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COMPETITION COMMITTEE**

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Working Party No. 3 on Co-operation and Enforcement

PROCEDURAL FAIRNESS ISSUES IN CIVIL AND ADMINISTRATIVE ENFORCEMENT

-- Korea --

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The attached document is submitted to Working Party No. 3 of the Competition Committee FOR DISCUSSION under item IV of the agenda at its forthcoming meeting on 15 June 2010.

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1. Introduction

1. The decision-making procedure of the Korea Fair Trade Commission (hereinafter “KFTC”) is not strictly the same as the judicial procedure governed by the court. But it can be seen as quasi-judicial one in that the KFTC decides infringement of the competition laws¹ through hearing process, and imposes corrective measures against violations. In addition, in a case a respondent dissatisfied with the KFTC decision wants to file an appeal to the appellate court, the person shall file a lawsuit to the Seoul High Court. This distinguishes KFTC measures from other administrative measures which are generally subject to three-level court system. Therefore, the decision-making process of the KFTC, which is quasi-judicial process of an independent agency in its nature, can be practically considered as having function of the first instance trial. Given the quasi-judicial nature of the KFTC’s decision making and its great impact on the people’s lives, it is fair to say that the decision process of the KFTC is required to ensure further scrutiny than general administrative adjudication procedure.

2. With this in mind, the KFTC has made consistent effort to improve transparency, fairness and efficiency of its case-handling system. Rules related to the case-handling system and various institutions to ensure fairness and transparency in the system were already introduced in the report submitted to the February 2010 Roundtable on Procedural Fairness, DAF/COMP/WP3/WD(2010)25. This report, therefore, will focus on main discussion topics of this roundtable in June; KFTC’s decision making process, protecting confidentiality of respondents’ business secrets, the process of requesting examinees to submit documents, consented resolutions of enforcement proceedings, and judicial review on the KFTC decision.

2. Decision-making Process

2.1 *Submission and delivery of Examination Report*

3. The decision making process of the KFTC begins as an Examiner² draws up an Examination Report and files it to the Committee of the KFTC³. Upon filing the report to the Committee, the Examiner should send a respondent the Examination Report including attached materials and a list of the attached materials, and notify the respondent to reply to the report within at least two weeks after the receipt of the report. [Article 29. 10 of the Regulation on Operation of KFTC Meetings and Case-handling Procedures (hereinafter referred to as the “Regulation”)]

¹ Other than the “Monopoly Regulation and Fair Trade Act (MRFTA)”, 11 laws are enforced by the KFTC. However, case handling procedures are governed by the MRFTA, which regulates essential parts of the competition law such as market dominance abuse or cartel conspiracy. The procedures applied to violations of other laws are the same as the MRFTA. The MRFTA is hereinafter referred to as the “Act”.

² Secretary General designates a director general of the headquarters or a head of a regional office as an Examiner in charge of a case investigation and the designated Examiner produces an Examination Report on the allocated case.

³ The Committee of the KFTC consists of the Chairman (ministerial level), Vice Chairman (vice-ministerial level), three standing commissioners and four non-standing commissioners. There are 2 kinds of sessions in KFTC proceedings. One is the “plenary session” attended by all of the nine commissioners and the other is the “chamber session” involving three commissioners including one standing commissioner as a chair. The plenary session convenes for cases of significant economic impact, cases involving different legal application and re-hearing cases while the chamber session is for other cases not handled in the plenary session.

2.2 *Designation of chief commissioner and prior review*

4. When the Examination Report is filed, the chair of the designated chamber session, or a chief commissioner of the plenary session designated by the Chairman of the KFTC among standing members for the case, is decided to be in charge of steering the Committee proceedings. The designated chief commissioner or the chair of the chamber session conducts prior review of the case to decide whether it can be referred to the committee proceeding (hearing). If the chair (or the chief commissioner) considers the submitted Report is insufficient, he/she orders the filing Examiner in charge to supplement or revise the materials of the report. (Article 30 of the Regulation)

2.3 *Preparatory procedures for hearing*

5. Once the replies from the respondent on the Examination Report are submitted, a chief commissioner (plenary session) or chair (chamber session) may allow preparatory procedures for hearing to be conducted, if deemed necessary for a more efficient and focused hearing.⁴ (Article 30-3 of the Regulation). The preparatory procedure is conducted either by way of submitting written explanation on arguments and evidence or in the manner of preliminary hearing (Regulation Article 30-2.2). During the preparatory procedure, both Examiner and respondent have to submit all the arguments and evidence needed for the hearing.⁵

