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The standard of review by courts in competition cases – Note by Korea

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Korea

1. Judicial Review System of Competition Cases in Korea

1.1. Competition law enforcement system

1. Korea's competition law is enforced mainly by the administrative disposition of the Korea Fair Trade Commission (hereinafter the "KFTC"), which is a central administrative agency under the Prime Minister. The KFTC investigates and deliberates on the conduct by the enterpriser or enterprisers' organization of the alleged violation. When the KFTC has reason to believe that there is a law violation, it can impose measures necessary for the rectification of such wrongdoing, impose administrative fine, request for prosecution to the prosecutor's office, etc. An undertaking that is dissatisfied with the KFTC's disposition may file an appeal to the KFTC or bring an administrative lawsuit before the court.[1] Korea's enforcement falls under the administrative system in that the KFTC can autonomously impose remedies without having to file a lawsuit before the court.

1.2. The standard of review by courts

1.2.1. Court jurisdiction and the scope of judicial review

2. Competition cases (appeals against the KFTC's decision) in Korea are operated by the two-tiered system unlike other general administrative cases.

3. In accordance with the article 55 of the Monopoly Regulation and Fair Trade Act (hereinafter the "MRFTA"), Seoul High Court (appellate court) is the only one which has an exclusive jurisdiction over the appeal of the KFTC's decision. While general administrative litigations in Korea are operated by the three-tiered system of an administrative court (district court), High Court and Supreme Court, the litigations related to competition law are operated by the two-tiered system of the High Court and the Supreme Court. The operation of such two-tiered system seems to be the result of the KFTC's expertise and its distinct feature as a quasi-judiciary agency. To be more specific, the two-tiered system intends to improve the specialty of a hearing by giving the exclusive jurisdiction to the High Court, and to promptly confirm the legal relations of the parties through streamlining the general court hierarchy system.

4. Due to the characteristic of Korea's judicial system, the High Court which is in charge of fact-finding proceedings deals with both questions of fact and questions of law. On the other hand, the Supreme Court in charge of trial on the law only reviews questions of law. Accordingly, the party (either the KFTC or a company) who wants to file an appeal against the High Court's decision can only appeal to the Supreme Court regarding legal issues such as interpretation of law, etc.

[1] The article 53 and 54 of the Monopoly Regulation and Fair Trade Act

1.2.2. Judgment of evidence

5. Since the appeal against the KFTC's decision constitutes an administrative litigation, it is subject to Administration Litigation Act. If there is no particular provision in the Administrative Litigation Act, then it applies mutatis mutandis to the provisions of Civil Procedure Act.[2]

6. Pursuant to the Civil Procedure Act, judgment on the facts is made depending on the free evaluation of evidence by the Judge.[3] The court can freely adopt evidence submitted by the parties (KFTC or enterprisers) at its discretion. In practice, all the documents submitted by the parties will be adopted as evidence unless it does not particularly raise controversy. The court does not necessarily make a factual judgment based limitedly on the relevant evidence.

1.2.3. Difference from criminal cases

7. The KFTC's disposition to impose surcharges is an administrative sanction, which is different in nature from the criminal punishment. Thus, litigation of competition cases does not ask for strict requirements (recognizing facts based on evidence, proving beyond reasonable doubt)[4] such as admission of evidence or proof of violation, and only requires as much level (considering the gist of the defense as a whole and the outcome of evidential investigation) as Civil Procedure Act. In 2008, the Supreme Court ruled that strict proof was needed only in case of criminal punishment.[5]

8. Since different requirements are needed for the administrative suits and criminal suits, there are cases where a violation of the same case is recognized for an administrative suit but not recognized for a criminal suit.

1.2.4. Duration of litigation

9. Between 1986 and March 2019, the average duration of litigation is 23.3 months. Some cases settled in less than a month[6] whereas for some cases they lasted for a maximum of 115 months[7].

1.3. Judicial review cases for the KFTC's measures

10. As mentioned above, the High Court reviews all matters (questions of facts and questions of law) and determines the legitimacy thereof. The court lists the grounds for its

[2] The Article 8 of the Administrative Litigation Act, Supreme Court July 24, 1984 sentence, 84nu124 ruling

[3] The Article 202 of Civil Procedure Act

[4] Article 307 of Criminal Procedure Act

[5] Supreme Court May 29, 2008 sentence, 2006do6625 ruling

[6] A major example is the ST Unitas's violation of electronic commerce case. The claim was brought against in Feb 21, 2017 and the case was closed when the complainant dropped the case in March 8, 2017.

