business area, an enterprise shall be presumed a market-dominating enterprise when 1) the market share of one operator is more than 50% or more, or 2) the total market share of not more than three enterprises is 75% or more (excluding those whose market share is less than 10% of the total market share). However, those whose annual sales or purchases are less than 4

billion won are excluded from presumption of market-dominating enterprises. Also, in applying presumption of market-dominating enterprises, an enterprise concerned and its affiliates shall be regarded as one enterprise.

2.2. Meaning and Effect of presumption

7. Presumption of market-dominating enterprises is to presume it based on a market share of an enterprise because it is practically very difficult to investigate and conclude whether the enterprise is actually in a market dominant position. However, even when an enterprise meets requirements for presumption of market-dominating enterprises, it is not subject to regulations for market-dominating enterprises if the enterprise proves that it has no market dominance. On the other hand, even when an enterprise does not meet the requirements for presumption of market-dominating enterprises, regulations can apply if its market dominant position is proved.

8. As presumption of market-dominating enterprises applies, the competition authorities only have to prove that the enterprise meets the requirements for the presumption, and the burden of proof to rebut the presumption falls on enterprises concerned. On the other hand, in applying presumption of market-dominating enterprises, the provision that says an enterprise concerned and its affiliates shall be regarded as one enterprise is not a presuming provision but a deeming provision.

2.3. Application cases of presumption of market-dominating enterprises

2.3.1. Abuse of Market dominant position by Microsoft

9. With regard to MS' s act of bundling its Windows Media Service with the Windows Server operating system, the KFTC concluded that by abusing its market dominant position in the PC server operating system market, Microsoft unfairly infringed consumers' choices by forcing them to use the Windows Media Service. This is an abuse of market dominant position that hinders competition and impedes business activities of competitors in the media server program market.

10. In this regard, the KFTC viewed that MS was a market-dominating enterprise when considering that the market share of MS in the domestic PC server operating system market was 77% based on shipments and 78% based on sales, and that its market share and technical and economic barriers were high.

11. The KFTC imposed corrective measures and penalty surcharges KRW 32,490 million on MS for the act mentioned above.

2.3.2. Abuse of Market dominant position by BC Card

12. The KFTC concluded that credit card companies such as BC Card and 12 member banks, LG Capital, and Samsung Card, engaged in abuse of market-dominant position by raising cash advance fees, instalment commissions and overdue interest rates. In this case, the market share of the card companies combined was 70.8%, which was below standard for presumption of market-dominating enterprises, but they were considered to be dominant enterprises considering institutional entry barriers. The KFTC imposed corrective measures and penalty surcharges KRW 3,957 million in total on card companies and banks for abuse of market dominant position.

13. However, the Court ruled that BC Card and 12 member banks should not be regarded as a single enterprise, but as separate independent enterprises. Therefore, the Court considered that BC Card and 12 member banks were not included in the top three companies and that since their respective market share was less than 10%, they were not presumed to be a market-dominating enterprise and plaintiffs were not in a market dominant position.

3. Presumption of market-dominating enterprises for M&A

3.1. Provisions for presumption of M&A

14. Article 7 (1) of the MRFTA restricts combination of enterprises that is anti-competitive. Paragraph 4 of the same Article stipulates that in cases of a combination of enterprises falling under any of the following subparagraphs; it shall be presumed that competition is practically suppressed in a particular business area.

15. In cases where the combined market share of merging companies meets the qualifications of the following items: 1) In cases where the combined market share of merging companies satisfies the presumptive requirements for a market dominating enterprise¹; or 2) In cases where the combined market share of merging companies is the largest in the business area concerned; or 3) In cases where the combined market share of merging companies exceeds the market share of a company with the second largest market share by not less than 25% of the aggregate of the market share.

16. On the other hand, in Guidelines for M&A Review, the criteria for evaluating anti-competitiveness are specified in more detail for each type of business combination. Under the Guidelines for M&A Review, a combination of enterprises is presumed to have no anti-competitiveness when it meets certain requirements, and is subject to a simplified review.

17. To be specific, for a horizontal merger, 1) in case where HHI is less than 1,200, or 2) in case where HHI is greater than 1,200 but less than 2,500, and an increased amount of HHI is less than 250, or 3) HHI is greater than 2,500 and an increased amount of HHI is less than 150, the merger of enterprises concerned is considered to be a safe harbour that is not anti-competitive.

18. For a vertical or conglomerate merger, 1) in case where HHI of the relevant market to which enterprises concerned belong is less than 2,500 and the market share of the enterprises is less than 25%, or 2) in case where an enterprise of the merger is the fourth largest or below in the related market respectively, the merger of enterprises concerned is considered to be a safe harbour that is not anti-competitive.