6. If one of the two parties, either an Examiner or a respondent, is not present, preliminary hearing cannot be opened. Also, the preliminary hearing process should be made public in principle. (Article 30-5 of the Regulation)

7. When a respondent requests for examination on evidence, a chair (or chief commissioner) may decide whether to grant the request (Article 30-6.1). If deemed necessary, the chair can request expert opinions or submission of necessary materials. (Article 30-6.5)

8. In order to conduct the preparatory procedure in a fair manner, a chair (or chief commissioner) is required;

- to provide opportunity to the parties to submit rebuttal or counterevidence for the argument and evidence presented by the opposing party;
- to ensure impartiality in the process and provide equal opportunity to the both parties in submission of argument and evidence; and
- not to have ex parte contact without legitimate reasons. (Article 30-7.1 ~ 3 of the Regulation)

9. The chair (or chief commissioner) may end the preparatory procedure of hearing process in the case where;

- three months have passed after the opening of the procedure;

⁴ If the preparatory process is not conducted, the case shall be presented to the Committee within 30 days from the date of the receiving replies from the respondents or the deadline of the submission (Article 31.1 of the Regulation). The case may be withdrawn or belatedly presented to the Committee at the request of the concerned Examiner or by the authority of the Committee (Article 32 of the Regulation).

⁵ However, insufficient submission of arguments or evidence cannot be a ground for disadvantage, as there are no legal backgrounds.

- opinions or other required materials are not submitted without any legitimate reasons;
- either an Examiner or respondent is absent from the preliminary hearing; and
- it is deemed unnecessary to continue the process.

10. After the preparatory procedure is ended, General Counsel reports the summary of the preparatory procedure to the Committee on the first day of the hearing.

11. The chair (or chief commissioner) may refer additional agenda to the preparatory procedure after the official hearing is opened, if considered necessary to clarify arguments and evidence. Moreover, when deemed necessary, the preparatory process may be resumed even after it is ended. (Article 30-8 ~ 30-11 of the Regulation)

2.4 Case filing to the Committee and the extended hearing system

12. A chair of the session is required to refer the case to the Committee for hearing within 30 days from the date of receiving replies from the respondents, the designated deadline of submission, or the date the preparatory process is ended. (Article 31.1. of the Regulation) The case may be withdrawn from the committee proceeding, or belatedly referred to hearing at the request of the Examiner or by the authority of the Committee if there is a specific reason. (Article 32 of the Regulation)

13. Once the date of hearing is set, a chair of the session shall give written notice on the date, venue and title of the concerned case to both the commissioners participating in the session and the respondent at least five days before the opening of the hearing process. Where there is inevitable circumstance, for example, when the case is urgent, oral notice is allowed. (Article 33.1 of the Regulation)

14. If the respondent who receives the hearing notice cannot attend the hearing on the designated date for unavoidable reasons, he/she may request to reschedule the hearing, specifying the reasons. The chair shall decide whether the rescheduling request is approved or not and notify the respondent of the decision immediately. (Article 33.3 of the Regulation)

15. Generally, the hearing concludes with one round of the process. However, if it is deemed that hearing is needed more than one time because the concerned case is complicated or requires thorough economic analysis or forensic review, the chair shall decide to proceed to the next round by fixing the date of the next hearing. (“Extended hearing system”) (Article 33.6 of the Regulation)

16. This extended hearing system has been in active use at the KFTC. For instance, the cases of market dominance abuse by Microsoft (2005) and Qualcomm (2009) went through seven and six rounds of hearing respectively.

2.5 Assistance of deliberation by General Counsel

17. The General Counsel of the KFTC is a person who reviews the case referred to the plenary or chamber session from the neutral perspective and assists the standing commissioners in the proceeding.

18. Under the General Counsel, the director-general level, there are five Committee Assistance Officers, director-level, each of whom are assisted by five to ten staff members. Two of them are in charge of enacting or revising notification and guidelines on operation of Committee proceeding, case handling and surcharges, and litigation proceedings respectively.

19. The rest of the three are directly responsible for assisting the standing commissioners for deliberation. For the chamber session⁶, the Committee Assistance Officer assigned to assist the chair of the session with the whole decision-making process of every case filed to the session. For the plenary session, the Committee Assistance Officer assigned to the chief commissioner takes the responsibility of assisting the commissioner in managing the procedure.

20. Once an Examination Report is filed to the Committee, the assigned Committee Assistance Officer reviews the report in terms of format, factual evidence, application of laws, etc. If the report is found to be insufficient in its formality, the Officer reports to a chair (or chief commissioner) of the session, and requests the concerned Examiner to complete the formality of the report.

