

RECENT DEVELOPMENTS OF ANTITRUST ENFORCEMENT
OF KOREA FAIR TRADE COMMISSION

Joseph Seon Hur (josehur@yahoo.com)
Senior Consultant, YYKS&Y (www.yoonyang.com)

I. Introduction

- Since introduction of the Monopoly Regulation and Fair Trade Act (the “Fair Trade Act”) in 1981, despite its relatively short history, Korea Fair Trade Commission (KFTC) has successfully promoted competition principles in various industries through rigorous law enforcement and active competition advocacy, steadily raising Korean competition regime towards the global standards.
 - ✓ Strengthened law enforcement against cartels and improved leniency program;
 - ✓ Reformed M&A Review System in line with global standards and required foreign companies to report M&As;
 - ✓ Tackled abuse of market dominating positions as evidenced in the MS case;
 - ✓ Added global cooperation provisions to the Fair Trade Act in December, 2004; and
 - ✓ Formed a □Task Force for Advancing the Market Economy□ in 2006 to upgrade the Fair Trade Act substantially and adjectively.

II. Cartel Regulation

- KFTC has made various endeavors, aiming at curbing cartel activities as top priority. KFTC’s law enforcement has produced substantial results, especially since the mid 1990s.

**GEORGE MASON LAW REVIEW'S ANTITRUST SYMPOSIUM
13TH SEP. 2006, MARIOTT HOTEL, WASHINGTON D.C.**

Corrective Orders against Cartels (1981~2005)

Prosecutions	Corrective Measures (Surcharges)	Corrective Recommendations	Warnings	Total
23	294 (139)	48	144	509

Surcharges Recently Imposed (2001~2005)

Cartels	Unfair Trade Acts	Restraints to Economic Power Concentration	Abuse of Market Dominating Position	Enterprises Group	Total
68%	28%	2%	1%	1%	100%

Surcharges on Cartels

	'88~95	'96	'97	'98	'99	'00	'01	'02	'03	'04	'05	Total
Cases	11	13	6	19	15	12	8	14	9	12	21	140
Amount (million won)	4,447	14,513	1,092	31,991	36,158	198,812	26,700	50,679	108,559	28,579	249,326	751,036
Amount (thousand dollar)	4,203	13,716	1,032	30,234	34,173	187,895	25,234	47,896	102,598	27,180	235,658	709,819

Foreign exchange rate: 1\$=1,058 won (as of October 25, 2005)

➤ **Introduction and Development of Leniency Program**

- ✓ In order to improve detection and correction of cartel activities, Korea revised the Fair Trade Act in 1996 to introduce a leniency program (effective as of 1997).
- ✓ However, the program was not be actively used until 2004,
 - because (i) under the previous program, KFTC was supposed to determine scope of reduction/exemption at its discretion to a certain extent, so those who applied for leniency were not able to clearly predict scope of their reduction/exemption, and (ii) identities of leniency applicants had been revealed to others during investigation in many cases.
- ✓ Leniency program was substantially improved in April 2005.
 - A certain level of reduction/exemption is granted if certain requirements are met;

**GEORGE MASON LAW REVIEW'S ANTITRUST SYMPOSIUM
13TH SEP. 2006, MARIOTT HOTEL, WASHINGTON D.C.**

- Confidentiality is strengthened during investigation to avoid revealing identities of confessors;
 - Introduction of the amnesty plus system: if a company which is not qualified for leniency or is qualified only for partial leniency becomes the first to provide evidence of another cartel cases it participated in, such company may be granted additional leniency in connection with such activity or exempted from a surcharge or a corrective order;
- ✓ The number of leniency applications has soared since 2005 due to the new program.
- While there were only 7 cases of leniency from 1997 to 2004, there were 11 cases only in 2005;
 - Among investigations commencing in 2005, over 40% applied for leniency before or after commencement of investigation;

<Leniency Cases and Imposed Surcharge Amounts Based on Leniency Programs>

(Case/million Korean Won)

Year	1999	2000	2002	2003	2004	2005	Total
Leniency Cases	1	1	2	1	2	11	18
Imposed Surcharges	314	43	1,288	3,433	-	184,660	189,738

- ✓ Korea amended “Notification on Implementation of Leniency Program for Corrective Measures against Leniency Applicants” in July 2006 to promote leniency programs. This amendment includes:
- Allowing oral applications for leniency, extending supplementation period after simplified leniency application, and allowing leniency applications even when there is a report filed by a third party.