3.2. Meaning and Effect of presumption

19. Although evaluating anti-competitiveness is a key task in reviewing M&A, it is not easy to actually grasp it. In other words, it is difficult for both the KFTC and enterprises concerned to verify whether the merger substantially restricts competition. Therefore, presumption of anti-competitive M&A is put in place to alleviate the burden of

¹ For your reference, please see ‘Ch.2. Presumption of Market-Dominating Enterprises, 1) Provisions for presumption of market-dominating enterprises’ of this paper.

proof falling on the competition authorities and to enhance the effectiveness of regulations on M&A.

20. However, there are conflicting views on the legal nature of presumption of anti-competitive M&A including 1) the first view that it meets the requirements for the commencement of examination if a combination of enterprises meets the requirements for presumption of Anti-competitive M&A, 2) the second view that it meets the requirements for the commencement of examination if a combination of enterprises meets the requirements for presumption of Anti-competitive M&A and add to that, the enterprises concerned should be responsible for the burden of proof if there is uncertainty about its anti-competitive impact, and 3) the third view that it is a legal presumption that is assumed to be anti-competitive.

21. The KFTC seems to be in line with the second view as it comprehensively reviews other factors to analyse anti-competitiveness of M&A such as the level of foreign competition introduced, the existence of alternative products and adjacent markets, the possibility of new entry, and collusive acts between competitors, even if the market share of a company concerned falls under the requirement for presumption of anti-competitive M&A in Article 7(4)-1 of the MRFTA.

22. The Court also considers that anti-competitiveness of a combination of enterprises is not recognized immediately even when it meets the requirements for presumption. The Seoul High Court, in the administrative litigation related to Shinsegae's violation of Restriction on Combination of Enterprises, concluded that even if the case met the presumption of anti-competitive M&A in Pohang area, the presumption was overturned after comprehensively considering facts that the market concentration was alleviated as two big discount stores newly opened, that the possibility of collusive acts was not high, and that there was no clear evidence proving that the company had been abusing market dominance in monopolistic areas.

3.3. Application cases of presumption of anti-competitive M&A

3.3.1. Violation of Restriction on Combination of Enterprises by Samick Music Corp.

23. After reviewing the acquisition of Youngchang Music Instrument by Samick Musical Instrument Co., Ltd, which engages in manufacturing and sales of musical instruments, the KFTC concluded that it is an anti-competitive M&A.

24. As a result of the acquisition, the total market share of the company in the upright piano, grand piano and digital piano market was 92%, 64.4% and 63.4%, respectively, which met the requirement for presumption of anti-competitive M&A. Meanwhile, it also fell under the requirements for market concentration standard (HHI) under the US guidelines on M&A Review.

25. However, the KFTC also reviewed other factors to analyse anti-competitiveness of M&A such as the level of foreign competition introduced, the existence of alternative products and adjacent markets, the possibility of new entry, and collusive acts between competitors, and decided that the acquisition could restrict competition.

26. The Court also acknowledged that it met the requirements for presumption of anti-competitive M&A, while it also examined the requirements for anti-competitiveness on Guidelines for M&A Review.

4. Presumption of cartel agreements

4.1. Provisions for presumption of cartel agreements

27. In order to prove the establishment of a cartel agreement, it must be proved that there is an explicit or implicit cartel agreement of enterprises. However, it is very difficult for the competition authorities to prove it since the cartel agreement is made in a confidential and sophisticated manner. Accordingly, the MRFTA stipulates provisions for presumption of cartel agreements to ensure the effectiveness of law enforcement by reducing the burden of proof falling on the competition authorities.

28. That is, Article 19 (5) of the MRFTA stipulates that where two or more enterprises conduct an act falling under any subparagraph of paragraph (1)², it shall be assumed that the enterprises have agreed to conduct an act in association falling under any subparagraph of paragraph (1) when it is highly probable to reckon that they did the act in association regarding the characteristic of the relevant transaction, goods or services, economic reasons and ripple effects of the relevant activity, frequency, mode, etc. of contact among enterprises.

29. In addition, Guidelines for Cartel Review provides the followings that can be circumstantial evidence to reinforce presumption of cartel agreements including 1) a case where there is evidence of direct or indirect communication or information exchange, 2) a case where it is concluded that it can be contributed to the interests of the operators only if it is carried out jointly and it will be contrary to the interests of the respective enterprise if it is performed individually, 3) a case where the coincidence of conduct among enterprises cannot be explained by the market situation, 4) a case where the coincidence of conduct among enterprises cannot be achieved without an agreement in a given industrial structure.

30. Meanwhile, Guidelines for Cartel Review stipulates safe harbours and requires to terminate a review if the total market share of participating companies is less than 20%, assuming there is no or limited anti-competitive effect.