21. If the report has adequate formality, the Committee Assistance Officer reviews contents of the report. If the Officer found that the concerned case includes many contentious issues and is expected to take much time to make the final decision, the Officer should consider whether to conduct preparatory procedures and reports to a chair (or the chief commissioner) of the session, who then makes a decision.

22. Regarding a case not subject to the preparatory procedure, the Officer looks into an Examination Report and replies from a respondent in an impartial manner and produces his/ her written opinion in order to present it to the commissioners participating in the session. For the purpose of making the written opinion, the Officer examines main points at issue, refers to relevant precedents or similar cases, and assesses illegality of the concerned behavior and adequacy of the level of measures. When necessary for fact-finding, the Officer in charge of the case may make direct communication with the Examiner or respondent on factual evidence of the report, or request the additional documents.

2.6 Assistance from Economic Analysis Division and independent experts

23. As antitrust cases get complicated with ever-growing impact on national economy, economic analysis to prove anti-competitiveness, define the relevant markets and assess consumer harm is becoming an essential part of the case-handling process.

24. Respondents especially in controversial antitrust cases on M&A, cartel and abuse of dominance actively defend themselves by hiring economists and submitting economic analysis reports supporting their arguments. In response to this movement, the KFTC established the Economic Analysis Division in 2006.

25. The Economic Analysis Division is responsible for providing economic analysis for cases presented to the committee proceeding. It conducts economic analysis such as regression analysis mostly for large scale M&A cases to enhance objectivity and thoroughness of case examination. In addition, the Division verifies validity of the economic analysis report presented by respondents and reports the result to the Committee.

26. Moreover, the KFTC seeks advice from its “advisory network” comprising outside economic experts. In a big case, both respondents and Examiners submit opinions based on consultation with recognized economists and legal experts, and participation of these experts is recently becoming more active. For instance, for major cases such as market dominance abuse by Microsoft, Intel and Qualcomm and eBay-Auction merger, experts in and outside of Korea have been actively participating in the decision-making process of the KFTC by submitting their written opinions or attending the hearing process.

⁶ The Committee Session of the KFTC consists of three chamber sessions and one plenary session.

2.7 *Hearing process*

27. The Act provides for the respondent's rights to attend the hearing by stipulating in its Article 52.2 that the respondents and interested parties may attend the hearing of the KFTC to state their opinions or present relevant materials. The Regulation (Article 34.1) provides that the hearing process cannot be opened without the attendance of respondents in order to fully ensure their rights to attend the procedure.

28. The hearing proceeds in the following order of identification questioning, opening statement, interrogation, Examiner's suggestion on corrective measures and closing statement by respondents. The respondent may attend the process in person or send legal representatives, such as lawyers.

29. Even though a respondent hires legal representatives for hearing participation, a chair of the session may order the respondent to be present in the hearing to take his/her responsible answers or statements. (Article 36 of the Regulation)

30. Commissioners may directly question the Examiner or a respondent regarding factual evidence or legal application with permission of the chair of the session. The Examiner or a respondent also may ask questions to each other with permission of the chair when the meaning of the counterparties' statement deemed not clear.

31. Evidential examination such as interrogating the person of reference may be conducted at the request of the respondent or Examiner, or by authority of the hearing session. When needed, the chair may order attendance of expert witnesses to seek their opinions. Before closing a hearing, the chair shall let the Examiner present his/her suggestion on penalties against the respondent such as corrective order, surcharge, or filing to prosecution. Respondents shall also be given opportunity to give closing statement to the hearing session. (Article 41 ~ 43 of the Regulation)

2.8 *Determination*

32. After the hearing process, participating commissioners deliberate on the case to make a decision. In the case of a plenary session, verdict is made through a majority vote. In a chamber session, a decision is made in the presence of all of the members by a unanimous vote of the members present. (Article 42 of the Act)

33. While the final decision is made public, the deliberation process should be kept undisclosed. This is aimed to make sure the members freely express their opinions on the case. (Article 43 of the Act)

34. If the KFTC concludes that the case is in violation of antitrust law, a written decision shall be made, which specifies the grounds for such conclusion. The written decision shall be signed and sealed by the commissioners who have participated in the decision-making process. (Article 45 of the Act)

3. *Protecting confidentiality of respondents' business secrets*

35. To protect confidentiality of respondents' business secrets, the Examiner should exclude or delete business secrets of other business enterprisers or take other measures deemed necessary when sending the Examination Report to the respondents. (Article 29.12 of the Regulation)

36. The Regulation prescribes that, in antitrust cases, the definition of business secrets from the Unfair Competition Prevention and Trade Secret Protection Act shall be applied. This act defines business secrets as information that is not open to the public and has independent economic values. Under the definition, the information includes production or sales methods that have kept secrets through considerable efforts, or other information on technology or business operation useful for business

activities. Although this law defines business secrets strictly as it is aimed to criminally prosecute confidentiality infringement, in practice, the KFTC implements relatively mitigated definition of business secrets and widely protect the confidentiality.