[7] Hyundai Motor Company and 28 other companies' unfair assistance case. The claim was brought against in Nov. 1998 and the case closed in July 2008.

ruling, e.g. whether the insistence of facts is true, requirements for determining the illegality are met, discretionary power of disposition (surcharges, remedies, etc.) is abused or misused. Below are some examples of major cases where we can find out about the standard of review by courts for competition cases.

1.3.1. Cartel case

Nine Lexus dealers' collusion (Supreme Court Jan. 12, 2017 sentence, 2015du2352 ruling)

11. The main issue generally in a cartel case is the 'existence of agreements'. Anti-competitive effect is relatively more easily recognized for a cartel. However, the court in this case said that anti-competitive effect should be determined in accordance with the MRFTA even against the hardcore cartels that are usually considered per se illegal in other jurisdictions. In order to do that, the relevant market should be defined.

12. The KFTC regarded this case as a violation of the article 19 (1) of the MRFTA and imposed administrative fine. The BMW and Lexus dealers restricted providing the price discount of the vehicles for the purpose of enhancing their profits, thereby jointly restricting the competition on promotion. In case of BMW, the High Court defined the market as, without conducting an economic analysis, 'domestic BMW sales market', and saw it as completely eliminating competition with the total market share of 100 percent. In contrast, in case of Lexus, the court defined the relevant market as 'the whole market of imported cars and domestic high-end cars'. In conclusion, the court ruled that anti-competitive effect could not be recognized since the market share was low.

13. However, the Supreme Court said that it needed to know whether a market was properly defined to determine the market dominance of all conspirators, and the KFTC bore the burden of proof. Previously, the prevailing view was that the agreements such as dealers' restriction of price discount, setting of the transactional terms, etc. are a hardcore cartel just like price fixing, and it itself is per se illegal, which therefore did not require defining relevant market. After this case, defining relevant market definition is also necessary for bid rigging cases, but less strictly.[8]

14. In conclusion, in a new trial by the Supreme Court, the KFTC persuaded the court that the relevant market at issue was 'imported car market' through critical loss analysis.

1.3.2. Abuse of market dominance and M&A case

POSCO's abuse of market dominance case (Supreme Court Nov. 22, 2007 sentence, 2002du8626 ruling)

15. POSCO is the sole domestic supplier of hot rolled steel coils, which is a necessary raw material for cold steel plates. It has refused to provide the hot rolled steel coils to its rival in the cold steel plates market, Hyundai Hysco. Against this backdrop, there has been a dispute with regard to whether the conduct perpetrated by POSCO constitutes unfair refusal to deal in the context of unreasonable interference with the business activities of other enterprises pursuant to the article 3-2(1) of the MRFTA. Seoul High Court regarded such conduct by POSCO in violation of the MRFTA for intentionally interfering with the

[8] Kang Woo-chan, "Relevant market definition and relevant turnover calculation of bid rigging cases"

business activities of the rival enterprise and maintaining its dominant position. This is not only against the purpose of the competition law, but also causing obstacles for other enterprises to the extent that they cannot fully function as competitors. For example, competitors have to bear additional burden such as shipping cost, tariff, unloading charges, etc., due to the import of hot rolled steel coils. Also, they have instability of transactions such as difficulty in securing the volume, suffer decreased in productivity due to mixed usage of raw materials, have difficulty in promptly adapting to the market changes due to excessive transport period, and have exchange risks, etc.[9]

16. However, the Supreme Court reversed and remanded Seoul High Court's ruling. The Supreme Court interpreted the elements of "unreasonableness" prescribed in the article 3 (2) of the MRFTA rather more strictly. "Unreasonableness" can be acknowledged when there is a clear intent or purpose either to maintain or enhance monopoly by a market dominant firm, namely to artificially manipulate the market order by limiting free competition in the market, and when there is a objectively probable concern of such anti-competitive effect. Finally, the Supreme Court decided that there is lack of proof that anti-competitive effects such as production decrease or price increase was likely to occur due to a refusal to deal by POSCO. Therefore, the Supreme Court decided that the conduct could not be considered unfair refusal to deal just based on the fact that POSCO's competitors suffered economic disadvantage, either in possibility or in actuality, after the refusal by a market dominant enterprise.

17. The court considered elements of determining illegality of refusal to deal as 'anti-competitive effects', which were interpreted in a similar manner with the U.S. or EU. Some view this as a transition of Korea's competition law enforcement to the effect-based approach.

1.4. Judicial review on consent order

18. The consent order was adopted in 2011, and is provided in the article 51-2 of the MRFTA. A consent resolution is an agreement or settlement between the respondent and the KFTC on an alleged violation to propose remedies through consultation. When its reasonableness is approved the case can be closed without formal process. It is prompt and effective and enhances consumer welfare since it can have an effective damage relief for the consumers by making the respondent rectify its wrongdoing voluntarily.[10]

19. In 2014, the consent order was applied for the first time on Naver and Daum's abuse of dominance in Internet portal service market. Since then, of 13 consent order applications, seven were accepted and six cases rejected.