➤ **Strengthened Cartel Regulation**

- ✓ In order to strengthen regulatory power over cartels, Korea increased the ceiling of surcharges from 5% to 10% of related turnover.

III. Merger Review

➤ Creation of Safe Harbor for M&As with No Anti-competitiveness

✓ □M&A Review Guideline□ was amended to set up criteria for the so-called "Safe Harbor" that refers to types of M&As with no anti-competitiveness. Business combinations falling under Safe Harbor shall be swiftly handled within 15 days (effective in July 2006).

✓ Expected Effects

- In case of M&As with no anti-competitiveness, it will lift burdens by shortening review periods; and
- to improve consumer benefits by concentrating on business combinations that may restrain competition.

➤ New Provision of Notification Threshold on Overseas M&A

✓ □M&A Review Guideline□ was amended to require overseas M&A notification if the following requirements are met (effective as of July 1, 2003)¹:

- One company's turnover in Korea is KRW100 billion or more; and
- The other company's turnover in Korea is KRW3 billion or more.

* An American company breaching the notification provision was imposed a surcharge of KRW5 million for the first time in December 2003².

✓ After July 1, 2003 when overseas M&A notification became a requirement, there were 48 reports in 2004 and 72 reports in 2005.

¹ See <http://ftc.go.kr/data/hwp/merger.doc>

² See <http://ftc.go.kr/data/hwp/20031216.doc>

**GEORGE MASON LAW REVIEW'S ANTITRUST SYMPOSIUM
13TH SEP. 2006, MARIOTT HOTEL, WASHINGTON D.C.**

<Number of M&As>

(Case / % / hundred million Korean Won)

Category		Foreign company's acquisition of domestic company	M&A between foreign companies	Total M&A
2004	Number (Percentage)	125 (16.7)	58 (7.7)	749 (100.0)
	Amount	63,454	1,683,267	1,845,132
2005	Number (Percentage)	84 (12.8)	72 (10.9)	658 (100.0)
	Amount	55,008	1,638,472	1,830,843

➤ **Creation of Economic Analysis Team**

- ✓ Created an Economic Analysis Team with experts in order to enhance economic analysis in enforcing the competition law including M&A (December 2004).

➤ **Cases (Hite-Jinro Business Combination)**

- ✓ Summary and significance
 - Hite, a brewery, acquired shares of Jinro, a *soju* company. This is the first example that restraint to competition was acknowledged in a conglomerate merger case.
- ✓ Arguments at issue
 - Whether *soju* (distilled liquor) and beer are substitute goods, i.e., belongs to the same market; and
 - Restraints to competition due to use of the same distribution channel (liquor wholesalers)
- ✓ Market definition
 - The *soju* market and the beer market were deemed different.
 - Not only *soju* and beer are different in terms of taste, alcohol percentage, and drinkers' tastes but also they are not substitute goods for each other considering results of consumer surveys.
- ✓ Restraints to competition

- Conglomerate merger of *soju* and beer manufactures may increase market dominance through dominance over distribution channels and thus result in restraints to competition.
 - The combined company may raise the prices of *soju* and beer based on enhanced market-dominating power.
 - The combined company was expected to try bundling sales based on its dominance of distribution channels, making it more difficult for new businesses to enter into either of the markets.
- ✓ Corrective Orders
- The combined company should not raise *soju* and beer prices beyond consumer price increasing rate for the next 5 years.
 - The combined company should submit, and obtain KFTC/s approval of, a specific plan to prevent tie-in sales and control of production volumes, and implement such plan for the next 5 years.
 - Sales teams and personnels of the two companies should remain separate for the next 5 years.