37. Respondent or interested parties may request permission to read or copy the documents excluded in an Examination Report. Reading or copying the excluded documents is allowed when the provider of the documents agrees or the KFTC finds it necessary for public benefits. (Article 52-2 of the Act)

38. The KFTC also have regulations on prevention of the business secret infringement that could occur in the course of hearing. If the respondent wants to make statements including confidential information, he/she may present written statements which specify the scope of the confidential information and desirable measures for its protection at least five days prior to the opening of the session⁷. If the request is accepted, necessary measures will be taken, for instance, ordering other respondents to leave the room temporarily while the protected information is presented to the Committee. The information regarded as confidential is excluded from the publicized decision later on. (Article 40-2 of the Regulation)

39. The hearing can be conducted separately for each respondent in the case where there is a need to protect confidential business information or identity of leniency applicants (Article 44 of the Regulation). This system has been actively utilized with the increased leniency application for cartel after 2005.

40. Moreover, the KFTC official who divulges business secrets of a company or business association obtained in the course of law enforcement, or uses them for other purposes, can be sentenced to imprisonment of up to two years or maximum fines of two million won (\$1,680). (Article 69 of the Act)

4. Request of document submission

41. When it is deemed necessary for enforcement of the Act, the KFTC can summon the concerned parties, interested parties or person of reference to hear the testimony. In a specialized case, the KFTC can designate an expert witness to seek their opinions. In addition, it can request an enterpriser or business association to submit reports on cost, current business status or present other necessary information or materials, and detain them. (Article 50.1 of the Act)

42. When considered necessary, the KFTC may have its officials enter an office or a business place of the concerned enterpriser or business association to investigate business and management state, account books, documents, electronic documents, voice-recording materials or video materials. The officials may take statements from the concerned parties, interested parties or person of reference at an office, a business place or other places designated in the summons produced by the KFTC

43. Where there is a possibility of evidence destruction, officials conducting the investigation may order an enterpriser, business association or its employees to present necessary documents or things, and detain them. (Article 50.2~3 of the Act)

44. To ensure due protection for an examinee, the Act prohibits abuse of investigative authority. The Act articulates that the officials should conduct an investigation within the minimum scope, and should not abuse his/her investigative power for other purposes. (Article 50-2 of the Act) Also, to protect the rights of an examinee and ensure fairness and transparency of an investigation, KFTC ordered the investigating officials should notify in advance an examinee of period, purpose and scope of an investigation. An investigation shall be conducted within the minimum scope and time needed. The KFTC also ensures the

⁷ In practice, the request is accepted even if the request is not made within the designated period.

examinee's rights-to-know by informing on the progress of the case examination within three months after the end of a specific investigation.

45. Also, the Act also has clauses on the postponement of investigation. An enterpriser or business association subject to an investigation or corrective measures of the KFTC may request postponement in conducting an investigation or taking measures in the case where the examinee has difficulties in receiving investigation or complying with the imposed measures for any of the following reasons;

- natural disasters;
- the concerned company's involvement in the process of M&A, court mediation, court receivership or bankruptcy or other similar procedures;
- seizure or detainment of account books or evidential documents by other competent authorities; or
- fire or other incidents that cause severe problems in business operation. (Article 50-3 of the Act)

5. Agreed resolutions of enforcement proceedings

5.1 Recommendation of correction

46. Even though an investigation of an Examiner finds violation of competition law, recommendation of correction can be issued to the concerned enterpriser or business association if;

- there is not enough time to correct anticompetitive practice through the Committee proceeding, or the harm caused by the concerned practice is expected to increase as time passes by Committee proceeding;
- the violator admits breach of the law and reveals clear intention to correct the concerned practice immediately;
- the effect of violation is negligible, or does not cause serious anti-competitiveness; or
- the violating company has introduced and managed Compliance Program and committed the offence for the first time after the introduction of the program.

47. A violating company subject to recommendation of correction undergoes simplified procedure instead of an official decision-making process. The purpose of recommendation of correction is to end anticompetitive practice by consulting with the concerned company on an equal footing, rather than to impose compulsory penalty.