20. Since there is no precedent, it is difficult to know the court's stance on whether an enterprise can object to the decision not to accept for application of a consent order or the third party can appeal to the consent order decided by the KFTC. However, whether to approve a consent order is up to the KFTC's discretion. It is also safe to say that the KFTC's

[9] Seoul High Court Aug, 27, 2002 sentence, 2001nu5370 ruling

[10] Lee Hoyoung, Monopoly Regulation Act 4th edition, hongmunsa, 2013 450p

refusing to approve a consent order would not bring any disadvantages to an enterprise[11] and that approving a consent order does not necessarily mean that the violation of law has been recognized. (Article 51-2 (4) of the MRFTA). For these reasons, the decisions on consent order, e.g. accepting or denying application of consent order, are difficult to be acknowledged as the subject to the appeal.[12]

1.5. Judicial review on procedural issues

21. The court not only judges on substantive issues related to competition infringement, but also the procedural issues when the KFTC imposes disposition. If there a grave flaws in procedure, the disposition can be repealed by the courts.

1.5.1. Review on the access to and copy of data

22. The article 52-2 and the article 29-2 of the Rules on the KFTC's Committee Operation and Case Handling Procedure, etc. (hereinafter "Case Handling Procedure Rules") stipulate the matters related to the access to and copy of materials needed to guarantee the defense rights, which is a procedural basic right, of a respondent.

23. It is not so common to go on litigation for appealing to the refusal of the access to or copy of materials. Recently, Apple Korea filed a lawsuit against the KFTC for infringing its defense rights by denying the access to or copy of some materials in the examiner's report and thus for violating the due process.

24. The main controversy in this case was whether one can request the access to or copy of evidence in the examiner's report as an exercise of procedural basic rights, and on what grounds the court reviews if the documents should be disclosed even if before the KFTC imposes measures such as a remedy or administrative fine.

25. Based on the following reasons, the court made a decision: First, the plaintiff did not argue for reasons like public interest other than the reason of securing defense rights; Secondly, the KFTC disclosed all contents excluding the parts that might reveal the informer's identity. Third, documents containing trade secrets have been indicated in the examiner's report quoting even specific figures as much as possible, taking sufficient measures to guarantee the plaintiff's defense rights. In conclusion, the court ruled that the KFTC had no reason to disclose the handset maker's methods of deciding retail price, etc. since it has nothing to do with securing the defense rights.[13]

[11] If a consent order is not approved, a disposition is imposed based on general case handling procedure

[12] Admitting the appeal for the consent order may not fit the purpose of restoring competition through prompt handling of the case. However, some argue that it should be allowed in limited cases, e.g. when a consent order was accepted due to the coercion or threat, or there was a flaw in procedure. (Choi Nan Sul Hun, "The right of undertakings in commitment decision proceedings", 2012, 196-197p

[13] Seoul High Court Oct, 4. 2018 sentence 2018nu47457 ruling. Apple Korea appealed before the Supreme Court, which was overruled by the Court and confirmed the ruling of High Court. (Supreme Court Feb, 14. 2019 sentence. 2018du61840 ruling)

1.5.2. Review on the KFTC's investigation procedure, etc.

26. Without many precedents, it is also challenging to accurately know the position of the court whether the judicial review is available for the KFTC's dawn raids or the request for materials against an enterprise in the investigative stage. The KFTC's investigation is basically non-compulsory and is conducted after getting consent from the company. Therefore, it will be difficult to file an administrative suit just because the amount of requested materials is immense or the duration of a dawn raid is too long.

1.6. Other judicial reviews

1.6.1. Judiciary's discretion

27. The judicial review of competition cases follows the article 202 of Civil Procedure Act that applies mutatis mutandis to the provision of the article 8 (2) of Administrative Litigation Act. This provision deals with the "principle of free evaluation of evidence". The principle is when the Judge reviews evidence and freely evaluates the credibility of such evidence and comes to a decision after comprehensively considering everything acquired in the process of a hearing. After all, an extensive discretion is granted to the Judge for fact-findings.

28. The Supreme Court ruled that the principle of free evaluation of evidence only indicates that one does not have to be bound by strict rules regarding legal evidence, and does not allow an arbitrary judgment of the Judge. The Court added that the acknowledgement of facts should be done by evidence which is validated with due process, and by the principle of logic and experience based on justice and fairness. Therefore, the discretion should not go beyond the limit.[14]

29. However, in case of not being able to determine the truthfulness of facts even with the obtained evidence and through hearing, one should follow the 'distribution of burden of proof', which puts the burden of proof on the person in accordance with the law. Most of the cases, the party who makes arguments that are advantageous to him or her should bear the burden of proof.