² No enterprise shall agree with other enterprises by contract, agreement, resolution, or any other means, to jointly engage in an act falling under any of the following subparagraphs, which unfairly restricts competition (hereinafter referred to as "unfair collaborative act") or allow any other enterprise to perform such unfair collaborative act: 1. Fixing, maintaining or changing the price; 2. Determining terms and conditions for the transaction of goods or services, or for payment of prices thereof; 3. Restricting production, delivery, transportation, or transaction of goods or restricting transaction of services; 4. Limiting the area in which a transaction arises or the transaction counterpart; 5. 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. Restricting kinds and standards of goods or services when they are produced or traded; 7. Jointly carrying out, managing the main parts of business or establishing a company, etc. to jointly carry out and manage it; 8. Deciding successful bidder, successful auctioneer, bidding price, highest price or contract price, and other matters prescribed by Presidential Decree; 9. Practically restricting competition in a particular business area by means of interfering or restricting the activities or contents of business by other enterprises (including the enterprise who has conducted the activity), which is other than the act referred to in subparagraphs 1 through 8.

4.2. Meaning and Effect of presumption

31. Regarding the presumption of cartel agreements, before the amendment of the MRFTA in 2007, it was possible to assume that there is an agreement for cartel if an outward conformity of conduct apparently exists and its anti-competitiveness is recognized. However, there has been criticism that the burden of proving the core requirements for illegality falls on enterprises.

32. Accordingly, the MRFTA was revised in 2007 to allow the presumption of cartel agreements only when an outward conformity of conduct exists and it is sufficiently supported by various circumstantial evidence and other situations. It embraces global standards such as the United States, which presume cartel agreements by considering other factors in addition to the existence of an outward conformity of conduct.

33. On the other hand, Guidelines for Cartel Review stipulates that if a cartel agreement is presumed pursuant to Article 19 (5) of the Act, the presumption can be overturned when an enterprise proves that the act is not conducted by an agreement.

4.3. Application cases of presumption of cartel agreements

4.3.1. *Seven steel bar manufacturers' cartel agreements*

34. The KFTC presumed that 7 steel bar manufacturers agreed to raise the price of their products at the same rate 5 times from February 2002 to April 4, given that they raised prices of steel bars at almost the same time since 2002, and there was an agreed act that set the actual prices at the exactly same level, along with the following circumstantial evidence supporting this outward conformity of conduct.

35. In the case where a leading company with a high market share under an oligopolistic market structure decides the price according to its own judgment and a second mover decides the price by imitating it unilaterally, the Court concluded, in accordance with Article 19 (5) of the MRFTA, that the presumption of cartel agreements is overturned unless there is a special reason that a leading company determines a price considering current market conditions with a prediction that second movers will follow suit. Accordingly, in this case, considering that there was no or very short of evidence that there was direct communication, that the plaintiff was able to know the price increase of other companies through newspapers, and that the company that collected information on the price increase imitated it unilaterally, it was believed that the presumption of cartel agreements is overturned because it is considered to be a parallel pricing caused by interdependence under the oligopolistic market structure as an act of simply imitating the price increase of the leading companies.

4.3.2. *Cartel agreements regarding the primary turnkey construction for the 4 Major Rivers Restoration Project*

36. Regarding 4 Major Rivers Restoration Project, the KFTC concluded that an agreement of construction companies to allocate the constructions of 13 sections among them falls under the Article 19-1(3) of the MRFTA. In addition, as a primary claim, it also applied the Article 19 (5) considering that the respondents insisted that bid is not a result of an explicit agreement but a natural result of a strategy to avoid competition with other companies with which they exchanged information.

37. Regarding the administrative litigation, the Court concluded that 8 companies including the plaintiff exchanged information and opinions about the status of construction sections and their intention to participate in the bidding by holding a steering committee or a meeting several times, and as a result, 8 companies decided the allocation of sections in advance so as to avoid any duplication of bidding for their targeted sections and most of them were awarded the bid as determined in advance. As a result, the Court concluded that based on such circumstantial evidence, the presumption of cartel agreements was established since it was acknowledged that there were considerable possibilities that 8 companies agreed to allocate the sections or at least agreed to take a joint action to allocate and decide sections.

5. Safe harbours regarding unfair trade practices

5.1. Provisions for safe harbours regarding unfair trade practices

38. Regarding an unfair trade practice under the MRFTA, in the case where impediment of fair trade is negligible considering an enterprise's market share, the KFTC does not initiate the examination process in principle even if there is an act that appears to be unfair trade practice.³

39. According to Guidelines for Review of Unfair Trade Practices, if the market share of an enterprise engaged in an unfair trade practice is less than 10%, it is exempted from examination in principle considering that its anti-competitive effect is negligible. However, if the calculation of the market share is virtually impossible or considerably difficult, an enterprise concerned is exempted from examination if its annual sales are less than 2 billion won.

5.2. Meaning and Effect of safe harbours

40. The reason for applying the safe harbours is that the effect on the market is small if the market share or sales amount of an enterprise is small. Therefore, even if there is an act that appears to be an unfair trade practice, it is regarded as a 'subject to exemption of examination' in principle as it does not have any impediment of fair trade.

41. However, even if an act is conducted by an enterprise falling under the safe harbours, the KFTC can still initiate the examination. In addition, it's not that the presumption of illegality is automatically established if an enterprise does not fall under the safe harbours.

³ Safe harbours are only applied to certain types of practices such as refusal to deal, discriminative treatment, exclusion of competitors, and exclusive dealing.