IV. Abuse of Market Dominance Cases

- Korea has strongly been coping with abuse of market dominating power.
- ✓ Monopolistic and oligopolistic market structures have taken root in Korea for a long time. Vertical relationships are also very strong due to Chaebol system.
- ✓ Since '99, general concentration, industrial concentration and market concentration by item have been on the decline in the mining and manufacturing industries, but they are still at a high level.

* General concentration³: (top 10) ['99] 24.9% → ['03] 23.8%
(top 100) ['99] 50.0% → ['03] 44.5%
(top 200) ['99] 56.7% → ['03] 50.8%

³ Percentage of Top 10, 100, and 200 companies portion out of the mining and manufacturing industries

GEORGE MASON LAW REVIEW'S ANTITRUST SYMPOSIUM
13TH SEP. 2006, MARIOTT HOTEL, WASHINGTON D.C.

* Industrial concentration⁴: (CR3 simple average) ['99] 49.0% → ['03] 42.8%
(HHI simple average) ['99] 177 → ['03] 148

* Market concentration by item⁵: (CR3 simple average) ['99] 75.3% → ['03] 61.4%
(HHI simple average) ['99] 396 → ['03] 259

- ✓ There is a higher probability of abuse of dominance in Korea due to such circumstances.
- As the possibility of abuse of dominance is increasing in the IT sector, Korea strives to detect and correct violations of law.
 - ✓ As to MS' abuse of dominance such as bundling sales, MS was ordered not to sell Media Player and Messenger bundled with Windows OS and imposed a fine of KRW32.5 billion (December 7, 2005) .
 - ✓ Intel and Qualcomm have been under investigation due to abuse of its dominance.

V. Regulatory Reform

- KFTC has put emphasis on reform of the existing regulations restraining competition since its early days in 1980s.
 - ✓ In 1997, Economic Regulation Reform Committee was created within KFTC and led reform of regulations.
 - ✓ In 1999, the Omnibus Cartel Regulation Act was legislated to abolish 20 cartels permitted by law like removal of fee standards of professional services such as lawyers and CPAs.
 - ✓ In 2004, KFTC reached a consensus with other relevant agencies to abolish or reform 56 competition restraining regulations based on Acts and Decrees including minimum amount of realtor fees and prohibition of establishing drugstores as corporations.

⁴ Based on 5 units of the Korea Standard Industry Classification

⁵ Based on 8 units of the Korea Standard Industry Classification

- ✓ In 2005, KFTC reached a consensus to abolish or reform 51 competition restraining regulations based on regulations and notifications.
- ✓ KFTC is striving to promote competition principles in the industries transforming from regulatory to competitive industries (broadcasting, finance, energy, etc.) and the service industries (health care, medical care, education, etc.).
- ✓ KFTC is working on active cooperation with industrial regulatory bodies to prepare shared guidelines and set up consulting channels.
- * **KFTC recently strengthened the “Team for Competition Restraining Regulation Reform” in order to efficiently expand competition principles in the regulatory industries.**

VI. Extraterritorial Application of Korean Competition Law

- KFTC takes measures through extraterritorial application provision of the Fair Trade Act if an act conducted abroad has competition restraining effect on the domestic market.
 - ✓ In 2002, KFTC rendered corrective orders to 6 foreign businesses participating in international cartel of graphite electrode including surcharges of KRW8.8 billion⁶.
 - ✓ In 2003, KFTC rendered corrective orders to 6 foreign businesses participating in international vitamin cartel including surcharges of KRW3.4 billion⁷.
- KFTC created clear legal basis of extraterritorial application by amending the Fair Trade Act.
 - ✓ Created clear legal basis of extraterritorial application by adding Article

⁶ See <http://ftc.go.kr/data/hwp/pressrelease0321.doc>

⁷ See <http://ftc.go.kr/data/hwp/vitaminl.doc>

**GEORGE MASON LAW REVIEW'S ANTITRUST SYMPOSIUM
13TH SEP. 2006, MARIOTT HOTEL, WASHINGTON D.C.**

2-2 of the Fair Trade Act (effective as of April 1, 2005).

- * Article 2-2 of the Fair Trade Act: This act shall be applied to an act conducted overseas that affects the domestic market.