1.6.2. Judicial review related to economic analysis

30. Competition cases dealt by the KFTC are highly complex and technical in nature. Accordingly, the judicial review of competition law enforcement should accompany technical economic analysis that can analyze the market structure, measure the anti-competitive effects, etc. The KFTC enacted the "Guidelines on the Submission of Economic Analysis Evidence" in July 2010 to come up with basic principles of economic analysis and guidelines related to evidence submission.

31. Recent litigations related to competition law enforcement more and more utilize economic analysis. The bid rigging case of road maintenance and repair construction that is pending at Seoul High Court is a case in point.[15] The plaintiff said in the opinion letter of economic analysis that the agreement dividing the sections of submitting bids could lower the bidding price compared to the tenders with competition, thus arguing there was no anti-competitive effect. To rebut the plaintiff's argument, the Economic Analysis

[14] Supreme Court Aug. 20, 2014 sentence 2012du14842 ruling

[15] Seoul High Court 2018nu39166 (pending as of April 24, 2019)

Division of the KFTC compared both the winning price with collusion and without collusion and proved that there was no significant difference in the winning price. Although it is still pending at the court, it is meaningful in that both the plaintiff and the KFTC utilized economic analysis to determine the illegality.

32. Economic analysis is used for the judicial review in various types of competition cases. If rigid evidence admissibility procedure as needed in the Criminal Procedure Act is also required for competition cases, it will greatly diminish the expected benefits of economic analysis. Therefore, the court considers the economic analysis as one of the elements that removes uncertainty to a considerable extent while maintaining the general context of judgment.[16]

2. The Expertise of Korean Competition Courts

2.1. Procedure of experts' participating in the court

33. As the modern society gets more specialized and sophisticated, competition cases become more segmented and complex requiring professional knowledge in the litigation. The courts in Korea adopted appraisal system and also introduced Expert Commissioner System in 2007 as a complementary method. The Judge lets the appraiser and expert commissioner to analyzed the dispute. The Judge can then deliberate the outcome of the analysis and make a decision based on the various rules of procedural and substantive law.

34. In case of competition cases, the court prefers letting an expert participate in the trial as a form of a reference witness to utilizing appraisal system or expert commissioner system. The two systems were of little use when it comes to the main issues of competition cases, namely 'the existence of agreement', 'appropriateness of surcharge calculation', 'definition of relevant market' and 'the extent of market share'. However, as competition cases become more diverse, the two systems will get more useful.

2.2. How to secure expertise

35. As mentioned above, there are only few cases where the court selects appraisers or expert commissioners upon the ex officio proposal of the court to analyze the case. In contrast, the litigants such as a competition authority or a company frequently request experts related to the issue as a witness or submit an opinion letter written by an expert. Adopting a witness requires an approval from the court in accordance with the Civil Procedure Act, but the parties can freely submit an opinion letter as they would do with other evidence without a special procedure.

36. As for the experts, professors in a related field or researchers in the research institute in general are selected. However, depending on the issues, sometimes public officials in charge of the relevant policies can also participate as a witness.

[16] Jo Sung-ik, "Proving collusion and utilizing economic analysis", KDI Policy Study 2017(10). KDI, 108~110p

2.3. Jurisdiction over the competition cases

37. As illustrated in paragraph 1, Seoul High Court has an exclusive jurisdiction over competition cases in Korea. The jurisdiction had been maintained since 1980 when the MRFTA was enacted.

38. Seoul High Court is a court of appeal for cases in the district of Seoul, and falls under a general court, not a special court dealing with competition law. Unlike many other European countries, there is no special court related to competition law enforcement in Korea.[17]

39. Seoul High Court has three benches in place that exclusively handle the competition cases (bench 3, 6 and 7), which enhance the expertise of the court. Duties assigned to each bench can change depending on the internal rules of the court. In the past, two benches exclusively handled competition cases whereas currently three benches deal with competition cases due to the increased number of cases.

40. Up to now, there has been no problem of running exclusive benches within a general court. However, as competition cases increase in number and get more complex, we can consider establishing a special court handling just the competition cases like other countries including the UK.

[17] Under the Korean judicial system, the first instance of an administrative case is dealt by Seoul Administrative Court or regional court in each region. However, there is a Patent Court separately dealing with patent-related cases and is run as a two-tier system as competition cases (Patent Court – Supreme Court).