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Procompetitive Industrial Policy – Note by Korea

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1. Introduction

1. The world is witnessing a growing emphasis on the role of governments, with some labeling recent trends as “the return of industrial policies”. These voices mainly derive from the potential of market failure. Moreover, governments around the world are increasing their R&D spending and promoting policies for industrial prosperity, factoring in the growing notion that large government subsidies for novel technologies such as carbon neutrality technologies are a crucial growth driver.

2. The increasing importance of industrial policies is once again shining a spotlight on the role of competition authorities – promoting free and fair competition order for effectively allocating resources and reinforcing public welfare, highlighting the need to strike a desirable balance and harmony between industrial and competition policies.

3. This paper will explore the tensions between industrial and competition policies and the changes in their relations by looking back on the evolution of Korea’s industrial policy and discuss the efforts to establish the role of competition authorities and their relation with ministries concerned with the industry for pro-competitive industrial policies when it comes to aligning industrial and competition policies.

2. Relations between industrial and competition policies

2.1. The evolution of Korea’s industrial policies

4. Korea’s remarkable economic growth achieved in the short term is attributable to policies aimed at industrial growth. Citing the relatively small size of the domestic market and lack of resource endowment, the Korean government strongly promoted export-oriented industrialization strategies by taking policy responses encouraging domestic industrial growth and providing financial subsidies or tax deductions.

5. However, policies that injected excessive investment into only a few industries (e.g., heavy chemical industry) and regulated prices brought negative impacts, entrenching a monopolistic market structure and prompting an ineffective allocation of resources. Going through the 1979 Oil Crisis, the Korean government sought a transformation in its economic policy – shifting to a market-oriented approach under the three principles of autonomy, competition, and openness; reducing government funds invested into policies; and curbing import restrictions by abolishing bans on importing certain goods. Policy trends geared towards heightened market autonomy remain in the 21st century, with businesses and financial industries undergoing structural reforms.

2.2. Tensions between industrial and competition policies and policy harmonization

6. The evolution of the Korean government’s industrial and competition policies illustrates that the two policies are contradictory from birth, and tensions between them remain.

7. The tension dynamics between the two policies may vary depending on the background of implementing industrial policies and their specifics. As mentioned above,

competition policies mainly focused on restoring fundamental functions served by the market undermined by aggressive industrial policies.

8. Industrial policies that contain anti-competitive elements are increasingly being implemented or maintained not to protect infant industries or foster specific industries but driven by the pressure from the beneficiaries of existing policies. Policy tensions arise when competition authorities implement policies to root out anti-competitive factors within industrial policies.

9. The government may also give rise to policy tensions when it sternly maintains the requirements for qualification or facilities to ensure that production serves public interests within relevant markets or when the government implements or sticks to imposing regulations that mandate the approval or permission of regulation authorities.

10. But striking a balance between industrial and competition policies is highly feasible in that (i) it is a widely shared notion among all government ministries that both policies should have their foundations on fair competition within the market under the principles of the rule of law and (ii) all government ministries in charge of industrial or competition policies have reached a strong consensus on the necessity of improving regulations for economic development through innovation of businesses and securing national competitiveness.

3. Efforts for a pro-competitive industrial policy

3.1. Competition advocacy efforts

11. The role of competition authorities encompasses a wide range of responsibilities, including not only law enforcement for monitoring the anti-competitive conduct of businesses but also competition advocacy efforts – further raising awareness of the benefits brought by competition and fostering a pro-competitive market environment by improving anti-competitive laws and policies. One of the main goals sought by competition advocacy efforts is improving the anti-competitive regulations devised amidst crafting and enforcing industrial policies.

12. The efforts sustained by the KFTC to improve anti-competitive regulations are twofold: preventing the development of an anti-competitive regulation and post-improvement of existing ones.

3.2. Pre-consultation requirements and Competition Impact Assessment

13. To prevent anti-competitive regulations from being newly established, regulation authorities that plan to legislate or amend anti-competitive laws or impose an anti-competitive administrative action are mandated to consult with the KFTC, under Article 120 of the Monopoly Regulation and Fair Trade Act (hereinafter the “MRFTA”).

14. The abovementioned mandate was introduced from the birth of the MRFTA in 1981, with the specifics stipulated in the *Guidelines for Examination of Statutes, etc., on Anti-competitive Factors* that classify anti-competitive factors into four types: (i) restrictions on the number of business operators and business areas; (ii) restrictions on the ability of business operators to compete; (iii) hindrance to inducement for the competition of business operators; and (iv) restrictions on choice and information of consumers.

15. The KFTC holistically examines the impact of the law in question on competition by defining the relevant market of goods and services stipulated and factoring in its impacts on market structure, prices of goods, and output.