48. The person who has received recommendation of correction shall notify the KFTC within ten days from the date of receiving the recommendation whether he/she will agree with the recommendation. If the recommendation is accepted, it shall be treated as a corrective measure has been taken under the Act. However, where the person notifies that he/she does not agree with the recommendation of correction, or does not give written notice within ten days after the recommendation is received, the Examiner of the concerned case has to produce an Examination Report and present it to the Committee for a hearing. (Article 51 of the Act, Article 58 of the Enforcement Decree, Article 51 of the Regulation)

5.2 *Simplified procedures*

49. In the case where an Examiner finds that the concerned case can be subject to the chamber session under the Regulation (except for the cases subject to prosecution complaint and surcharge imposition) and that there is a need to ask the respondent on whether he/she admits the violation indicated in the Examination Report and agrees with the corrective measures suggested by the Examiner, the Examiner may request the respondent to give written notice on whether he/she will comply with the measures. (Article 28 of the Regulation)

50. If the respondent replies that he/she admits the violation and will comply with the suggested measures, the Examiner submits the Examination Report including the reply of the respondent to the session. Then the decision-making process of the chamber session is conducted in a simplified manner based on written review without respondent's presence.

51. If the respondent replies of not accepting the suggested measures, the case is referred to the chamber session and undergoes official committee procedure. Even if the measures are agreed upon, the case can be brought to the official decision-making process in the case where the chamber, during written review procedure, considers different measures than what are originally suggested by Examiner need to be taken against the violator. (Article 59~63 of the Regulation)

5.3 *Consent order*

52. The consent order system which terminates case-handling process through an agreement between competition authority and offender on measures to correct anticompetitive practice has yet to be introduced in KFTC. The consent order system would save time and economic costs incurred in the usual one-sided process of case handling. Moreover, as the system enables various corrective measures, if adequately utilized, it can be mutually beneficial for both the company and competition authority. Based on the recognition of its need, the KFTC is considering its introduction of the consent order system.

6. **Judicial review on the KFTC decision**

53. The respondent who is dissatisfied with the decision of the KFTC may appeal to the Seoul High Court within 30 days after the written decision or the re-hearing result is received according to Article 54.1 and 55 of the Act.

54. For ordinary administrative measures, the first instance trial should be filed to the administrative court and can be appealed to the high court. For the measures decided by the KFTC, however, it should be appealed to the Seoul High Court. It is based on the consideration that the KFTC serves as the court of the first instance as it is quasi-judicial agency which handles cases based on adversary proceeding and prolonged litigation on a case of business activity is not desirable for the national economy.

55. If a respondent would like to appeal against the decision of the KFTC, he/she shall file the suit within 30 days after the written decision or the result of the re-hearing is received. This is based on the regulation in Administrative Litigation Act, saying that an administrative appeal shall be filed within 30 days after receiving the administrative decision or result of re-hearing. The person therefore may skip the re-hearing process and directly file a lawsuit.

56. Administrative lawsuits on the KFTC decisions proceed in the court through the same process as other administrative suits. But several unique features can be found in lawsuits on the KFTC decisions.

57. First, a plaintiff tends to move for preliminary injunction on the measures like surcharge orders or publication orders taken by the KFTC when filing an administrative suit.

58. In principle, execution of surcharge order, which is a kind of monetary penalty, cannot be suspended, as it is not regarded as causing “irrecoverable damage.” However, if the amount of the surcharge is so enormous to the extent that it can determine the survival of the concerned company, the execution can be suspended exceptionally.

59. Since the publication order in its nature is irredeemable once executed, the court usually grants preliminary injunction. The request for suspension of execution of publication order, however, is sometimes dismissed when the court finds that it is very unlikely that the plaintiff has his/her case.

60. Also, if the pending issue is on whether the concerned behavior is anticompetitive or not, the court tends to closely examine the case on both questions of fact and issues of law. But once the concerned practice is found to be anticompetitive, it is understood that the court respects the KFTC decisions by giving it great discretion as to whether the level of sanction is adequate.

61. Lastly, the court sometimes encourages settlement between the KFTC and a plaintiff on the amount of surcharges and other matters in the course of the lawsuit. Though the KFTC rejected the recommendation of settlement from the court in 1999 on the case of false advertisement by six installment financing companies, it followed the court’s recommendation in the case of six vending machine sellers violating Door-to-door Sales Act of 2004 and the 2009 case against LG Electronics for unfair coercion of transaction. The recommendation of settlement of the court is expected to be on a steady increase.