16. Moreover, the KFTC is responsible for conducting the Competition Impact Assessment as a part of its effort to analyze the impacts of regulations under Article 7 of the Framework Act on Administrative Regulations in order to preemptively analyze and evaluate the potential impact of newly established or strengthened regulations on competition before being introduced to the market.

17. Competition Impact Assessment involves two different stages: preliminary assessment and in-depth assessment. The first stage filters out regulations that require in-depth assessment based on their potential anti-competitive concerns¹. The latter involves an in-depth analysis of the regulations' impact on the efficiency of their relevant markets and seeking alternatives for minimizing negative impacts on competition while effectively achieving policy objectives. To this end, their impacts on prices, output, quality, diversity of goods and services, and the innovation within relevant markets are analyzed comprehensively in the in-depth assessment stage.

18. In 2023, the KFTC conducted Competition Impact Assessment of 783 regulations implemented in 509 laws and proposed opinions to relevant ministries on 22 regulations within 19 laws. The abovementioned ministries in charge of these regulations have adopted the opinion on 15 regulations within 13 laws and revised or withdrew them, with the rate of adoption recording an impressive 86.7%, based on the number of laws.

19. An exemplary case would be revising the regulation that limited the institutions that can offer work experience certificates for pharmacists and the educational institutions that provide pharmacy residency programs to a hospital-level medical institution². The KFTC found the regulation to be anti-competitive, stating that seeking an alternative, such as recognizing the career experience at pharmacies that meet headcount thresholds and facility requirements as actual work experience, is required in that the regulation may potentially create barriers to market entry against local pharmacies that aim to raise resident pharmacists, thereby reducing competition incentives within the pharmacy residency market.

20. In addition, when newly designating institutions for inspecting the safety of elevators, the institutions that could conduct inspection on a regular basis were limited to those within a set range of cities and provinces under existing regulations, which the KFTC deemed anti-competitive in that it may reduce existing businesses' incentives for competition by limiting the number or range of suppliers and also hinder the entry of new suppliers to the market.

¹ The judgment is made through conducting assessments across four primary domains of (i) restrictions on the number of business operators and business areas; (ii) restrictions on the ability of business operators to compete; (iii) hindrance to inducement for the competition of business operators; and (iv) restrictions on choice and information of consumers, with the extent of the regulation's anticompetitive nature proportionate to the indicators met within each domain.

² A clinic-level medical institution has less than 30 sickbeds and mainly serves outpatients; A hospital-level medical institution has more than 30 and less than 99 sickbeds and mainly serves inpatients; and a general hospital equipped with at least 100 patient beds.

3.3. Improving anti-competitive regulations

21. The KFTC is striving to identify and improve existing anti-competitive regulations of government ministries, which is a crucial part of the KFTC's work that aims to break unreasonable barriers to entry that stem from implementing industrial policies and thereby foster a free and fair environment for competition.

22. The KFTC's efforts to improve anti-competitive regulations starts with identifying regulations that need improvement by leveraging proposals from businesses, opinions from experts, and market analyses. The KFTC then seeks and devises alternatives by holding public hearings or meetings with stakeholders, gathering opinions from relevant ministries, and engaging in coordination procedures with the Office for Government Policy Coordination of Korea.

23. The KFTC identifies regulations in various areas that require improvement: (i) regulations imposed on fields that require urgent responses against longstanding monopolies; (ii) regulations with unnecessarily burdensome requirements for market entry that may reduce small- and medium-sized businesses' opportunities to start new business or induce price increases; and (iii) regulations that undermine consumer welfare in areas that are jointly intertwined with citizens' lives. By consulting with relevant ministries, the KFTC finalizes or announces revisions for an annual average of 20 to 30 regulations.

24. For instance, the Korean government amended the Distribution Industry Development Act in 2013 to support the growth of local traditional markets and protect small business owners, through which it implemented a new regulation against large superstores that mandated twice-a-month breaks on Sundays and banned them from operating online deliveries during off-business hours.

25. The KFTC, however, cast doubt on whether the regulation has achieved the abovementioned objective and raised the need to abolish or revise it, citing that they are only causing inconvenience for citizens and that the reduced profits of traditional markets result not from their competition with large superstores but from the growth of online e-commerce platforms. Addressing such concerns, the Korean government announced its plans to ease the regulation earlier this year – leading to municipal governments increasingly changing mandatory closure dates to weekdays even before the new proposal passed the National Assembly.

4. Other efforts for achieving industrial-competition policy compatibility

26. To achieve harmony between industrial and competition policies, understanding the policy environment for industrial policies and accurately analyzing relevant markets before promoting competition policies are as crucial as devising and enforcing pro-competitive industrial policies.

27. Regarding this objective, the issue of judgment on actions that conform to administrative guidance is again garnering attention, which will be discussed in the below paragraphs together with the KFTC reinforcing its market analysis function.

4.1. Competition law judgment on conduct complying with administrative guidance

28. Government ministries that are concerned with industrial policies may introduce policies that involve administrative guidance to stimulate specific industries, safeguard existing businesses, and serve public interests. The KFTC is relentlessly working to strike

a harmony between industrial and competition policies by exempting certain cartel conduct of business entities from the application of the MRFTA if found to be conforming to administrative guidance.

29. In particular, the *Guidelines for examination of unfair cartel conduct involving administrative guidance* define the term “administrative guidance” as a non-authoritative act provided in anticipation of voluntary cooperation to realize the intention of an administrative subject itself, taking various forms such as a direction, recommendation, demand, caution or warning. Unfair cartels that involve administrative guidance are illegal in principle but may be exempt from the application of the MRFTA if the conduct is regarded as “legal conduct in accordance with the law”, meeting the requirements under Article 116 of the MRFTA.

30. Exemption from the MRFTA is also granted for unfair cartel conduct involving administrative guidance if (i) a law other than the MRFTA explicitly allows the conduct between businesses or (ii) the legal basis for the administrative guidance on the cartel conduct between businesses is stated in another law. In the second case, the goals, tools, content, and methods of the administrative guidance should be in accordance with the law that contains the legal basis, and the conduct of the businesses must be within the permitted range of the administrative guidance.

31. Moreover, if an administrative institution issues individual administrative guidance on businesses, the conduct is deemed illegal if businesses enter into a separate agreement in regard to the administrative guidance, while being legal if they individually abided by it.

32. To illustrate, the KFTC sanctioned poultry processors and distributors in 2022 for fixing the price, total industry output, and delivery amount of poultry meat, regarding the agreement as an unfair cartel conduct, resulting in a backlash against the sanction from the businesses that argued the conduct in question is pursuant to the administrative guidance issued by the Ministry of Agriculture, Food and Rural Affairs.

33. But the KFTC rejected their claims, asserting that price-fixing is not a matter that falls within the purview of the Ministry’s supply and demand control regulations, nor is it permitted under any legislation. Moreover, the KFTC referred to the reply regarding fixing total industry output and delivery amount of poultry meat from the Ministry, where it clarified that it did not order supply adjustment nor output control. Another reason behind the rejection was that the cartel already existed before the issuance of the administrative guidance.

4.2. Strengthened function of market analysis

34. The KFTC conducts a comprehensive market study on a specific industry to accelerate competition within monopolized industries and to address new competition issues arising in emerging industries. The results of such market studies become a cornerstone for understanding how competition works between businesses in markets for goods or services through analyzing in depth the circumstances of a specific industry and market and crafting responses to deal with anti-competitive concerns when competition is hindered within a market by analyzing the reasons.

35. Market analysis, therefore, enhances understanding of industries and relevant industrial policies, boosting the efficacy of policies by further increasing the legitimacy of promoting competition policy and the likelihood of endorsement by regulation authorities.

36. The KFTC chooses one to three industries every year since 2008, into which the KFTC conducts market analysis to expand the knowledge on relevant industries.

Furthermore, the KFTC proposes measures to accelerate competition within that industry to relevant ministries and holds consultations accordingly.

37. In particular, to curb monopolization within the beer market and to promote the growth of small segments of the beer market (e.g., the craft beer market), the KFTC has reached an agreement with the National Tax Service of Korea on improving regulations that govern beer distribution and the size of production facilities based on the results of its market study on the beer industry. In addition, to accelerate businesses' innovation within the Internet of Things (IoT) industry, the KFTC reached a deal on revising regulations that required IoT business operators to obtain a permit from the Ministry of Science and ICT before engaging in sideline activities, even if previously acquired.

5. Conclusion

38. Policy tensions between industrial and competition policies of Korea existed since their birth, as competition authorities' roles were highlighted and reinforced in response to the government-led efforts promoting industrial policies, seeking to resolve the problems stemming from the government intervention that took place rather swiftly.

39. However, achieving industrial-competition policy compatibility is in prospect, as (i) both policies fundamentally seek to fix problems through a seamlessly functioning market based on the dual objectives of enhancing public welfare and underpinning national competitiveness and (ii) competition authorities and all government ministries have reached a consensus on the need to improve regulations.

40. To achieve industrial-competition policy compatibility, competition authorities should strive to understand the expertise and technology required for devising industrial policies while actively working to improve policies that distort the order of fair competition underpinning the market by reinforcing their function of competition advocacy. Furthermore, competition authorities should be able to propose alternatives that can gain support from regulation authorities based on accurate industry-wide analyses to further the knowledge on industrial policies.

41. The KFTC ensures expertise of its Competition Impact Assessment through advancing relevant assessment methods by encouraging the participation of competent bodies for reinforcing the KFTC's function of competition advocacy and will continue the efforts to strengthen its function of market analysis and to facilitate joint communication and consultation among government ministries to strike a balance between industrial and competition policies.